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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 927

[Doc. No. AMS-FV-11-0070 FV11-927-3 IR]

Pears Grown in Oregon and Washington; Assessment Rate Decrease for Processed Pears

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Processed Pear Committee (Committee) for the 2011–2012 and subsequent fiscal periods from \$8.41 to \$7.73 per ton of summer/fall processed pears. The Committee locally administers the marketing order which regulates the handling of processed pears grown in Oregon and Washington. Assessments upon handlers of Oregon-Washington processed pears are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins July 1 and ends June 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective August 31, 2011. Comments received by October 31, 2011, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: <http://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be

available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or E-mail: Teresa.Hutchinson@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 927, as amended (7 CFR part 927), regulating the handling of pears grown in Oregon and Washington, hereinafter referred to as the “order.” The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.”

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Oregon-Washington pear handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable summer/fall processed pears beginning July 1, 2011, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file

with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2011–2012 and subsequent fiscal periods from \$8.41 to \$7.73 per ton for summer/fall processed pears handled. The assessment rate for “winter” and “other” pears for processing would remain unchanged at a zero rate.

The order provides authority for the Committee, with USDA approval, to formulate an annual budget of expenses and to collect assessments from handlers to administer the processed pear program. The members of the Committee are producers, handlers, and processors of Oregon-Washington processed pears. They are familiar with the Committee’s needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2009–2010 and subsequent fiscal periods, the Committee unanimously recommended, and USDA approved, the following three base rates of assessment: (a) \$8.41 per ton for any or all varieties or subvarieties of pears for canning classified as “summer/fall”, excluding pears for other methods of processing; (b) \$0.00 per ton for any or all varieties or subvarieties of pears for processing classified as “winter”; and (c) \$0.00 per ton for any or all varieties or subvarieties of pears for processing classified as “other”. The assessment rate for “summer/fall” pears applies only to pears for canning and excludes pears for other methods of processing as defined in § 927.15, which includes

pears for concentrate, freezing, dehydrating, pressing, or in any other way to convert pears into a processed product. This rate would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on June 2, 2011, and unanimously recommended 2011–2012 expenditures of \$926,933 and an assessment rate of \$7.73 per ton for summer/fall processed pears handled. In comparison, last year's budgeted expenditures were \$1,038,258. The assessment rate of \$7.73 is \$0.78 lower than the rate previously in effect. The Committee recommended the assessment rate decrease because the summer/fall processed pear promotion budget was reduced.

The major expenditures recommended by the Committee for the 2011–2012 fiscal period include \$759,000 for promotion and paid advertising, \$117,243 for research programs, \$24,000 for contracted administration by Washington State Fruit Commission, and \$12,500 for market access and trade policy. In comparison, major expenses for the 2010–2011 fiscal period included \$846,500 for promotion and paid advertising, \$140,658 for research programs, \$24,200 for contracted administration by Washington State Fruit Commission, and \$11,400 for market access and trade policy.

The Committee based its recommended assessment rate for processed pears on the 2011–2012 summer/fall processed pear crop estimate, the 2011–2012 program expenditure needs, and the current and projected size of its monetary reserve. Applying the \$7.73 per ton rate to the Committee's 120,000 ton summer/fall processed pear crop estimate should provide \$927,600 in assessment income. Thus, income derived from summer/fall processed pear handler assessments, and interest and other income (\$500) would be adequate to cover the recommended \$926,933 budget for 2011–2012. Funds in the reserve were \$467,501 as of June 30, 2010. The Committee estimates that \$98,055 will be added to the reserve for 2010–2011. Thus, the Committee estimates a reserve of \$565,556 on June 30, 2011. For 2011–2012, the Committee estimates that \$1,167 will be added to the reserve for an estimated reserve of \$566,723 on June 30, 2012, which would be within the maximum permitted by the order of approximately one fiscal period's operational expenses (\$ 927.42).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2011–2012 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 1,500 growers of processed pears in the regulated production area and approximately 51 handlers of processed pears subject to regulation under the order. Small agricultural growers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,000,000.

According to the Noncitrus Fruits and Nuts 2010 Preliminary Summary issued in January 2011 by the National Agricultural Statistics Service, the total farm-gate value of summer/fall processed pears grown in Oregon and Washington for 2010 was \$76,427,000.

Based on the number of processed pear growers in the Oregon and Washington, the average gross revenue for each grower can be estimated at approximately \$50,951. Furthermore, based on Committee records, the Committee has estimated that all of the Northwest pear handlers currently ship less than \$7,000,000 worth of processed pears each on an annual basis. From this information, it is concluded that the majority of growers and handlers of Oregon and Washington processed pears may be classified as small entities.

There are five processing plants in the production area, with one in Oregon and four in Washington. All five processors would be considered large entities under the SBA's definition of small businesses.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2011–2012 and subsequent fiscal periods from \$8.41 to \$7.73 per ton for processed pears handled. The Committee unanimously recommended 2011–2012 expenditures of \$926,933 and an assessment rate of \$7.73 per ton for summer/fall processed pears. The assessment rate of \$7.73 is \$0.78 lower than the previous rate. The Committee recommended the assessment rate decrease because the summer/fall processed pear promotion budget was reduced.

The quantity of assessable processed pears for the 2011–2012 fiscal period is estimated at 120,000 tons. Thus, the \$7.73 rate should provide \$927,600 in assessment income. Income derived from summer/fall processed pear handler assessments, and interest and other income (\$500) would be adequate to cover the budgeted expenses.

The major expenditures recommended by the Committee for the 2011–2012 fiscal period include \$759,000 for promotion and paid advertising, \$117,243 for research programs, \$24,000 for contracted administration by Washington State Fruit Commission, and \$12,500 for market access and trade policy. In comparison, major expenses for the 2010–2011 fiscal period included \$846,500 for promotion and paid advertising, \$140,658 for research programs, \$24,200 for contracted administration by Washington State Fruit Commission, and \$11,400 for market access and trade policy.

The Committee discussed alternate rates of assessment, but determined that the recommended assessment rate would be sufficient to fund the 2011–2012 summer/fall processed pear programs.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the Oregon-Washington grower price for the 2011–2012 fiscal period could range between \$216 and \$283 per ton of processed pears. Therefore, the estimated assessment revenue for the 2011–2012 fiscal period as a percentage of total grower revenue could range between 3.58 and 2.73 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the Committee's meeting was widely publicized throughout the Oregon-Washington pear industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 2, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1991 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189, Generic Fruit Crops. No changes in those requirements as a result of this action are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large Oregon-Washington processed pear handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may

be viewed at: <http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2011–2012 fiscal period began on July 1, 2011, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable pears handled during such fiscal period; (2) this action decreases the assessment rate for assessable processed pears beginning with the 2011–2012 fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 927

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 927 is amended as follows:

PART 927—PEARS GROWN IN OREGON AND WASHINGTON

■ 1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 927.237, the introductory text and paragraph (a) are revised to read as follows:

§ 927.237 Processed pear assessment rate.

On and after July 1, 2011, the following base rates of assessment for pears for processing are established for the Processed Pear Committee:

(a) \$7.73 per ton for any or all varieties or subvarieties of pears for

canning classified as “summer/fall” excluding pears for other methods of processing;

* * * * *

Dated: August 19, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–22115 Filed 8–29–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Doc. No. AMS–FV–11–0068; FV11–993–1 IR]

Dried Prunes Produced in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Prune Marketing Committee (Committee) for the 2011–12 and subsequent crop years from \$0.27 to \$0.22 per ton of salable dried prunes handled. The Committee locally administers the marketing order which regulates the handling of dried prunes produced in California. Assessments upon dried prune handlers are used by the Committee to fund reasonable and necessary expenses of the program. The crop year begins August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective August 31, 2011. Comments received by October 31, 2011, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: <http://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and

will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

Andrea Ricci or Kurt Kimmel, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: Andrea.Ricci@ams.usda.gov or Kurt.Kimmel@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 110 and Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes produced in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California dried prune handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable dried prunes beginning August 1, 2011, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an

inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2011-12 and subsequent crop years from \$0.27 per to \$0.22 per ton of salable dried prunes.

The California dried prune marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California dried prunes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2010-11 and subsequent crop years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from crop year to crop year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on June 16, 2011, and unanimously recommended 2011-12 expenditures of \$46,497 and an assessment rate of \$0.22 per ton of salable dried prunes. In comparison, last year's budgeted expenditures were \$55,548. The assessment rate of \$0.22 is \$0.05 lower than the rate currently in effect.

The Committee unanimously recommended the lower assessment rate because of a substantial decrease in salaries and wages expense. The current excess funds carried forward and estimated interest income combined with the funds generated from the decreased assessment rate and decreased crop is expected to provide adequate income to cover anticipated 2011-12 year expenses.

The major expenditures recommended by the Committee for the 2011-12 year include \$20,993 for salaries and wages expense, \$9,783 for operating expenses, and \$15,721 for contingencies. Budgeted expenses for these items in 2010-11 were \$31,781, \$10,730, and \$13,037, respectively.

The assessment rate recommended by the Committee was derived by considering the excess funds carried

forward into the 2011-12 crop year, the estimated interest income, the estimated salable tons of California dried prunes, and handler assessment revenue needed to meet anticipated expenses. Excess funds carried forward are expected to be about \$19,650 and interest income is estimated at \$7. Dried prune production for the year is estimated at 122,000 salable tons, which should provide \$26,840 in assessment income. In addition, most of the Committee's expenses reflect its portion of the joint administrative costs of the Committee and the California Dried Plum Board (CDPB). Based on the Committee's reduced activities in the recent years, it is funding only 5 percent of the shared expenses of the two programs. This funding level is similar to that of last year. The Committee believes that the current excess funds carried forward from the 2010-11 crop year and estimated interest income combined with funds generated from the lower 2011-12 assessment rate and decreased crop will be adequate to cover its anticipated 2011-2012 expenses of \$46,497.

The Committee is authorized under § 993.81(c) of the order to use excess assessment funds from the 2010-11 crop year (currently estimated at \$19,650) for up to 5 months beyond the end of the crop year to meet the 2011-12 crop year expenses. At the end of the 5 months, the Committee either refunds or credits excess funds to handlers.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2011-12 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 800 producers of dried prunes in the California area and approximately 21 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,000,000.

Committee data indicates that about 64 percent of the handlers ship under \$7,000,000 worth of dried prunes. Dividing the average dried prune crop value for 2010 reported by the National Agricultural Statistics Service (NASS) of \$149,860,000 by the number of producers (800) yields the average annual producer revenue estimate of about \$187,325. Thus, the majority of handlers and California dried prune producers may be classified as small entities.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2011–12 and subsequent crop years from \$0.27 to \$0.22 per ton of salable dried prunes. The Committee unanimously recommended 2011–12 estimated expenses of \$46,497 and a decreased assessment rate of \$0.22 per ton of salable dried prunes.

The quantity of assessable dried prunes for the 2011–12 crop year is estimated at 122,000 tons. Thus, the \$0.22 rate should provide \$26,840 in assessment income. The current excess funds carried forward and estimated interest income combined with funds generated from the decreased assessment rate and decreased crop is expected to provide adequate income to cover anticipated 2011–12 crop year expenses.

The major expenditures recommended by the Committee for the 2011–12 crop year include \$20,993 for salaries and wages expense, \$9,783 for operating expenses, and \$15,721 for contingences. Budgeted expenses for these items in 2010–11 were \$31,781, \$10,730, and \$13,037, respectively.

The Committee unanimously recommended the lower assessment rate because of a substantial decrease in salaries and wages expense. The current excess funds carried forward and estimated interest income combined with the funds generated from the decreased assessment rate and decreased crop are expected to provide adequate income to cover anticipated 2011–12 year expenses.

The Committee discussed alternatives to this rule, including alternative expenditure levels, but determined that the recommended expenses were reasonable and necessary to adequately cover program operations. Prior to arriving at its budget of \$46,497, the Committee considered information from various sources, including the Committee's Executive Subcommittee. The Executive Subcommittee reviewed the administrative expenses shared between the Committee and the CDPB in recent years.

According to NASS, the season average producer price was \$1,230 in 2009 and \$1,180 per ton of salable dried prunes in 2010. A review of this historical data and preliminary information pertaining to the upcoming crop year indicates that the producer prices for the 2011–12 crop year could range between \$1,230 and \$1,180. Therefore, the estimated assessment revenue for the 2011–12 crop year as a percentage of total producer prices during the 2011–12 crop year could range between 0.018 and 0.019 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the California dried prune industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 16, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and

informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0178 Vegetable and Specialty Crop Marketing Orders. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2011–12 crop year begins on August 1, 2011, and the marketing order requires that the rate of assessment for each crop year apply to all assessable dried prunes handled during such crop year; (2) this action decreases the assessment rate for assessable dried prunes beginning with

the 2011–12 crop year; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 993 is amended as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 993.347 is revised to read as follows:

§ 993.347 Assessment rate.

On and after August 1, 2011, an assessment rate of \$0.22 per ton is established for California dried prunes.

Dated: August 19, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–22119 Filed 8–29–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1217

[Document Number AMS–FV–10–0015C; FR]

RIN 0581–AD03

Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order; Correction

AGENCY: Agricultural Marketing Service.

ACTION: Corrections to final rule.

SUMMARY: This document contains corrections to the final rule published on August 2, 2011 (76 FR 46185), regarding softwood lumber. Corrections are made in the amendatory instruction section and in § 1217.88 of the final rule.

DATES: *Effective Date:* August 31, 2011.

FOR FURTHER INFORMATION CONTACT:

Maureen T. Pello, Marketing Specialist, Research and Promotion Division, Fruit

and Vegetable Programs, AMS, USDA, P.O. Box 831, Beavercreek, Oregon 97004; telephone: (503) 632–8848; facsimile (503) 632–8852; or electronic mail: Maureen.Pello@ams.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

This rule establishes a Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (Order). The purpose of the Order is to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. The Order is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425).

Corrections

In FR Doc. 2011–19491, published August 2, 2011 (76 FR 46185), make the following corrections.

1. On page 46193, in column 2, the words of issuance are corrected to read as follows:

For the reasons set forth in the preamble, Title 7, Chapter XI of the Code of Federal Regulations is amended by adding subpart A to part 1217 to read as follows:

2. On page 46194, column 1, the words “Subpart B—[Reserved]” are removed.

3. On page 46202 in column 1, § 1217.88 is revised to read as follows:

§ 1217.88 OMB Control numbers.

The control numbers assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, are OMB control number 0505–0001 (Board nominee background statement) and OMB control number 0581–0264.

Dated: August 22, 2011.

David R. Shipman,

Acting Administrator.

[FR Doc. 2011–22150 Filed 8–29–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 14

[Docket No. FDA–2011–N–0002]

Advisory Committee; Change of Name and Function; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the standing advisory committees’ regulations to change the name and function of the Anesthetic and Life Support Drugs Advisory Committee. This action is being taken to reflect changes made to the charter for this advisory committee.

DATES: Effective September 6, 2011.

FOR FURTHER INFORMATION CONTACT:

Philip Bautista, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001.

SUPPLEMENTARY INFORMATION: FDA is announcing that the name of the Anesthetic and Life Support Drugs Advisory Committee, which was established on May 1, 1978, has been changed. The Agency decided that the name “Anesthetic and Analgesic Drug Products Advisory Committee” would more accurately describe the subject areas for which the committee is responsible. The mandate of the committee is being expanded to include analgesics, e.g., abuse-deterrent opioids, novel analgesics, and opioid abuse.

The Committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products including analgesics, e.g., abuse-deterrent opioids, novel analgesics, and issues related to opioid abuse, and those for use in anesthesiology.

The Anesthetic and Life Support Drugs Advisory Committee name was changed and its functions expanded in the charter renewal dated June 9, 2011. FDA is hereby revising 21 CFR 14.100 (c)(1) to reflect these changes.

Publication of this final rule constitutes a final action on this change under the Administrative Procedure Act. Under 5 U.S.C. 553(b)(3)(B) and (d) and 21 CFR 10.40(d) and (e), the Agency finds good cause to dispense with notice and public procedure and to proceed to an immediately effective regulation. Such notice and procedures are unnecessary and are not in the public interest, because the final rule is merely codifying the new name and the expanded function of the advisory committee to reflect the current committee charter.

List of Subjects in 21 CFR Part 14

Administrative practice and procedure, Advisory committees, Color additives, Drugs, Radiation protection.

Therefore, under the Federal Food and Drug, and Cosmetic Act and under

authority delegated to the Commissioner of Food and Drugs, 21 CFR part 14 is amended as follows:

PART 14—PUBLIC HEARING BEFORE A PUBLIC ADVISORY COMMITTEE

■ 1. The authority citation for 21 CFR part 14 continues to read as follows:

Authority: 5 U.S.C. App. 2; 15 U.S.C. 1451–1461; 21 U.S.C. 41–50, 141–149, 321–394, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201, 262, 263b, 264; Pub. L. 107–109, Pub. L. 108–155.

■ 2. Section 14.100 is amended by revising the heading of paragraph (c)(1) and paragraph (c)(1)(ii) to read as follows:

§ 14.100 List of standing advisory committees.

* * * * *

(c) * * *

(1) *Anesthetic and Analgesic Drug Products Advisory Committee.*

* * * * *

(ii) *Function:* Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products including analgesics, *e.g.*, abuse-deterrent opioids, novel analgesics, and issues related to opioid abuse, and those for use in anesthesiology.

* * * * *

Dated: August 25, 2011.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2011–22105 Filed 8–29–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 542 and 543

Minimum Internal Control Standards for Class II Gaming

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Final rule; delay of effective date and request for comments.

SUMMARY: The National Indian Gaming Commission (“NIGC”) announces the delay of the effective date on the final rule for Minimum Internal Control Standards for Class II Gaming. The final rule was first published in the **Federal Register** on October 10, 2008. The Commission delayed the effective date for portions of the final rule on October 9, 2009, and September 10, 2010. With this document, the Commission further delays the effective date in order to

allow the Commission time to convene a Tribal Advisory Committee (TAC), to receive and review input from the TAC, and to thoroughly review comments from the public on any potential amendments to the regulations.

DATES: This rule is effective October 12, 2012. The effective date for the amendments to §§ 542.7 and 542.16 in the final rule published October 10, 2008 (73 FR 60492), delayed October 9, 2009 (74 FR 52138) and September 10, 2010 (75 FR 55269), is further delayed until October 12, 2012. Comments must be received on or before October 25, 2011.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

• *E-mail comments to:* reg.review@nigc.gov.

• *Mail comments to:* Lael Echo-Hawk, Counselor to the Chair, National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington, DC 20005.

• *Hand deliver comments to:* 1441 L Street, NW., Suite 9100, Washington, DC 20005.

• *Fax comments to:* Lael Echo-Hawk, Counselor to the Chair, National Indian Gaming Commission at 202–632–0045.

FOR FURTHER INFORMATION CONTACT: Lael Echo-Hawk, National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington, DC 20005. Telephone: 202–632–7009; e-mail: reg.review@nigc.gov.

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (“Commission”) and sets out a comprehensive framework for the regulation of gaming on Indian lands.

The NIGC issued a final rule that superseded specified sections of established Minimum Internal Control Standards and replaced them with a new part titled Minimum Internal Control Standards Class II Gaming, that was published in the **Federal Register** on October 10, 2008 (73 FR 60492). The final rule provided an effective date for amendments to §§ 542.7 and 542.16 of October 13, 2009. An extension delayed the effective date of the amendments until October 13, 2010. 74 FR 52138, October 9, 2009. An additional extension delayed the effective date of the amendments until October 13, 2011, 75 FR 55269, September 10, 2010. The NIGC is again extending the effective

date of these amendments to October 12, 2012. The rule at § 543.3(c)(3) also set a deadline of within six months of the date the tribal gaming regulatory authorities’ enactment of tribal internal controls for tribal operators to come into compliance with tribal internal controls. This deadline has likewise been extended to October 12, 2012.

As explained in the preamble to the final rule (73 FR 60492 (October 10, 2008)), the Commission intended these amendments to be the first part of a multi-phase process of establishing separate MICS for class II gaming and that the extended effective date would provide the necessary time to complete this process. On October 9, 2009, the Commission extended the effective date of the amendments until October 13, 2010, anticipating that all phases of the process would then be complete and that a final comprehensive set of class II MICS would take effect at that time. 74 FR 52138 (October 9, 2009). The newly appointed Commission approved an additional extension to delay the effective date of the amendments until October 13, 2011, 75 FR 55269 (September 10, 2010). The Commission then decided to create a Tribal Advisory Committee to assist in the review of these rules. The NIGC is again extending the effective date of these amendments to October 12, 2012 to allow time for the transition as contemplated by the final rule.

List of Subjects

25 CFR Part 542

Accounting, Gambling, Indians—lands, Reporting and recordkeeping requirements.

25 CFR Part 543

Administrative practice and procedure, Gambling, Indians—lands, Reporting and recordkeeping requirements.

For the reasons set forth above, under the authority at 25 U.S.C. 2701, 2702, 2706, *et seq.*, the effective date for the amendments to §§ 542.7 and 542.16 in the final rule published October 10, 2008, 73 FR 60492, is delayed from October 13, 2011, until October 12, 2012 and 25 CFR part 543.3 is amended as set forth below:

PART 543—MINIMUM INTERNAL CONTROL STANDARDS FOR CLASS II GAMING

■ 1. The authority citation for part 543 continues to read as follows:

Authority: 25 U.S.C. 2701 *et seq.*

■ 2. Section 543.3 is amended by revising paragraph (c)(3) to read as follows:

§ 543.3 How do tribal governments comply with this part?

* * * * *

(c) * * *
 (3) Establish a deadline, no later than October 12, 2012, by which a gaming operation must come into compliance with the tribal internal control standards. However, the tribal gaming regulatory authority may extend the deadline by six months if written notice citing justification is provided to the Commission no later than two weeks before the deadline.

* * * * *

Dated: August 24, 2011, Washington, DC.

Tracie L. Stevens,
Chairwoman.

Steffani A. Cochran,
Vice-Chairwoman.

Daniel J. Little,
Associate Commissioner.

[FR Doc. 2011-22035 Filed 8-29-11; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-126519-11]

RIN 1545-BK41

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains corrections to a notice of proposed rulemaking by cross-reference to temporary regulations that were published in the **Federal Register** on Monday, July 18, 2011. These regulations address certain highly structured arrangements that produce inappropriate foreign tax credit results.

FOR FURTHER INFORMATION CONTACT: Jeffrey Cowan, (202) 622-3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking by cross-reference to temporary regulations (REG-126519-11) that is the subject of this correction is under section 901 of the Internal Revenue Code.

Need for Correction

As published July 18, 2011 (76 FR 42076), the notice of proposed rulemaking by cross-reference to temporary regulations (REG-126519-11) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking by cross-reference to temporary regulations (REG-126519-11), that was the subject of FR Doc. 2011-17919, is corrected as follows:

Section 1.901-2 is amended by adding paragraphs (e)(5)(iv)(B)(1)(iii) and (h)(3) to read as follows:

§ 1.901-2 Income, war profits, or excess profits tax paid or accrued.

* * * * *

(e) * * *

(5) * * *

(iv) * * *

(B) * * *

(1) * * *

(iii) [The text of proposed § 1.901-2(e)(5)(iv)(B)(1)(iii) is the same as the text of § 1.901-2T(e)(5)(iv)(B)(1)(iii) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(h) * * *

(3) [The text of proposed § 1.901-2(h)(3) is the same as the text of § 1.901-2T(h)(3) published elsewhere in this issue of the **Federal Register**.]

Treena V. Garrett,

Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure and Administration.

[FR Doc. 2011-22067 Filed 8-29-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9535]

RIN 1545-BK25

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final and temporary regulations.

SUMMARY: This document contains a correction to final and temporary regulations (TD 9535), that were published in the **Federal Register** on

Monday, July 18, 2011. These regulations provide guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured transactions that produce inappropriate foreign tax credit results. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits.

DATES: This correction is effective August 30, 2011, and is applicable beginning July 18, 2011.

FOR FURTHER INFORMATION CONTACT: Jeffrey Cowan, (202) 622-3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations (TD 9535) that is the subject of this correction are under section 901 of Internal Revenue Code.

Need for Correction

As published, TD 9535 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly July 18, 2011 (76 FR 42038), the publication of the final and temporary regulations (TD 9535), that were the subject of FR Doc. 2011-17920, is corrected as follows:

On page 42042, column 3, in the preamble under the caption “K. Effective Date”, line 5, the language, “or after July 17, 2011.” is corrected to read “or after July 13, 2011.”.

Treena V. Garrett,

Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2011-22064 Filed 8-29-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9536]

RIN 1545-BK40

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final and temporary regulations.

SUMMARY: This document contains a correction to final and temporary regulations (TD 9536) that were

published in the **Federal Register** on Monday, July 18, 2011, providing guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured arrangements that produce inappropriate foreign tax credit results. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits.

DATES: This correction is effective August 30, 2011, and is applicable beginning July 18, 2011.

FOR FURTHER INFORMATION CONTACT: Jeffrey Cowan, (202) 622-3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary and final regulation (TD 9536) that is the subject of this correction is under section 901 of the Internal Revenue Code.

Need for Correction

As published July 18, 2011 (76 FR 42036), TD 9536 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the final and temporary regulations (TD 9536), that were the subject of FR Doc. 2011-17916, is corrected as follows:

On page 42037, column 2, in the preamble under the caption "Explanation of Provision", first paragraph, tenth line from the bottom, the language, "2(e)(5)(iv)(B)(1)(iii) that a foreign" is corrected to read "2T(e)(5)(iv)(B)(1)(iii) that a foreign".

Treena V. Garrett,

Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2011-22066 Filed 8-29-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9536]

RIN 1545-BK40

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains amendments to correct errors in final and temporary regulations (TD 9536) that were published in the **Federal Register** on Monday, July 18, 2011, providing guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured arrangements that produce inappropriate foreign tax credit results. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits.

DATES: This correction is effective on August 30, 2011 and is applicable beginning July 18, 2011.

FOR FURTHER INFORMATION CONTACT: Jeffery Cowan, (202) 622-3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary and final regulation (TD 9536) that is the subject of this correction is under section 901 of the Internal Revenue Code.

Need for Correction

As published July 18, 2011 (76 FR 42036), TD 9536 contains errors that may prove to be misleading and is in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.901-2 is amended by adding paragraphs (e)(5)(iv)(B)(1)(iii) and (h)(3) to read as follows:

§ 1.901-2 Income, war profits, or excess profits tax paid or accrued.

* * * * *

(e) * * *

(5) * * *

(iv) * * *

(B) * * *

(1) * * *

(iii) [Reserved]. For further guidance, see § 1.901-2T(e)(5)(iv)(B)(1)(iii).

* * * * *

(h) * * *

(3) [Reserved]. For further guidance, see § 1.901-2T(h)(3).

■ **Par. 3.** Section 1.901-2T is added to read as follows:

§ 1.901-2T Income, war profits, or excess profits tax paid or accrued.

(a) through (e)(5)(iv)(B)(1)(ii)

[Reserved]. For further guidance, see § 1.901-2(a) through (e)(5)(iv)(B)(1)(ii).

(iii) A foreign payment attributable to income of the entity, within the meaning of § 1.901-2(e)(5)(iv)(B)(1)(ii), also includes a withholding tax (within the meaning of section 901(k)(1)(B)) imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

(2) through (h)(2) [Reserved]. For

further guidance, see § 1.901-2(e)(5)(iv)(B)(2) through (h)(2).

(h)(3) *Effective/applicability date.*

This section applies to foreign payments that, if such payments were an amount of tax paid, would be considered paid or accrued under § 1.901-2(f) on or after July 14, 2011.

(h)(4) *Expiration date.* The applicability of this section expires on July 14, 2014.

Treena V. Garrett,

Federal Register Liaison, Publication and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2011-22065 Filed 8-29-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9534]

RIN 1545-BD81

Methods of Accounting Used by Corporations That Acquire the Assets of Other Corporations; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document describes corrections to final regulations (TD 9534) relating to the methods of accounting, including the inventory methods, to be used by corporations that acquire the assets of other corporations in certain corporate reorganizations and tax-free liquidations. These regulations were published in the **Federal Register** on Monday, August 1, 2011.

DATES: This correction is effective on August 31, 2011.

FOR FURTHER INFORMATION CONTACT: Cheryl Oseekey, (202) 622-4970 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9534) that are the subject of this correction are under sections 381 and 446 of the Internal Revenue Code.

Need for Correction

As published on August 1, 2011 (76 FR 45673), the final regulations (TD 9534) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (TD 9534), which were the subject of FR Doc. 2011-19256, is corrected as follows:

§ 1.381(c)(5)-1 [Corrected]

■ 1. On page 45683, column 1, § 1.381(c)(5)-1(b), first line of the paragraph, the language “(b) *Definitions.* (1) *Inventory method.*” is corrected to read “(b) *Definitions.* For purposes of this section—(1) *Inventory method.*”.

■ 2. On page 45685, column 1, § 1.381(c)(5)-1(c)(3) *Example* (6).(i), third sentence of the paragraph, the language “X Corporation’s manufacturing business and T Corporation’s manufacturing business use, the same methods to capitalize costs under section 263A.” is corrected to read “X Corporation’s manufacturing business and T Corporation’s manufacturing business use the same methods to capitalize costs under section 263A.”.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2011-22051 Filed 8-29-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2011-0511]

RIN 1625-AA00

Safety Zone; Missouri River From the Border Between Montana and North Dakota

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule; change of effective period.

SUMMARY: The Coast Guard is extending the effective period for the temporary safety zone on the specified waters of the Missouri River from the Montana and North Dakota border to the confluence with the Mississippi River, extending the entire width of the river. Temporary section 33 CFR 165.T11-0511, which established the temporary safety zone, was set to expire August 30, 2011. Extending the effective period for this safety zone provides continued and uninterrupted protection of levees and personnel involved in ongoing high water response. Continuing the safety zone will significantly reduce the threat of destruction to levees and vessels and tows.

DATES: Section 165.T11-0511 temporarily added at 76 FR 37647, June 28, 2011, effective from June 2, 2011 to August 30, 2011, will continue in effect through October 31, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2011-0511 and are available online by going to <http://www.regulations.gov>, inserting USCG-2011-0511 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 about this notice, call or e-mail Lieutenant Commander (LCDR) Scott Stoermer, Sector Upper Mississippi River, Coast Guard at (314) 269-2540 or Scott.A.Stoermer@uscg.mil.

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 an NPRM. This rule extends the existing temporary safety zone on the Missouri River from the border between Montana and North Dakota at 104.05 degrees west

longitude to the confluence with the Mississippi River at 90.11 degrees West longitude and extending the entire width of the river, which is currently set to expire on August 30, 2011. This extension is necessary to continue uninterrupted protection of levees and personnel involved in ongoing high water response.

Failing to extend the effective dates for this rule pending completion of notice and comment rulemaking is impracticable and contrary to the public interest because it would cause a gap in the ability to enforce the needed safety zone for protection of all responders, the response efforts, and the environment. For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Basis and Purpose

The safety zone in place pursuant to the temporary final Rule at docket USCG-2011-0511 (76 FR 37647) established a safety zone for the record flooding on the Missouri River from June 2, 2011 through August 30, 2011. The safety zone was enforced through actual notice from June 2, 2011 until June 28, 2011, when the rule published in the **Federal Register** to ensure seamless protection of those involved in the response efforts. This rule extends the effective dates of the temporary safety zone on the Missouri River from the border between Montana and North Dakota at 104.05 degrees west longitude to the confluence with the Mississippi River at 90.11 degrees West longitude and extending the entire width of the river, which is currently set to expire on August 30, 2011. The temporary safety zone created by this rule ensures that there is no gap in authority to protect all responders, levees, and tow boats and tows.

Discussion of Rule

The Coast Guard is extending the effective date of a safety zone encompassing the entire Missouri River from the border between Montana and North Dakota at 104.05 degrees west longitude to the confluence with the Mississippi River at 90.11 degrees West longitude and extending the entire width of the river.

During enforcement periods, vessels and tows may not enter this zone unless authorized by the Captain of the Port Sector Upper Mississippi River. Emergency response boats or vessels may enter these waters when responding to emergent situations on or near the river. The Captain of the Port Sector Upper Mississippi River will

inform the public through broadcast notices to mariners and/or marine safety information bulletins when enforcement periods are in place and of all safety zone changes. When enforcement is implemented, vessels currently in the safety zone will be provided opportunity to safely exit the restricted area.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that those Orders.

Notifications to the marine community will be made through broadcast notices to mariners and/or marine safety information bulletins. Vessels requiring entry into or passage through the Safety Zone may request permission from the Captain of the Port Sector Upper Mississippi, or a designated representative and entry will be evaluated on a case-by-case basis to minimize impact and protect the general public, levee system, vessels from destruction, and loss or injury due to the hazards associated with rising flood water. The impacts on routine navigation are expected to be minimal.

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.

This temporary safety zone is not expected to have a significant economic impact on a substantial number of small entities because vessels may request permission to transit the area from the Captain of the Port Sector Upper Mississippi, or a designated

representative, for passage through the Safety Zone. Passage through the safety zone will be evaluated on a case-by-case basis to minimize impact and protect the general public, levee system, vessels from destruction, and loss or injury due to the hazards associated with rising flood water. If you are a small business entity and are significantly affected by this regulation, please contact LCDR Scott Stoermer, Sector Upper Mississippi River, Coast Guard at (314) 269–2540.

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 (adjusted for inflation) or

more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of

Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, 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, from further environmental documentation since implementation of this action will not result in any significant cumulative impacts on the human environment; does not involve a substantial change to existing environmental conditions; and is consistent with Federal, State, and/or local laws or administrative determinations relating to the environment. This rule involves establishing a temporary safety zone.

Pursuant to paragraph (34)(g) of the Instruction, an environmental checklist and a categorical exclusion checklist are available in the docket 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—SAFETY ZONES

■ 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. Section 165.T11-0511 temporarily added at 76 FR 37647, 28 June 2011, effective from June 2, 2011 to August 30, 2011, will continue in effect through October 31, 2011.

Dated: August 18, 2011.

B.L. Black,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2011-22198 Filed 8-29-11; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2011-0709]

RIN 1625-AA00

Safety Zone; Labor Day at the Landing Santa Rosa Sound, Fort Walton Beach, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for a portion of the Santa Rosa Sound in Fort Walton Beach, Florida extending 150 yards around a fireworks barge that will be positioned between Fort Walton Beach Landing and the Gulf Intracoastal Waterway. This action is necessary for the protection of persons and vessels on navigable waters during Fort Walton Beach's Labor Day at the Landing fireworks display. Entry into, transiting or anchoring in this zone is prohibited to all vessels, mariners, and persons unless specifically authorized by the Captain of the Port (COTP) Mobile or a designated representative.

DATES: This rule is effective from 8:15 p.m. until 9:15 p.m. on September 4, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2011-0709 and are available online by going to <http://www.regulations.gov>, inserting USCG-2011-0709 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 and U.S. Coast Guard Sector Mobile (spw), Building 102, Brookley Complex South Broad Street, Mobile, AL 36615,

between 8 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail LT Lenell J. Carson, Coast Guard Sector Mobile, Waterways Division; telephone 251-441-5940 or e-mail Lenell.J.Carson@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 there is insufficient time to publish a NPRM. The Coast Guard received an application for a Marine Event Permit on July 11, 2011, from the Greater Fort Walton Beach Chamber of Commerce, noting their intention to hold their Labor Day at the Landing fireworks display on September 4, 2011. Publishing a NPRM is impracticable because it would unnecessarily delay the required safety zone's effective date. The safety zone is needed to protect persons and vessels from safety hazards associated with the fireworks display and will be enforced with actual notice during a short period of time.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The Coast Guard received an application for a Marine Event Permit on July 11, 2011, from the Greater Fort Walton Beach Chamber of Commerce, noting their intention to hold their Labor Day at the Landing fireworks display on September 4, 2011. Additionally, this rule is temporary and will only be enforced for a short period while the fireworks display is taking place. Providing a 30 day notice period would unnecessarily delay the effective date and is impracticable because immediate action is needed to protect persons and vessels from safety hazards associated with the fireworks display.

Basis and Purpose

The Greater Fort Walton Beach Chamber of Commerce applied for a Marine Event Permit to conduct a fireworks display on the Santa Rosa Sound, in Fort Walton Beach, Florida from 8:15 p.m. until 9:15 p.m. on September 4, 2011. This event will draw in a large number of pleasure crafts and the fireworks display poses a significant safety hazard to both vessels and mariners operating in or near the area. The COTP Mobile is establishing a temporary safety zone for a portion of the Santa Rosa Sound, Ft. Walton Beach, Florida, to protect persons and vessels during the fireworks display.

The COTP anticipates minimal impact on vessel traffic due to this regulation. However, this safety zone is deemed necessary for the protection of life and property within the COTP Mobile zone.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone for a portion of the Santa Rosa Sound in Fort Walton Beach, Florida extending 150 yards around a fireworks barge that will be positioned between Fort Walton Beach Landing and the Gulf Intracoastal Waterway. This temporary safety zone will protect the safety of life and property in this area. Entry into, transiting or anchoring in this zone is prohibited to all vessels, mariners, and persons unless specifically authorized by the COTP Mobile or a designated representative. The COTP may be contacted by telephone at 251-441-5976.

The COTP Mobile or a designated representative will inform the public through broadcast notice to mariners of changes in the effective period and enforcement times for the safety zone. This rule is effective from 8:15 p.m. until 9:15 p.m. on September 4, 2011.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management

and Budget has not reviewed it under that those Orders.

The temporary safety zone listed in this rule will restrict vessel traffic from entering, transiting or anchoring in a small portion of the Santa Rosa Sound during a short period of time. The effect of this regulation will not be significant for several reasons: (1) This rule will only affect vessel traffic for a short duration; (2) vessels may request permission from the COTP to transit through the safety zone; and (3) the impacts on routine navigation are expected to be minimal. Notifications to the marine community will be made through local notice to mariners and broadcast notice to mariners. These notifications will allow the public to plan operations around the affected area.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in affected portions of the Santa Rosa Sound during the fireworks display. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. The zone is limited in size, is of short duration and vessel traffic may request permission from the COTP Mobile or a designated representative to enter or transit through the zone.

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 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 (adjusted for inflation) or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to

health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded this action is one of a

category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction. This rule involves safety for the public and environment and is not expected to result in any significant adverse environmental impact as described in NEPA. An environmental analysis checklist and a categorical exclusion determination are available as directed under the **ADDRESSES** section.

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 § 165.T08-0709 to read as follows:

§ 165.T08-0709 Safety Zone; Labor Day at the Landing Santa Rosa Sound, Fort Walton Beach, FL.

(a) *Location.* The following area is a safety zone: A portion of the Santa Rosa Sound in Fort Walton Beach, FL extending 150 yards around the fireworks barge positioned between Fort Walton Beach Landing and the Gulf Intracoastal Waterway.

(b) *Enforcement dates.* This rule will be enforced from 8:15 p.m. until 9:15 p.m. on September 4, 2011.

(c) *Regulations.* (1) In accordance with the general regulations in 33 CFR part 165, subpart C, entry into this zone is prohibited unless authorized by the Captain of the Port Mobile or a designated representative.

(2) Vessels desiring to enter into or passage through the zone must request permission from the Captain of the Port Mobile or a designated representative. They may be contacted on VHF-FM channels 16 or by telephone at 251-441-5976.

(3) If permission is granted, all persons and vessels shall comply with the instructions of the Captain of the Port or designated representative. Designated representatives include

commissioned, warrant, and petty officers of the U.S. Coast Guard.

(d) *Informational Broadcasts:* The Captain of the Port or a designated representative will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

Dated: August 4, 2011.

D.J. Rose,

Captain, U.S. Coast Guard, Captain of the Port Mobile.

[FR Doc. 2011-22073 Filed 8-29-11; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2011-0195]

RIN 1625-AA00

Safety Zone; 2011 Rohto Ironman 70.3 Miami, Biscayne Bay, Miami, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Biscayne Bay, east of Bayfront Park, in Miami, Florida during the 2011 Rohto Ironman 70.3 Miami, a triathlon. The Rohto Ironman 70.3 Miami is scheduled to take place on Sunday, October 30, 2011. The temporary safety zone is necessary for the safety of race participants, participant vessels, and the general public during the 1.2 mile swim portion of this competition. 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 Miami or a designated representative. **DATES:** This rule is effective from 6:45 a.m. until 10 a.m. on October 30, 2011.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2011-0195 and are available online by going to <http://www.regulations.gov>, inserting USCG-2011-0195 in the “Keyword” box, and then clicking “Search.” This material is also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Lieutenant Jennifer S. Makowski, Sector Miami Prevention Department, Coast Guard; telephone 305-535-8724, e-mail Jennifer.S.Makowski@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

On May 3, 2011, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; 2011 Rohto Ironman 70.3 Miami, Biscayne Bay, Miami, FL in the **Federal Register** (76 FR 24840). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and 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; Public Law 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

The purpose of this rule is to protect race participants, participant vessels, and the general public during the 1.2 mile swim portion of the triathlon.

Discussion of Rule

On October 30, 2011, Paramount Productions, LLC will be hosting the Rohto Ironman 70.3 Miami. This event includes a 1.2 mile swim, which will take place on the waters of Biscayne Bay located east of Bayfront Park in Miami, Florida. Approximately 2,500 individuals are scheduled to compete in the event.

The temporary safety zone encompasses the swim area of the Rohto Ironman 70.3 Miami on Biscayne Bay, east of Bayfront Park, in Miami, Florida. The temporary safety zone is effective from 6:45 a.m. until 10 a.m. on October 30, 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 Miami or a designated representative. Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the safety zone by contacting the Captain of the Port Miami via telephone at 305-535-4472, or a designated representative via VHF radio on channel 16.

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 in effect for just over three hours; (2) vessel traffic in the area during the effective period will be minimal; (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 Miami or a designated representative, they may operate in the surrounding area during the effective 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 Miami or a designated representative; and (5) advance notification will be made to the local maritime community via Local Notice to Mariners and Broadcast Notice to Mariners.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this rule will 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 the waters of Biscayne Bay that are encompassed within the safety zone from 6:45 a.m. until 10 a.m. on October 30, 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), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are

technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, 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 establishing a temporary safety zone, as described in paragraph 34(g) of the Instruction, on the waters of Biscayne Bay that will be in effect for just over three hours. 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.T07-0195 to read as follows:

§ 165.T07-0195 Safety Zone; 2011 Rohto Ironman 70.3 Miami, Biscayne Bay, Miami, FL.

(a) *Regulated Area.* The following regulated area is a safety zone. All waters of Biscayne Bay located east of Bayfront Park and encompassed within an imaginary line connecting the following points: starting at Point 1 in

position 25°46'44" N, 80°10'59" W; thence southeast to Point 2 in position 25°46'24" N, 80°10'46" W; thence southwest to Point 3 in position 25°46'18" N, 80°11'06" W; thence north to Point 4 in position 25°46'31" N, 80°11'06" W; thence northeast back to origin. 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 Miami 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 Miami 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 Port Miami via telephone at 305-535-4472, or a designated representative via VHF radio on channel 16, to seek authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port Miami or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Miami or a designated representative.

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

(d) *Effective Date.* This rule is effective from 6:45 a.m. until 10 a.m. on October 30, 2011.

Dated: August 8, 2011.

C.P. Scraba,

Captain, U.S. Coast Guard, Captain of the Port Miami.

[FR Doc. 2011-22076 Filed 8-29-11; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 165**

[Docket No. USCG–2011–0528]

RIN 1625–AA00

Safety Zone; Big Sioux River From the Military Road Bridge North Sioux City to the Confluence of the Missouri River, SD**AGENCY:** Coast Guard, DHS.**ACTION:** Temporary final rule; change of effective period.

SUMMARY: The Coast Guard is extending the effective period for the temporary safety zone restricting navigation on the Big Sioux River from the Military Road Bridge in North Sioux City, South Dakota to the confluence of the Missouri River and extending the entire width of the river. Temporary section 33 CFR 165.T11–0511, which established the temporary safety zone, was set to expire August 30, 2011. Extending the effective period for this safety zone provides continued and uninterrupted protection of levees and personnel involved in ongoing high water response. Continuing the safety zone will significantly reduce the threat of destruction to levees. Additionally, to avoid duplicative temporary section numbers, section 33 CFR 165.T11–0511 is redesignated as 33 CFR 165.T11–0528.

DATES: The temporary safety zone added at 76 FR 38013, June 29, 2011, effective from June 2, 2011 until August 30, 2011, will continue in effect through October 31, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0528 and are available online by going to <http://www.regulations.gov>, inserting USCG–2011–0528 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 about this notice, call or e-mail Lieutenant Commander (LCDR) Scott Stoermer, Sector Upper Mississippi River, Coast Guard at (314) 269–2540 or Scott.A.Stoermer@uscg.mil.

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 an NPRM. This rule extends the existing temporary safety zone on the Big Sioux River from the Military Road Bridge in North Sioux City, SD at 42.52 degrees North, 096.48 degrees West longitude to the confluence of the Missouri River at 42.49 degrees North, 096.45 degrees West longitude and extending the entire width of the river, which is currently set to expire on August 30, 2011. This extension is necessary to continue uninterrupted protection of levees and personnel involved in ongoing high water response.

Failing to extend the effective dates for this rule pending completion of notice and comment rulemaking is impracticable and contrary to the public interest because it would cause a gap in the ability to enforce the needed safety zone for protection of all responders, the response efforts, and the environment. For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Basis and Purpose

The safety zone in place pursuant to the Temporary Final Rule at docket USCG–2011–0528 (76 FR 38013, June 29, 2011) established a temporary safety zone for the flooding on the Big Sioux River from June 2, 2011 through August 30, 2011. The safety zone was enforced through actual notice from June 2, 2011 until June 28, 2011. The rule published in the **Federal Register** on June 29, 2011 to ensure seamless protection of those involved in the response efforts. This rule extends the existing temporary safety zone on the Big Sioux River from the Military Road Bridge in North Sioux City to the confluence of the Missouri River and extending the entire width of the river, which is currently set to expire on August 30, 2011. The temporary safety zone created by this rule ensures that there is no gap in authority to protect all responders, and levees.

Discussion of Rule

The Coast Guard is extending the effective date of a safety zone encompassing the Big Sioux River from the Military Road Bridge in North Sioux City, South Dakota at 42.52 degrees North, 096.48 degrees West longitude to the confluence of the Missouri River at 42.49 degrees North, 096.45 degrees West longitude and extending the entire width of the river.

During enforcement periods, vessels and tows may not enter this zone unless authorized by the Captain of the Port Sector Upper Mississippi River. Emergency response boats or vessels may enter these waters when responding to emergent situations on or near the river. The Captain of the Port Sector Upper Mississippi River will inform the public through broadcast notices to mariners and/or marine safety information bulletins when enforcement periods are in place and of all safety zone changes. When enforcement is implemented, vessels currently in the safety zone will be provided opportunity to safely exit the restricted area.

Additionally, the 33 CFR section number assigned to this temporary safety zone has the same 33 CFR section number as an existing temporary safety zone added by USCG–2011–0511 (76 FR 37649, June 28, 2011). To avoid duplicative temporary section numbers, section 33 CFR 165.T11–0511 associated with this safety zone in place pursuant to the temporary final rule at docket USCG–2011–0528 (76 FR 38013, June 29, 2011) is redesignated as 33 CFR 165.T11–0528.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that those Orders.

Notifications to the marine community will be made through broadcast notices to mariners and/or

marine safety information bulletins. Vessels requiring entry into or passage through the Safety Zone may request permission from the Captain of the Port Sector Upper Mississippi, or a designated representative and entry will be evaluated on a case-by-case basis to minimize impact and protect the general public, levee system, vessels from destruction, and loss or injury due to the hazards associated with flood water. The impacts on routine navigation are expected to be minimal.

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.

This Safety Zone is not expected to have a significant economic impact on a substantial number of small entities because vessels may request permission to transit the area from the Captain of the Port Sector Upper Mississippi, or a designated representative, for passage through the Safety Zone. Passage through the safety zone will be evaluated on a case-by-case basis to minimize impact and protect the general public, levee system, vessels from destruction, and loss or injury due to the hazards associated with flood water. If you are a small business entity and are significantly affected by this regulation, please contact LCDR Scott Stoermer, Sector Upper Mississippi River, Coast Guard at (314) 269–2540.

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 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial

direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D, 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, from further environmental documentation since implementation of this action will not result in any significant cumulative

impacts on the human environment; does not involve a substantial change to existing environmental conditions; and is consistent with Federal, State, and/or local laws or administrative determinations relating to the environment. This rule involves establishing a temporary safety zone.

Pursuant to paragraph (34)(g) of the Instruction, an environmental checklist and a categorical exclusion checklist are available in the docket 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—SAFETY ZONES

■ 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. Redesignate section 165.T11–0511 temporarily added at 76 FR 38013, June 29, 2011, as section 165.T11–0528, effective from June 2, 2011 to August 30, 2011, and will continue in effect through October 31, 2011.

Dated: August 18, 2011.

B.L. Black,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2011–22072 Filed 8–29–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0691]

RIN 1625–AA00

Safety Zone; ESI Ironman 70.3 Augusta Triathlon, Savannah River, Augusta, GA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of the Savannah River in Augusta, Georgia during the ESI Ironman 70.3 Augusta Triathlon on Sunday, September 25, 2011. The

temporary safety zone is necessary for the safety of the race participants, participant vessels, spectators, and the general public during the 1.1 mile swim portion of the competition. 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 Savannah or a designated representative.

DATES: This rule is effective from 7 a.m. until 11:59 a.m. on September 25, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0691 and are available online by going to <http://www.regulations.gov>, inserting USCG–2011–0691 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 Marine Science Technician Third Class Timothy R. Estep, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone 912–652–4353, e-mail Timothy.R.Estep@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 ESI Ironman 70.3 Augusta Triathlon until July 7, 2011. As a result, the Coast Guard did not have sufficient time to publish an NPRM and to receive public comments prior to the event. Any delay in the effective date of this rule would be contrary to the public interest because

immediate action is needed to minimize the potential danger to the race participants, participant vessels, spectators, and the general public.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Immediate action is necessary in order to restrict vessel movement and ensure maritime public safety during this event.

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; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

The purpose of the rule is to ensure the safety of the swimmers, participant vessels, spectators, and the general public during the ESI Ironman 70.3 Augusta Triathlon.

Discussion of Rule

On Sunday, September 25, 2011, the ESI Ironman 70.3 Augusta Triathlon is scheduled to take place in Augusta, Georgia. This event includes a 1.1 mile swim that will take place on the waters of the Savannah River. The swim starts at the 6th Street Railroad Bridge and finishes at Mile Post 198.

The safety zone encompasses certain waters of the Savannah River in Augusta, Georgia. The safety zone will be enforced from 7 a.m. until 11:59 a.m. on September 25, 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 Savannah 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 Savannah by telephone at 912–652–4353, 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 Savannah or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Savannah or a designated representative. The Coast Guard will provide notice of the safety zone by Local Notice to Mariners, 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, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order 12866 or under section 1 of Executive Order 13563. 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 only five hours; (2) 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 Savannah or a designated representative, they may operate in the surrounding area during the enforcement period; (3) persons and vessels may still enter, transit through, anchor in, or remain within the safety zone if authorized by the Captain of the Port Savannah or a designated representative; and (4) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners 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 Savannah River

encompassed within the safety zone from 7 a.m. until 11:59 a.m. on September 25, 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.ID, 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 on the waters of the Savannah River that will be enforced for a total of five hours. 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.T07-0691 to read as follows:

§ 165.T07-0691 Safety Zone; ESI Ironman 70.3 Augusta Triathlon, Savannah River, Augusta, GA.

(a) *Regulated Area.* The following regulated area is a safety zone. All waters of the Savannah River encompassed within an imaginary line connecting the following points: starting at Point 1 in position 33°28'44" N, 81°57'53" W; thence northeast to Point

2 in position 33°28'50" N, 81°57'50" W; thence southeast to Point 3 in position 33°27'51" N, 81°55'36" W; thence southwest to Point 4 in position 33°27'47" N, 81°55'43" W; thence northwest back to origin. 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 Savannah 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 Savannah or a designated representative.

(2) Persons and vessels desiring to enter, transit through, and anchor in, or remain within the regulated area may contact the Captain of the Port Savannah by telephone at 912-652-4353, 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 Savannah or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Savannah or a designated representative.

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

(d) *Effective Date.* This rule is effective from 7 a.m. until 11:59 a.m. on September 25, 2011.

Dated: August 8, 2011.

J.B. Loring,

Commander, U.S. Coast Guard, Captain of the Port Savannah.

[FR Doc. 2011-22074 Filed 8-29-11; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 101029427-1413-03]

RIN 0648-XY82

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2011 Summer Flounder, Scup, and Black Sea Bass Specifications; Correction

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

ACTION: Final rule, correcting amendment.

SUMMARY: On December 28, 2010, NMFS published in the **Federal Register** the final rule to implement the 2011 summer flounder, scup, and black sea bass specifications, which established commercial summer flounder allocations for each coastal state from North Carolina to Maine. Following publication, an error was identified in the amount of commercial summer flounder allocated to the State of Maryland. This rule corrects that error.

DATES: Effective August 30, 2011 through December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Carly Knoell, Fisheries Management Specialist, (978) 281-9224, carly.knoell@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

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

Need for Correction

The final rule implementing 2011 summer flounder, scup, and black sea bass specifications published on December 28, 2010 (75 FR 81498). An error was found in the specifications in Table 1, on page 81500, regarding the amount of commercial summer flounder quota allocated to Maryland. Using the most recent summer flounder landings data for Maryland, NMFS determined that the 2011 commercial summer flounder quota for Maryland should be increased from 298,330 lb (135.3 mt) to 354,296 lb (160.7 mt). The entry in

Table 1 for the commercial summer flounder quota for Maryland is corrected to read as follows:

TABLE 1—FINAL STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2011

State	FMP percent share	Initial quota (TAL)		Initial quota, less RSA		2010 quota overages (through 10/31/10)		Adjusted quota, less RSA	
		lb	kg	lb	kg	lb	kg	lb	kg
MD	2.03910	360,676	163,603	354,296	160,709	0	0	354,296	160,760

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries, NOAA, finds good cause to waive prior notice and opportunity for additional public comment for this action because this would be impracticable and contrary to the public interest. The proposed rule for the 2011 summer flounder, scup, and black sea bass specification already took comment on the initial summer flounder quota with the understanding that overage adjustments would be made. This action is correcting an error found in the specifications regarding the amount of commercial summer flounder quota allocated to Maryland. Using the most recent summer flounder landings data for Maryland, NMFS determined that the 2011 commercial summer flounder quota for Maryland should be increased from 298,330 lb (135.3 mt) to 354,296 lb (160.7 mt). This action is correcting an error made in the overage calculation and not to the initial summer flounder quota. Delaying the implementation of this action to allow for prior notice and opportunity for comment of this correction could result in a premature closure of the summer flounder fishery in Maryland. Given that Maryland has surpassed the state’s summer flounder quota in the past, if the revised quota is not implemented, there is a higher potential this could happen again, and could produce unnecessary adverse economic consequences for fishermen that participate in this fishery. The measures in the proposed rule for the 2011 summer flounder, scup, and black sea bass specifications, for which the opportunity for public comment was already given, are unaffected by this correction.

Moreover, pursuant to 5 U.S.C. 553(d), the Assistant Administrator finds good cause to waive the 30-day delay in effective date. This action is correcting an error found in the specifications regarding the amount of commercial summer flounder quota

allocated to Maryland. Delaying the effective date of this correction for 30 days could result in a premature closure of the summer flounder fishery in Maryland. Given that Maryland has surpassed the state’s summer flounder quota in the past, if the revised quota is not implemented immediately, there is a higher potential this could happen again, and could produce unnecessary adverse economic consequences for fishermen that participate in this fishery.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, do not apply.

This final rule is exempt from review under Executive Order 12866.

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

Dated: August 24, 2011.

Samuel D. Rauch III,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

[FR Doc. 2011–22164 Filed 8–29–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0910051338–0151–02]

RIN 0648–XA652

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Trip Limit Decrease for the Common Pool Fishery

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

ACTION: Temporary rule; inseason adjustment of trip limit.

SUMMARY: NMFS decreases the trip limits for Gulf of Maine (GOM) and George’s Bank (GB) cod for Northeast (NE) multispecies common pool vessels for the 2011 fishing year (FY), through April 30, 2012. This action is authorized under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and by the regulations implementing Amendment 16 and Framework Adjustment (FW) 44 to the NE Multispecies Fishery Management Plan (FMP). The action is intended to reduce the harvest of GOM and GB cod to prevent the common pool sub-annual catch limit (sub-ACL) from being exceeded.

DATES: Effective August 30, 2011, through April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Brett Alger, Fisheries Management Specialist, (978) 675–2153, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the NE multispecies fishery are found at 50 CFR part 648, subpart F. The regulations at § 648.86(o) authorize the NMFS NE Regional Administrator (RA) to adjust the trip limits for common pool vessels in order to optimize the harvest of NE regulated multispecies by preventing the overharvest or underharvest of stocks subject to sub-ACLs. For FY 2011, the common pool sub-ACL for GOM cod is 229,281 lb (104 mt). The current trip limit for GOM cod is 500 lb (226.8 kg) per day-at-sea (DAS), up to 2,000 lb (907.2 kg) per trip (76 FR 23042; April 25, 2011). The common pool sub-ACL for GB cod is 205,030 lb (93 mt). The current trip limit for GB cod is 3,000 lb (1,360.8 kg) per day-at-sea (DAS), up to 30,000 lb (13,607.8 kg) per trip (76 FR 30035; May 24, 2011).

As of August 11, 2011, based on the best available catch information, including Vessel Monitoring System (VMS) reports, dealer reports, and vessel trip reports, approximately 57 percent of the GOM cod, and 59 percent of the GB

cod of the common pool sub-ACLs have been harvested.

This action decreases the GOM cod trip limit to 350 lb (158.8 kg) per DAS, up to 1,000 lb (453.6 kg) per trip and decreases the GB cod trip limit to 300 lb (136.1 kg) per DAS, up to 600 lb (272.2 kg) per trip, for common pool vessels, effective August 30, 2011, through April 30, 2012, to reduce harvest of these stocks and prevent the overharvest of their respective sub-ACLs. This action does not change the current GB cod trip limit for vessels with a Handgear A permit (300 lb (136.1 kg) per trip), Handgear B permit (75 lb (34.0 kg) per trip), or Small Vessel Category permit (300 lb (136.1 kg) of cod, haddock, and yellowtail flounder combined). Catch will continue to be monitored through dealer-reported landings, VMS catch reports, and other available information, and if necessary, additional adjustments to common pool management measures may be made.

Classification

This action is authorized 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)(3)(B) to waive prior notice and the opportunity for public comment for this inseason adjustment because notice and comment would be impracticable and contrary to the public interest. The regulations at § 648.86(o) grant the RA authority to adjust the NE multispecies trip limits for common pool vessels in order to prevent the overharvest or underharvest of the pertinent common pool sub-ACLs. This action decreases the trip limits for GOM and GB cod to reduce their harvest in order to prevent the common pool sub-ACLs from being exceeded. The time necessary to provide for prior notice and comment would prevent NMFS from implementing the necessary trip limit adjustments in a timely manner. A resulting delay in the reduction of trip limits would allow for continued higher catch rates and potentially allow the pertinent common pool sub-ACLs to be exceeded. This is contrary to the agency's obligation under the Magnuson-Stevens Act to prevent overfishing. Further, if the sub-ACLs are exceeded, this would trigger the implementation of accountability measures that will have negative economic impacts on the participants in the common pool. Giving effect to this rule as soon as possible will prevent these unnecessary impacts.

Further, the AA finds good cause pursuant to 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this

action. This action decreases the trip limits for GOM and GB cod to reduce their harvest in order to prevent the common pool sub-ACLs from being exceeded. A delay in the reduction of trip limits would allow for continued higher catch rates and potentially allow the pertinent common pool sub-ACLs to be exceeded. This is contrary to the agency's obligation under the Magnuson-Stevens Act to prevent overfishing. Further, if the sub-ACLs are exceeded, this would trigger the implementation of accountability measures that will have negative economic impacts on the participants in the common pool. Giving effect to this rule as soon as possible will prevent these unnecessary impacts

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

Dated: August 25, 2011.

James P. Burgess,

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

[FR Doc. 2011-22141 Filed 8-29-11; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 110721401-1470-01]

RIN 0648-BB31

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Amendments 20 and 21; Trawl Rationalization Program; Correcting Amendments

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

ACTION: Final rule; correcting amendment.

SUMMARY: NMFS announces a correcting amendment to regulations implementing the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). The regulations implementing Amendments 20 and 21 to the PCGFMP, which included reorganization of the entire groundfish regulations and revision of the trawl related regulations, contained inadvertent non-substantive errors that are being corrected by this action in order to assure the enforceability of the regulations and reduce potential confusion of regulated parties. Amendment 20 established a trawl rationalization program for the Pacific

Coast groundfish fishery, which included an individual fishing quota (IFQ) program for the shorebased trawl fleet (including whiting and nonwhiting sectors); and cooperative (coop) programs for the at-sea (whiting only) mothership and catcher/processor trawl fleets. Amendment 21 established fixed allocations for limited entry trawl participants.

DATES: This action is effective August 30, 2011.

FOR FURTHER INFORMATION CONTACT:

Becky Renko, NMFS, Northwest Region, 206-526-6110.

SUPPLEMENTARY INFORMATION:

Need for Corrections

On October 1, 2010 (75 FR 60868) and December 15, 2010 (75 FR 78344) NMFS published final rules to implement Amendments 20 and 21 to the PCGFMP. The October 1, 2010, final rule reorganized the Pacific Coast groundfish regulations previously at subpart G of part 660 by restructuring the regulations in subparts C through G of part 660 and adding regulations for establishing a new allocation structure and issuance of quota shares for the new trawl rationalization program. The second final rule, published on December 15, 2010, implemented the management structure for the trawl rationalization program that took effect on January 1, 2011. These actions contained numerous inadvertent minor errors in regulatory text, including: duplicate paragraphs; cross references that refer to incorrect sections and paragraphs; inconsistent formatting for cross references; and obsolete regulatory text that was not removed. This action corrects these non-substantive errors.

Duplicate paragraphs were identified at § 660.112 (c)(5) and (d)(12), § 660.150 (f)(2), and § 660.160 (e)(1). This action removes the duplicate regulatory text. Incorrect cross references as well as cross reference formatting errors are being corrected by this action. Language regarding the use of "bycatch limits" in the Pacific whiting fishery has been removed as they are no longer in use and have been replaced by allocations. Terms that were defined in the definitions, but inconsistently used in regulatory text were revised, including "Pacific Fishery Management Council", "sablefish primary season" and "economic data collection."

Classification

The Assistant Administrator (AA) finds good cause under 5 U.S.C. 553(b)(3)(B) to waive prior notice and opportunity for public comment because it is unnecessary and contrary

to the public interest. This document corrects inaccurate cross references; removes language regarding referring to “bycatch limits” in the Pacific whiting fishery at § 660.60 (c) that are no longer in use; removes duplicate paragraphs at § 660.112 (c)(5), and (d)(12), § 660.150 (f)(2) and § 660.160 (e)(1); and, revises the use of the terms “Pacific Fishery Management Council”, “sablefish primary season” and “economic data collection” so they are consistently used in regulatory text and are used consistently with the defined terms. Providing notice and comment on these changes is unnecessary because all are non-substantive and have no effect on the public or the operation of the fishery; thus would have no impact on regulated parties. Allowing inconsistencies in regulatory text to persist would be contrary to the public interest as it could affect the enforceability of the regulations. For the same reasons above, the AA finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness and makes this rule effective immediately upon publication.

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

It has been determined that this rule is not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: August 25, 2011.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.11, revise the definitions for “*B_{MSY}*”, “Catch monitor”, “Commercial harvest guideline”, “Open access fishery”, “Pacific Coast Groundfish Fishery Management Plan or PCGFMP”, “Person”, “Processing or to

process” introductory text and “Processor” to read as follows:

§ 660.11 General definitions.

* * * * *

B_{MSY} means the biomass level that produces maximum sustainable yield (MSY), as stated in the PCGFMP at Section 4.3.

* * * * *

Catch monitor means an individual that is certified by NMFS, is deployed to a first receiver, and whose primary duties include: monitoring and verification of the sorting of fish relative to Federal requirements defined in § 660.60(h)(6); documentation of the weighing of such fish relative to the requirements of § 660.13(b); and verification of first receivers’ reporting relative to the requirements defined in § 660.113(b)(4).

* * * * *

Commercial harvest guideline means the fishery harvest guideline minus the estimated recreational catch. Limited entry and open access allocations are derived from the commercial harvest guideline.

* * * * *

Open access fishery means the fishery composed of commercial vessels using open access gear fished pursuant to the harvest guidelines, quotas, and other management measures governing the harvest of open access allocations (detailed in § 660.55) or governing the fishing activities of open access vessels (detailed in subpart F of this part). Any commercial vessel that is not registered to a limited entry permit and which takes and retains, possesses or lands groundfish is a participant in the open access groundfish fishery.

* * * * *

Pacific Coast Groundfish Fishery Management Plan or PCGFMP means the Fishery Management Plan for the Washington, Oregon, and California Groundfish Fishery developed by the Council and approved by the Secretary on January 4, 1982, and as it may be subsequently amended.

* * * * *

Person, as it applies to limited entry and open access fisheries conducted under, subparts C through F of this part means any individual, corporation, partnership, association or other entity (whether or not organized or existing under the laws of any state), and any Federal, state, or local government, or any entity of any such government that is eligible to own a documented vessel under the terms of 46 U.S.C. 12102(a).

Processing or to process means the preparation or packaging of groundfish to render it suitable for human

consumption, retail sale, industrial uses or long-term storage, including, but not limited to, cooking, canning, smoking, salting, drying, filleting, freezing, or rendering into meal or oil, but does not mean heading and gutting unless additional preparation is done. (A vessel that is 75-ft (23-m) or less LOA that harvests whiting and, in addition to heading and gutting, cuts the tail off and freezes the whiting, is not considered to be a catcher/processor nor is it considered to be processing fish (See § 660.112(b)(1)(xii)(A))).

Processor means a person, vessel, or facility that engages in commercial processing; or receives live groundfish directly from a fishing vessel for retail sale without further processing. (Also see the definition for processors at § 660.140, which defines processor for the purposes of qualifying for initial issuance of QS in the Shorebased IFQ Program.)

(1) For the purposes of economic data collection or EDC in the Shorebased IFQ Program, shorebased processor means a person that engages in commercial processing, that is an operation working on U.S. soil or permanently fixed to land, that takes delivery of fish that has not been subject to at-sea processing or shorebased processing; and that thereafter engages that particular fish in shorebased processing; and excludes retailers, such as grocery stores and markets, which receive whole or headed and gutted fish that are then filleted and packaged for retail sale. At § 660.114(b), trawl fishery—economic data collection program, the definition of processor is further refined to describe which shorebased processors are required to submit their economic data collection forms.

(2) [Reserved]

* * * * *

■ 3. In § 660.12, revise paragraphs (a)(8), (e)(7), (f)(5), and (f)(9) to read as follows:

§ 660.12 General groundfish prohibitions.

* * * * *

(a) * * *

(8) Fail to sort, prior to the first weighing after offloading, those groundfish species or species groups for which there is a trip limit, size limit, scientific sorting designation, quota, harvest guideline, ACT, ACL or OY, if the vessel fished or landed in an area during a time when such trip limit, size limit, scientific sorting designation, quota, harvest guideline, ACT, ACL or OY applied; except as specified at § 660.130(d), for vessels participating in the Pacific whiting sectors.

* * * * *

(e) * * *

(7) Fail to provide departure or cease fishing reports specified at §§ 660.113(c), 660.150(c), 660.160(c); § 660.216(c); or § 660.316(c).

* * * * *

(f) * * *

(5) Receive, purchase, or take custody, control, or possession of a delivery without catch monitor coverage when such coverage is required under § 660.140(i).

* * * * *

(9) Fail to meet the catch monitor provider responsibilities specified at § 660.17(e).

* * * * *

■ 4. In § 660.17, revise paragraphs (b)(3), and (e)(5) to read as follows:

§ 660.17 Catch monitors and catch monitor providers.

* * * * *

(b) * * *

(3) Have not been decertified as an observer or catch monitor under provisions in §§ 660.18(e), and 660.140(h)(6), 660.150(g)(6), and 660.160(g)(6).

* * * * *

(e) * * *

(5) *Respond to industry requests for catch monitors.* A catch monitor provider must provide a catch monitor for assignment pursuant to the terms of the contractual relationship with the first receiver to fulfill first receiver requirements for catch monitor coverage under § 660.140(i)(1). An alternate catch monitor must be supplied in each case where injury or illness prevents the catch monitor from performing his or her duties or where the catch monitor resigns prior to completion of his or her duties. If the catch monitor provider is unable to respond to an industry request for catch monitor coverage from a first receiver for whom the provider is in a contractual relationship due to the lack of available catch monitors, the provider must report it to NMFS at least 4 hours prior to the expected assignment time.

* * * * *

■ 5. In § 660.18, revise paragraphs (e)(3) to read as follows:

§ 660.18 Certification and decertification procedures for catch monitors and catch monitor providers.

* * * * *

(e) * * *

(3) *Issuance of IAD.* Upon determination that decertification is warranted, the decertification official will issue a written IAD. The IAD will identify the specific reasons for the action taken. Decertification is effective

30 calendar days after the date on the IAD, unless there is an appeal.

* * * * *

■ 6. In § 660.25, revise paragraphs (b)(2), (b)(3)(v) and (vi), and (b)(4)(iv)(B) to read as follows:

§ 660.25 Permits.

* * * * *

(b) * * *

(2) *Mothership (MS) permit.* The MS permit conveys a conditional privilege for the vessel registered to it, to participate in the MS fishery by receiving and processing deliveries of groundfish in the Pacific whiting mothership sector. An MS permit is a type of limited entry permit. An MS permit does not have any endorsements affixed to the permit. The provisions for the MS permit, including eligibility, renewal, change of permit ownership, vessel registration, fees, and appeals are described at § 660.150 (f).

(3) * * *

(v) *MS/CV endorsement.* An MS/CV endorsement on a trawl limited entry permit conveys a conditional privilege that allows a vessel registered to it to fish in either the coop or non-coop fishery in the MS Coop Program described at § 660.150. The provisions for the MS/CV-endorsed limited entry permit, including eligibility, renewal, change of permit ownership, vessel registration, combinations, accumulation limits, fees, and appeals are described at § 660.150(g).

(vi) *C/P endorsement.* A C/P endorsement on a trawl limited entry permit conveys a conditional privilege that allows a vessel registered to it to fish in the C/P Coop Program described at § 660.160. The provisions for the C/P-endorsed limited entry permit, including eligibility, renewal, change of permit ownership, vessel registration, combinations, fees, and appeals are described at § 660.160(e).

* * * * *

(4) * * *

(iv) * * *

(B) *Effective date.* The change in ownership of the permit or change in the permit holder will be effective on the day the change is approved by SFD, unless there is a concurrent change in the vessel registered to the permit. Requirements for changing the vessel registered to the permit are described at paragraph (b)(4)(v) of this section.

* * * * *

■ 7. In § 660.55, (b)(4), (f)(2), and (k) are revised to read as follows:

§ 660.55 Allocations.

* * * * *

(b) * * *

(4) EFPs are authorized and governed by regulations at §§ 660.60(f) and 600.745.

* * * * *

(f) * * *

(2) The commercial harvest guideline for Pacific whiting is allocated among three sectors, as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shore based IFQ Program. No more than 5 percent of the Shore based IFQ Program allocation may be taken and retained south of 42° N. lat. before the start of the primary Pacific whiting season north of 42° N. lat. Specific sector allocations for a given calendar year are found in Tables 1a through c and 2a through c of this subpart. Set asides for other species for the at-sea whiting fishery for a given calendar year are found in Tables 1d and 2d of this subpart.

* * * * *

(k) *Exempted fishing permit set-asides.* Annual set-asides for EFPs described at §§ 660.60(f) and 600.745, will be deducted from the ACL or ACT when specified. Set-aside amounts will be adjusted through the biennial harvest specifications and management measures process.

* * * * *

■ 8. In § 660.60, paragraphs (c)(1)(ii) and (iii), and (f)(3) are revised to read as follows:

§ 660.60 Specifications and management measures.

* * * * *

(c) * * *

(1) * * *

(ii) *Differential trip landing limits and frequency limits based on gear type, closed seasons, and bycatch limits.* Trip landing and frequency limits that differ by gear type and closed seasons may be imposed or adjusted on a biennial or more frequent basis for the purpose of rebuilding and protecting overfished or depleted stocks.

(iii) *Type of limited entry trawl gear on board.* Limits on the type of limited entry trawl gear on board a vessel may be imposed on a biennial or more frequent basis. Requirements and restrictions on limited entry trawl gear type are found at § 660.130(b).

* * * * *

(f) * * *

(3) U.S. vessels operating under an EFP are subject to restrictions in subparts C through G of this part unless otherwise provided in the permit.

* * * * *

■ 9. In § 660.70, the introductory text and paragraph (p) are revised to read as follows:

§ 660.70 Groundfish conservation areas.

In § 660.11, a groundfish conservation area is defined in part as “a geographic area defined by coordinates expressed in degrees latitude and longitude, wherein fishing by a particular gear type or types may be prohibited.” While some groundfish conservation areas may be designed with the intent that their shape be determined by ocean bottom depth contours, their shapes are defined in regulation by latitude/longitude coordinates and are enforced by those coordinates. Latitude/longitude coordinates designating the large-scale boundaries for rockfish conservation areas are found in §§ 660.71 through 660.74. Fishing activity that is prohibited or permitted within a particular groundfish conservation area is detailed at subparts D through G of part 660.

* * * * *

(p) *Rockfish Conservation Areas.* RCA restrictions are detailed in subparts D through G. RCAs may apply to a single gear type or to a group of gear types such as “trawl RCAs” or “non-trawl RCAs.” Specific latitude and longitude coordinates for RCA boundaries that approximate the depth contours selected for trawl, non-trawl, and recreational RCAs are provided in §§ 660.71 through 660.74. Also provided in §§ 660.71 through 660.74, are references to islands and rocks that serve as reference points for the RCAs.

(1) *Trawl (Limited Entry and Open Access Nongroundfish Trawl Gears) Rockfish Conservation Areas.* Trawl RCAs are intended to protect a complex of species, such as overfished shelf rockfish species, and have boundaries defined by specific latitude and longitude coordinates intended to approximate particular depth contours. Boundaries for the trawl RCA throughout the year are provided in Table 1 (North) and Table 1 (South), and may be modified by NMFS inseason pursuant to § 660.60(c). Trawl RCA boundaries are defined by specific latitude and longitude coordinates and are provided in §§ 660.71 through 660.74.

(2) *Non-Trawl (Limited Entry Fixed Gear and Open Access Non-trawl Gears) Rockfish Conservation Areas.* Non-trawl RCAs are intended to protect a complex of species, such as overfished shelf rockfish species, and have boundaries defined by specific latitude and longitude coordinates intended to approximate particular depth contours. Boundaries for the non-trawl RCA throughout the year are provided in Table 2 (North), and Table 2 (South) of subpart E, and Table 3 (North) and

Table 3 (South) of subpart F and may be modified by NMFS inseason pursuant to § 660.60(c). Non-trawl RCA boundaries are defined by specific latitude and longitude coordinates and are provided in §§ 660.71 through 660.74.

(3) *Recreational Rockfish Conservation Areas.* Recreational RCAs are closed areas intended to protect overfished rockfish species. Recreational RCAs may either have boundaries defined by general depth contours or boundaries defined by specific latitude and longitude coordinates intended to approximate particular depth contours. Boundaries for the recreational RCAs throughout the year are provided in the text in subpart G under each state (Washington, Oregon and California) and may be modified by NMFS inseason pursuant to § 660.60(c). Recreational RCA boundaries are defined by specific latitude and longitude coordinates and are provided in §§ 660.71 through 660.74.

■ 10. In § 660.75, the introductory text is revised to read as follows:

§ 660.75 Essential Fish Habitat (EFH).

Essential fish habitat (EFH) is defined as those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity (16 U.S.C. 1802 (10)). EFH for Pacific Coast Groundfish includes all waters and substrate within areas with a depth less than or equal to 3,500 m (1,914 fm) shoreward to the mean higher high water level or the upriver extent of saltwater intrusion (defined as upstream and landward to where ocean-derived salts measure less than 0.5 parts per thousand during the period of average annual low flow). Seamounts in depths greater than 3,500 m (1,914 fm) are also included due to their ecological importance to groundfish. Geographically, EFH for Pacific Coast groundfish includes both a large band of marine waters that extends from the Northern edge of the EEZ at the U.S. border with Canada to the Southern edge of the EEZ at the U.S. border with Mexico, and inland within bays and estuaries. The seaward extent of EFH is consistent with the westward edge of the EEZ for areas approximately north of Cape Mendocino. Approximately south of Cape Mendocino, the 3500 m depth contour and EFH is substantially shoreward of the seaward boundary of the EEZ. There are also numerous discrete areas seaward of the main 3500 m depth contour where the ocean floor rises to depths less than 3500 m and therefore are also EFH. The seaward boundary of EFH and additional areas of EFH are defined by straight lines connecting a series of latitude and

longitude coordinates in §§ 660.76 through 660.79.

* * * * *

■ 11. In § 660.76, the introductory text is revised to read as follows:

§ 660.76 EFH Conservation Areas.

EFH Conservation Areas are designated to minimize to the extent practicable adverse effects to EFH caused by fishing (16 U.S.C. 1853 section 303(a)(7)). The boundaries of areas designated as Groundfish EFH Conservation Areas are defined by straight lines connecting a series of latitude and longitude coordinates. This section provides coordinates outlining the boundaries of the coastwide EFH Conservation Area. Section 660.77 provides coordinates outlining the boundaries of EFH Conservation Areas that occur wholly off the coast of Washington. Section 660.78 provides coordinates outlining the boundaries of EFH Conservation Areas that occur wholly off the coast of Oregon. Section 660.79 provides coordinates outlining the boundaries of EFH Conservation Areas that occur wholly off the coast of California. Fishing activity that is prohibited or permitted within the EEZ in a particular area designated as a groundfish EFH Conservation Area is detailed at § 660.11; §§ 660.112 and 660.130; §§ 660.212 and 660.230; §§ 660.312 and 660.330; and §§ 660.360.

* * * * *

■ 12. In § 660.77, the introductory text is revised to read as follows:

§ 660.77 EFH Conservation Areas off the Coast of Washington.

Boundary line coordinates for EFH Conservation Areas off Washington are provided in this section. Fishing activity that is prohibited or permitted within the EEZ in a particular area designated as a groundfish EFH Conservation Area is detailed at §§ 660.11; §§ 660.112 and 660.130; §§ 660.212 and 660.230; §§ 660.312 and 660.330; and §§ 660.360.

* * * * *

■ 13. In § 660.78, the introductory text is revised to read as follows:

§ 660.78 EFH Conservation Areas off the Coast of Oregon.

Boundary line coordinates for EFH Conservation Areas off Oregon are provided in this section. Fishing activity that is prohibited or permitted within the EEZ in a particular area designated as a groundfish EFH Conservation Area is detailed at §§ 660.11; §§ 660.112 and 660.130; §§ 660.212 and 660.230; §§ 660.312 and 660.330; and §§ 660.360.

* * * * *

■ 14. In § 660.79, the introductory text is revised to read as follows:

§ 660.79 EFH Conservation Areas off the Coast of California.

Boundary line coordinates for EFH Conservation Areas off California are provided in this section. Fishing activity that is prohibited or permitted within the EEZ in a particular area designated as a groundfish EFH Conservation Area is detailed at §§ 660.11; §§ 660.112 and 660.130; §§ 660.212 and 660.230; §§ 660.312 and 660.330; and §§ 660.360.

■ 15. In § 660.112, paragraphs (a)(3)(i), (a)(5)(vi), (c)(1)(ii), and (c)(3), are revised and paragraph (c)(5) is removed. The revisions read as follows:

§ 660.112 Trawl fishery—prohibitions.

* * * * *

(a) * * *
(3) * * *

(i) Fail to comply with all recordkeeping and reporting requirements at § 660.13; including failure to submit information, submission of inaccurate information, or intentionally submitting false information on any report required at § 660.13(d), and § 660.113.

* * * * *

(5) * * *

(vi) Fish with bottom trawl gear (defined at § 660.11), other than demersal seine, unless otherwise specified in this section or § 660.130, within the EEZ in the following areas (defined at § 660.79): Eel River Canyon, Blunts Reef, Mendocino Ridge, Delgada Canyon, Tolo Bank, Point Arena North, Point Arena South Biogenic Area, Cordell Bank/Biogenic Area, Farallon Islands/Fanny Shoal, Half Moon Bay, Monterey Bay/Canyon, Point Sur Deep, Big Sur Coast/Port San Luis, East San Lucia Bank, Point Conception, Hidden Reef/Kidney Bank (within Cowcod Conservation Area West), Catalina Island, Potato Bank (within Cowcod Conservation Area West), Cherry Bank (within Cowcod Conservation Area West), and Cowcod EFH Conservation Area East.

* * * * *

(c) * * *
(1) * * *

(ii) The fish are processed by a waste-processing vessel according to § 660.131(g); or

* * * * *

(3) Operate as a waste-processing vessel within 48 hours of a primary season for Pacific whiting in which that vessel operates as a catcher/processor or mothership, according to § 660.131(g).

* * * * *

■ 16. In § 660.113, paragraphs (c)(3)(i) introductory text and (ii) and (d)(3)(i) introductory text and (ii) are revised to read as follows:

§ 660.113 Trawl fishery—recordkeeping and reporting.

* * * * *

(c) * * *
(3) * * *

(i) The designated coop manager for the mothership coop must submit an annual report to the Council for its November meeting each year. The annual coop report will contain information about the current year's fishery, including:

* * * * *

(ii) The annual coop report submitted to the Council must be finalized to capture any additional fishing activity that year and submitted to NMFS by March 31 of the following year before a coop permit is issued for the following year.

* * * * *

(d) * * *
(3) * * *

(i) The designated coop manager for the C/P coop must submit an annual report to the Council for its November meeting each year. The annual coop report will contain information about the current year's fishery, including:

(ii) The annual coop report submitted to the Council must be finalized to capture any additional fishing activity that year and submitted to NMFS by March 31 of the following year before a coop permit is issued for the following year.

* * * * *

■ 17. In § 660.130, (c)(2) introductory text, (c)(2)(i), and (e)(5)(ii) are revised to read as follows:

§ 660.130 Trawl fishery—management measures.

* * * * *

(c) * * *

(2) *Fishing with small footrope trawl gear.* North of 40°10' N. lat., it is unlawful for any vessel using small footrope gear (except selective flatfish gear) to fish for groundfish or have small footrope trawl gear (except selective flatfish gear) onboard while fishing shoreward of the RCA defined at paragraph (e) of this section and at §§ 660.70 through 660.74. South of 40°10' N. lat., small footrope gear is required shoreward of the RCA. Small footrope gear is permitted seaward of the RCA coastwide.

(i) North of 40°10' N. lat., selective flatfish gear is required shoreward of the RCA defined at paragraph (e) of this section and at §§ 660.70, through

660.74. South of 40°10' N. lat., selective flatfish gear is permitted, but not required, shoreward of the RCA. The use of selective flatfish trawl gear is permitted seaward of the RCA coastwide.

* * * * *

(e) * * *
(5) * * *

(ii) *EFHCAs for bottom contact gear, which includes bottom trawl gear.* Fishing with bottom contact gear, including bottom trawl gear is prohibited within the following EFHCAs, which are defined by specific latitude and longitude coordinates at §§ 660.75 through 660.79: Thompson Seamount, President Jackson Seamount, Cordell Bank (50 fm (91 m) isobath), Harris Point, Richardson Rock, Scorpion, Painted Cave, Anacapa Island, Carrington Point, Judith Rock, Skunk Point, Footprint, Gull Island, South Point, and Santa Barbara. Fishing with bottom contact gear is also prohibited within the Davidson Seamount EFH Area, which is defined with specific latitude and longitude coordinates at § 660.79.

■ 18. In § 660.131, paragraphs (c)(4) and (d) are revised as follows:

§ 660.131 Pacific whiting fishery management measures.

* * * * *

(c) * * *

(4) *Pacific whiting bycatch reduction areas (BRAs).* Vessels using limited entry midwater trawl gear during the primary whiting season may be prohibited from fishing shoreward of a boundary line approximating the 75-fm (137-m), 100-fm (183-m) or 150-fm (274-m) depth contours. Latitude and longitude coordinates for the boundary lines approximating the depth contours are provided at §§ 660.72 and 660.73. Closures may be implemented inseason for a sector(s) through automatic action, defined at § 660.60(d), when NMFS projects that a sector will exceed an allocation for a non-whiting groundfish species specified for that sector before the sector's whiting allocation is projected to be reached.

(d) *Eureka area trip limits.* Trip landing or frequency limits may be established, modified, or removed under § 660.60 or this paragraph, specifying the amount of Pacific whiting that may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fished in the fishery management area shoreward of the 100 fathom (183 m) contour (as shown on NOAA Charts 18580, 18600, and 18620) in the Eureka area (from 43° 00' to 40° 30' N. lat.). Unless otherwise specified, no more than

10,000-lb (4,536 kg) of whiting may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fished in the fishery management area shoreward of the 100 fm (183 m) contour (as shown on NOAA Charts 18580, 18600, and 18620) in the Eureka management area (defined at § 660.11).

■ 19. In § 660.140, paragraphs (c)(1) introductory text (h)(3)(i) introductory text, (h)(5)(xi)(I)(2), are revised to read as follows:

§ 660.140 Shorebased IFQ Program.

(c) ***
(1) IFQ species. IFQ species are those groundfish species and Pacific halibut in the exclusive economic zone or adjacent state waters off Washington, Oregon and California, under the jurisdiction of the Council, for which QS and IBQ are issued. Groupings and area subdivisions for IFQ species are those groupings and area subdivisions for which ACLs or ACTs are specified in the Tables 1a through 2d, and those for which there is an area-specific precautionary harvest policy. The lists of individual groundfish species included in the minor shelf complex north of 40°10' N. lat., minor shelf complex south of 40°10' N. lat., minor slope complex north 40°10' N. lat., minor slope complex south of 40°10' N. lat., and in the other flatfish complex are specified under the definition of "groundfish" at § 660.11. The following are the IFQ species:

* * * * *

(h) ***
(3) * * * *

(i) Owners of vessels required to carry observers under paragraph (h)(1) of this section must arrange for observer services from a permitted observer provider, except that:

* * * * *

(5) ***
(xi) ***
(I) ***

(2) Any information regarding any action prohibited under § 660.12(e); § 660.112(a)(4); or § 600.725(o), (t) and (u);

* * * * *

■ 20. In § 660.150, remove duplicate (f)(2) paragraph marked [Reserved]; revise paragraphs (j)(5)(iv)(B)(2), (j)(5)(xi)(A)(5)(ii), and (j)(5)(xi)(B)(10)(ii) to read as follows:

§ 660.150 Mothership (MS) Coop Program.

* * * * *

(j) ***
(5) ***

(iv) ***
(B) ***

(2) Must have not informed the provider prior to the time of embarkation that he or she is experiencing a mental illness or a physical ailment or injury developed since submission of the physician's statement (required in paragraph (j)(5)(xi)(B)(2) of this section) that would prevent him or her from performing his or her assigned duties; and,

* * * * *

(xi) ***
(A) ***
(5) ***

(ii) Any information regarding any action prohibited under § 660.12(e); § 660.112(a)(4); or § 600.725(o), (t) and (u);

* * * * *

(B) ***
(10) ***

(ii) Any information regarding any action prohibited under § 660.12(e); § 660.112(a)(4); or § 600.725(o), (t) and (u);

* * * * *

■ 21. In § 660.160, remove duplicate paragraph (e)(1) and revise remaining paragraph (e)(1) to read as follows:

§ 660.160 Catcher/processor (C/P) Coop Program.

* * * * *

(e) ***

(1) General. Any vessel participating in the C/P sector of the non-tribal primary Pacific whiting fishery during the season described at § 660.131(b) of this subpart must be registered to a valid limited entry permit with a C/P endorsement. A C/P-endorsed permit is a limited entry permit and is subject to the limited entry permit provisions given at § 660.25(b).

(i) Non-severable. A C/P endorsement is not severable from the limited entry trawl permit, and therefore, the endorsement may not be transferred separately from the limited entry trawl permit.

(ii) Restriction on C/P vessel operating as a catcher vessel in the mothership sector. A vessel registered to a C/P-endorsed permit cannot operate as a catcher vessel delivering unprocessed Pacific whiting to a mothership processor during the same calendar year it participates in the C/P sector.

(iii) Restriction on C/P vessel operating as mothership. A vessel registered to a C/P-endorsed permit cannot operate as a mothership during the same calendar year it participates in the C/P sector.

* * * * *

■ 22. In § 660.211, remove the definition for "Sablefish primary fishery or

sablefish tier limit fishery" and add a definition for "Sablefish primary fishery" in its place and revise the definition for "Sablefish primary season" to read as follows:

§ 660.211 Fixed gear fishery—definitions.

* * * * *

Sablefish primary fishery means, for the limited entry fixed gear sablefish fishery north of 36° N. lat, the fishery where vessels registered to at least one limited entry permit with both a gear endorsement for longline or trap (or pot) gear and a sablefish endorsement fish up to a specified tier limit and when they are not eligible to fish in the DTL fishery.

Sablefish primary season means, for the limited entry fixed gear sablefish fishery north of 36° N. lat, the period when vessels registered to at least one limited entry permit with both a gear endorsement for longline or trap (or pot) gear and a sablefish endorsement, are allowed to fish in the sablefish primary fishery described at § 660.231 of this subpart.

* * * * *

■ 23. In § 660.212, paragraphs (a)(2), and (d)(1) are revised to read as follows:

§ 660.212 Fixed gear fishery—prohibitions.

(a) ***

(2) Take, retain, possess, or land more than a single cumulative limit of a particular species, per vessel, per applicable cumulative limit period, except for sablefish taken in the limited entry, fixed gear sablefish primary season from a vessel authorized to fish in that season, as described at § 660.231 and except for IFQ species taken in the Shorebased IFQ Program from a vessel authorized under gear switching provisions as described at § 660.140(k).

* * * * *

(d) ***

(1) Take, retain, possess or land sablefish under the tier limits provided for the limited entry, fixed gear sablefish primary season, described in § 660.231(b)(3), from a vessel that is not registered to a limited entry permit with a sablefish endorsement.

* * * * *

■ 24. In § 660.230, paragraphs (a) and (d)(14) are revised to read as follows:

§ 660.230 Fixed gear fishery-management measures.

(a) General. Most species taken in limited entry fixed gear (longline and pot/trap) fisheries will be managed with cumulative trip limits (see trip limits in Tables 2 (North) and 2 (South) of this subpart), size limits (see § 660.60(h)(5)), seasons (see trip limits in Tables 2

(North) and 2 (South) of this subpart and sablefish primary season details in § 660.231, gear restrictions (see paragraph (b) of this section), and closed areas (see paragraph (d) of this section and §§ 660.70 through 660.79). Cowcod retention is prohibited in all fisheries, and groundfish vessels operating south of Point Conception must adhere to CCA restrictions (see paragraph (d)(10) of this section and § 660.70). Yelloweye rockfish and canary rockfish retention is prohibited in the limited entry fixed gear fisheries. Regulations governing and tier limits for the limited entry, fixed gear sablefish primary season north of 36° N. lat. are found in § 660.231. Vessels not participating in the sablefish primary season are subject to daily or weekly sablefish limits in addition to cumulative limits for each cumulative limit period. Only one sablefish landing per week may be made in excess of the daily trip limit and, if the vessel chooses to make a landing in excess of that daily trip limit, then that is the only sablefish landing permitted for that week. The trip limit for black rockfish caught with hook-and-line gear also applies, see § 660.230(e). The trip limits in Table 2 (North) and Table 2 (South) of this subpart apply to vessels participating in the limited entry groundfish fixed gear fishery and may not be exceeded. Federal commercial groundfish regulations are not intended to supersede any more restrictive state commercial groundfish regulations relating to federally-managed groundfish.

* * * * *

(d) * * *

(14) *Essential Fish Habitat*

Conservation Areas (EFHCA). An EFHCA, a type of closed area, is a geographic area defined by coordinates expressed in degrees of latitude and longitude at §§ 660.75 through 660.79, where specified types of fishing are prohibited in accordance with § 660.12. EFHCAs apply to vessels using “bottom contact gear,” which is defined at § 660.11, to include limited entry fixed gear (longline and pot/trap,) among other gear types. Fishing with all bottom contact gear, including longline and pot/trap gear, is prohibited within the following EFHCAs, which are defined by specific latitude and longitude coordinates at §§ 660.75 through 660.79: Thompson Seamount, President Jackson Seamount, Cordell Bank (50 fm (91 m) isobath), Harris Point, Richardson Rock, Scorpion, Painted Cave, Anacapa Island, Carrington Point, Judith Rock, Skunk Point, Footprint, Gull Island, South Point, and Santa Barbara. Fishing with bottom contact gear is also prohibited

within the Davidson Seamount EFH Area, which is defined by specific latitude and longitude coordinates at § 660.75.

* * * * *

■ 25. In § 660.231, paragraph (b)(1) is revised to read as follows:

§ 660.231 Limited entry fixed gear sablefish primary fishery.

* * * * *

(b) * * *

(1) *Season dates.* North of 36° N. lat., the sablefish primary season for the limited entry, fixed gear, sablefish- endorsed vessels begins at 12 noon local time on April 1 and closes at 12 noon local time on October 31, or closes for an individual permit holder when that permit holder’s tier limit has been reached, whichever is earlier, unless otherwise announced by the Regional Administrator through the routine management measures process described at § 660.60(c).

* * * * *

■ 26. In § 660.232, paragraph (a)(1) is revised to read as follows:

§ 660.232 Limited entry daily trip limit (DTL) fishery for sablefish.

(a) * * *

(1) Before the start of the sablefish primary season, all sablefish landings made by a vessel authorized by § 660.231(a) to fish in the sablefish primary season will be subject to the restrictions and limits of the limited entry daily and/or weekly trip limit (DTL) fishery for sablefish specified in this section and which is governed by routine management measures imposed under § 660.60(c).

* * * * *

■ 27. In § 660.330, paragraphs (a), (d)(11)(i), (d)(11)(ii), (d)(12)(iv), (d)(13)(iv)(B), (d)(16)(i)(A), (d)(16)(i)(E), and (e) are revised to read as follows:

§ 660.330 Open access fishery—management measures.

(a) *General.* Groundfish species taken in open access fisheries will be managed with cumulative trip limits (see trip limits in Tables 3 (North) and 3 (South) of this subpart), size limits (see § 660.60(h)(5)), seasons (see seasons in Tables 3 (North) and 3 (South) of this subpart), gear restrictions (see paragraph (b) of this section), and closed areas (see paragraph (d) of this section and §§ 660.70 through 660.79). Unless otherwise specified, a vessel operating in the open access fishery is subject to, and must not exceed any trip limit, frequency limit, and/or size limit for the open access fishery. Cowcod retention is prohibited in all fisheries and

groundfish vessels operating south of Point Conception must adhere to CCA restrictions (see paragraph (d)(11) of this section and § 660.70). Retention of yelloweye rockfish and canary rockfish is prohibited in all open access fisheries. For information on the open access daily/weekly trip limit fishery for sablefish, see § 660.332 of this subpart and the trip limits in Tables 3 (North) and 3 (South) of this subpart. Open access vessels are subject to daily or weekly sablefish limits in addition to cumulative limits for each cumulative limit period. Only one sablefish landing per week may be made in excess of the daily trip limit and, if the vessel chooses to make a landing in excess of that daily trip limit, then that is the only sablefish landing permitted for that week. The trip limit for black rockfish caught with hook-and-line gear also applies, see paragraph (e) of this section. Open access vessels that fish with non-groundfish trawl gear or in the salmon troll fishery north of 40°10' N. lat. are subject to the cumulative limits and closed areas (except the pink shrimp fishery which is not subject to RCA restrictions) listed in Tables 3 (North) and 3 (South) of this subpart. Federal commercial groundfish regulations are not intended to supersede any more restrictive state commercial groundfish regulations relating to federally managed groundfish.

* * * * *

(d) * * *

(11) * * *

(i) Fishing for “other flatfish” is permitted within the CCAs under the following conditions: when using no more than 12 hooks, “Number 2” or smaller, which measure no more than 11 mm (0.44 inches) point to shank, and up to two 1-lb (0.45 kg) weights per line; and provided a valid declaration report as required at § 660.13(d), has been filed with NMFS OLE.

(ii) Fishing for rockfish and lingcod is permitted shoreward of the 20 fm (37 m) depth contour within the CCAs when trip limits authorize such fishing, and provided a valid declaration report as required at § 660.13(d), has been filed with NMFS OLE.

(12) * * *

(iv) Fishing for “other flatfish” off California (between 42° N. lat. south to the U.S./Mexico border) is permitted within the nontrawl RCA with fixed gear only under the following conditions: When using no more than 12 hooks, “Number 2” or smaller, which measure no more than 11 mm (0.44 inches) point to shank, and up to two 1-lb (0.91 kg) weights per line when trip

limits authorize such fishing; and provided a valid declaration report as required at § 660.13(d), has been filed with NMFS OLE.

(13) * * *

(iv) * * *

(B) When the shoreward line of the trawl RCA is shallower than 100 fm (183 m), vessels using ridgeback prawn trawl gear south of 34°27.00' N. lat. may operate out to the 100 fm (183 m) boundary line specified at § 660.73, when a valid declaration report as required at § 660.13(d), has been filed with NMFS OLE. Groundfish caught with ridgeback prawn trawl gear are subject to the limits in Table 3 (North) and Table 3 (South) of this subpart.

* * * * *

(16)

(i) * * *

(A) *Seaward of a boundary line approximating the 700-fm (1280-m) depth contour.* Fishing with bottom trawl gear is prohibited in waters of depths greater than 700 fm (1280 m) within the EFH, as defined by specific latitude and longitude coordinates at § 660.76.

* * * * *

(E) *EFHCAs for bottom contact gear, which includes bottom trawl gear.* Fishing with bottom contact gear is prohibited within the following EFHCAs, which are defined by specific latitude and longitude coordinates at §§ 660.78 through 660.79: Thompson Seamount, President Jackson Seamount, Cordell Bank (50-fm (91-m) isobath), Harris Point, Richardson Rock, Scorpion, Painted Cave, Anacapa Island, Carrington Point, Judith Rock, Skunk Point, Footprint, Gull Island, South Point, and Santa Barbara. Fishing with bottom contact gear is also prohibited within the Davidson Seamount EFH Area, which is defined by specific latitude and longitude coordinates at § 660.75.

* * * * *

(e) *Black rockfish fishery management.* The trip limit for black rockfish (*Sebastes melanops*) for commercial fishing vessels using hook-and-line gear between the U.S.-Canada border and Cape Alava (48°09.50' N. lat.), and between Destruction Island (47°40' N. lat.) and Leadbetter Point (46°38.17' N. lat.), is 100-lbs (45 kg) or 30 percent, by weight of all fish on board, whichever is greater, per vessel per fishing trip. These per trip limits apply to limited entry and open access fisheries, in conjunction with the cumulative trip limits and other management measures in §§ 660.230 and 660.330. The crossover provisions

in § 660.60(h)(7), do not apply to the black rockfish per-trip limits.

[FR Doc. 2011-22162 Filed 8-29-11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521-0640-02]

RIN 0648-XA672

Fisheries of the Exclusive Economic Zone Off Alaska; Other Rockfish, Other Flatfish, Sharks, and Skates in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; apportionment of reserves; request for comments.

SUMMARY: NMFS apportions amounts of the non-specified reserve to the initial total allowable catch of other rockfish, other flatfish, sharks, and skates in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the fisheries to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI management area.

DATES: Effective August 25, 2011 through 2400 hrs, Alaska local time, December 31, 2011. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, September 9, 2011.

ADDRESSES: Send comments to Glenn Merrill, Assistant Regional Administrator, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by FDMS Docket Number NOAA-NMFS-2011-0212, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Web site at <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter [NOAA-NMFS-2011-0212] in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.

- *Mail:* Submit written comments to P.O. Box 21668, Juneau, AK 99802.

- *Fax:* (907) 586-7557.

- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered.

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

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

FOR FURTHER INFORMATION CONTACT:

Obren Davis, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2011 initial total allowable catch (ITAC) of Aleutian Islands (AI) other rockfish, BSAI other flatfish, BSAI sharks, and BSAI skates was established as 425 metric tons (mt), 2,550 mt, 43 mt, and 14,025 mt, respectively, by the final 2011 and 2012 harvest specifications for groundfish of the BSAI (76 FR 11139, March 1, 2011). In accordance with § 679.20(a)(3) the Regional Administrator, Alaska Region, NMFS, has reviewed the most current available data and finds that the ITACs for AI other rockfish, BSAI other flatfish, BSAI sharks, and BSAI skates in the BSAI need to be supplemented from the non-specified reserve in order to promote efficiency in the utilization of fishery resources in the BSAI and allow fishing operations to continue.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish

75 mt, 450 mt, 7 mt, and 2,475 mt to the AI other rockfish, BSAI other flatfish, BSAI sharks, and BSAI skates ITACs, respectively. This apportionment is consistent with § 679.20(b)(1)(i) and does not result in overfishing of a target species because the revised ITACs are equal to or less than the specifications of the acceptable biological catch in the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011).

The harvest specification for the 2011 AI other rockfish, BSAI other flatfish, BSAI sharks, and BSAI skates ITACs included in the harvest specifications for groundfish in the BSAI is revised as follows: 500 mt for AI other rockfish, 3,000 mt for BSAI other flatfish, 50 mt for BSAI sharks, and 16,500 mt for BSAI skates.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant

Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the AI other rockfish, BSAI other flatfish, BSAI sharks, and BSAI skates fisheries in the BSAI. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for

public comment because the most recent, relevant data only became available as of August 24, 2011.

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

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until September 9, 2011.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 25, 2011.

James P. Burgess,

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

[FR Doc. 2011-22139 Filed 8-25-11; 4:15 pm]

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Proposed Rules

Federal Register

Vol. 76, No. 168

Tuesday, August 30, 2011

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS-FV-11-0051; FV11-948-1 PR]

Irish Potatoes Grown in Colorado; Modification of the Handling Regulation for Area No. 3

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on revisions to the size requirements currently prescribed under the Colorado potato marketing order (order). The order regulates the handling of Irish potatoes grown in Colorado, and is administered locally by the Colorado Potato Administrative Committee for Area No. 3 (Committee). This rule would modify the size requirements for handling small potatoes that measure under 1 $\frac{7}{8}$ inches in diameter. This rule would allow the handling of two size ranges, $\frac{3}{4}$ -inch minimum diameter to 1 $\frac{7}{8}$ inches maximum diameter and Size B (1 $\frac{1}{2}$ to 2 $\frac{1}{4}$ inches), if such potatoes otherwise meet the requirements of the U.S. No. 1 grade. The revisions would promote orderly marketing by ensuring that only potatoes of certain similar size profiles are packed and shipped in the same container. This rule is expected to benefit the producers, handlers, and consumers of Colorado potatoes.

DATES: Comments must be received by October 31, 2011.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. All comments should reference the document number and the date and

page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

Barry Broadbent or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: Barry.Broadbent@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement No. 97 and Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler

is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on revisions to the size requirements currently prescribed under the order. This proposed rule would revise the size requirements for small U.S. No. 1 grade potatoes handled under the Colorado Area 3 handling regulations. The rule would modify the current size requirements to establish allowable size ranges for potatoes that measure less than 1 $\frac{7}{8}$ inches. This rule would allow potatoes that measure $\frac{3}{4}$ -inch minimum diameter to 1 $\frac{7}{8}$ inches maximum diameter to be handled if such potatoes otherwise meet the requirements of the U.S. No. 1 grade. In addition, Size B potatoes (1 $\frac{1}{2}$ inches minimum diameter to 2 $\frac{1}{4}$ inches maximum diameter) would also be allowed to be handled if they otherwise meet the U.S. No. 1 grade requirements. The size requirements for U.S. No. 2 and better grade potatoes that are 1 $\frac{7}{8}$ inches minimum diameter and larger would not be affected by this proposed change. The rule was unanimously recommended by the Committee at a meeting on May 12, 2011. The proposed changes are expected to enhance orderly marketing conditions and increase returns for producers and handlers.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the production area. Section 948.21 further authorizes the modification, suspension, or termination of requirements issued pursuant to § 948.22.

Section 948.40 provides that whenever the handling of potatoes is regulated pursuant to §§ 948.20 through 948.24, such potatoes must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Under the order, the State of Colorado is divided into three separate regulatory areas for marketing order purposes. Area No. 1, commonly known as the Western Slope, includes and consists of the

counties of Routt, Eagle, Pitkin, Gunnison, Hinsdale, La Plata, and all counties west thereof; Area No. 2, commonly known as the San Luis Valley, includes and consists of the counties of Saguache, Huerfano, Las Animas, Mineral, Archuleta, and all counties south thereof; and Area No. 3 includes and consists of all the remaining counties in the State of Colorado which are not included in Area No. 1 or Area No. 2. The order currently regulates the handling of potatoes grown in Areas No. 2 and No. 3 only; regulation for Area No. 1 is currently not active.

Grade, size, and maturity regulations specific to the handling of Colorado potatoes grown in Area No. 3 are contained in § 948.387 of the order's administrative rules and regulations. Section 948.387(a) currently requires that all varieties of potatoes handled under the order must be U.S. No. 2 or better grade and 1⁷/₈ inches minimum diameter or 4 ounces minimum weight, except that potatoes that meet the requirements of the U.S. No. 1 grade may be ³/₄-inch minimum diameter.

The Committee met on May 12, 2011, to discuss revising the size requirements in the handling regulations. As a result of the deliberations, the Committee unanimously recommended modifying the size requirements for potatoes that meet the U.S. No. 1 grade. Specifically, the Committee recommended establishing allowable size ranges for small size (under 1⁷/₈ inches in diameter) U.S. No. 1 grade and better potatoes. Two allowable size ranges, ³/₄-inch minimum diameter to 1⁷/₈ inches maximum diameter and Size B (1¹/₂ inches minimum diameter to 2³/₄ inches maximum diameter), would be established for potatoes that otherwise meet or exceed the minimum requirements of the U.S. No. 1 grade standard. The proposed allowable size ranges would replace the current ³/₄-inch minimum diameter size requirement allowance now in effect.

The proposed revision would not prohibit the handling of any of the small size potatoes that are currently allowed to be handled under the order. All potatoes that measure ³/₄-inch minimum diameter and larger and meet the requirements of the U.S. No. 1 grade could continue to be handled under the order. However, in the future, such small potatoes would be required to be handled subject to the new size requirements, with like size potatoes packed into certain size profiles. The handling of all other potatoes currently permitted under the order would continue without change, subject to the U.S. No. 2 or better, 1⁷/₈ inches

minimum diameter size or 4 ounces minimum weight requirements.

The Committee has observed that, in recent years, consumer demand has been increasing for smaller size potatoes and that those size potatoes often command premium prices. The Committee previously responded to this trend by modifying the size requirements in the handling regulations to allow for the handling of ³/₄-inch minimum diameter and larger size potatoes, if the potatoes otherwise meet the requirements of the U.S. No. 1 grade. However, the current ³/₄-inch minimum size requirement has no other parameters associated with it and allows for the commingling of small size potatoes (under 1⁷/₈ inches in diameter) with larger size potatoes (over 1⁷/₈ inches in diameter).

The Committee reiterated that quality assurance is important to the industry and to consumers. Providing consistent, high quality potatoes is necessary to maintain consumer confidence. The potential for mixing small size potatoes with larger size potatoes in the same container is perceived by the Committee as being contrary to the goals of maintaining orderly marketing conditions and ensuring that only consistent, high quality potatoes from the production area enter the market. As such, the Committee felt that implementing the proposed revisions to the size requirements would help to maintain the consistency and quality of the product while still allowing the industry the maneuverability to respond to changing consumer preferences.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Based on Committee data, there are eight producers (the majority of whom are also handlers) in the regulated area and eight handlers (the majority of whom are also producers) subject to regulation under the order. Small agricultural producers are defined by

the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$7,000,000.

According to the Committee, 981,609 hundredweight of Colorado Area No. 3 potatoes were produced for the fresh market during the 2009–2010 season. Based on National Agricultural Statistics Service (NASS) data, the average producer price for Colorado summer potatoes for that season was \$6.90 per hundredweight. The average annual producer revenue for the eight Colorado Area No. 3 potato producers is therefore calculated to be approximately \$846,637. Using Committee data regarding each individual handler's total shipments during the 2009–2010 fiscal period and a Committee estimated average f.o.b. price for 2010 of \$9.10 per hundredweight (\$6.90 per hundredweight producer price plus estimated packing and handling costs of \$2.20 per hundredweight), none of the Colorado Area No. 3 potato handlers ship over \$7,000,000 worth of potatoes. Thus, all of the handlers and many of the producers of Colorado Area No. 3 potatoes may be classified as small entities.

This rule would revise the current size requirements contained in the order's handling regulations. The rule would revise the size requirements to establish two allowable size ranges, ³/₄-inch minimum to 1⁷/₈ inches maximum diameter and Size B, if such potatoes otherwise meet the requirements of the U.S. No. 1 grade standard. The revisions would promote orderly marketing by ensuring that only potatoes of a similar size profile are shipped in the same container.

The authority for regulating grade and size is provided in § 948.22 of the order. Section 948.387(a) of the order's administrative rules and regulations prescribes the applicable size requirements.

This rule is expected to have a beneficial impact on handlers and producers by maintaining the superior reputation of the industry and ensuring that only consistent, high quality potatoes are shipped from the production area. There should be no extra cost to producers or handlers as a result of the proposed changes because current harvesting and handling methods can accommodate the sorting of these smaller potatoes. The Committee believes that this revision should translate into greater returns for handlers and producers over time.

Neither NASS nor the Committee compiles statistics relating to the

production of potatoes measuring less than 1 $\frac{7}{8}$ inches in diameter. The Committee has relied on information provided by producers and handlers familiar with the small potato market for its recommendation.

As small potatoes have grown in popularity with consumers, high quality potatoes from Colorado have been in demand. The Committee believes that modifying the size requirements for such small potatoes would maintain their consistency and increase their quality reputation in the market. The proposed changes are expected to increase sales of Colorado potatoes and to benefit the Colorado potato industry. The benefits of this rule are not expected to be disproportionately greater or lesser for small entities than for large entities.

The Committee discussed alternatives to this recommendation, including taking no action on the matter. One alternative discussed was to use other size ranges other than the ranges proposed. The Committee believed that the size ranges proposed offered the best compromise between regulatory control and accommodation for the marketing needs of the handlers. Another alternative was to establish just one $\frac{3}{4}$ -inch to 1 $\frac{7}{8}$ inches size range for small potatoes. However, that alternative was rejected because it would not have accommodated the mid-size range potatoes that some handlers prefer to ship. Thus, the Committee unanimously agreed that their recommendation reflected the best alternative available to achieve the desired result.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0178. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This action would not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide

increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, the Committee's meeting was widely publicized throughout the potato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the May 12, 2011, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is proposed to be amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR part 948 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In § 948.387, revise paragraph (a) and add paragraphs (a)(1) through (a)(3) to read as follows:

§ 948.387 Handling regulation.

* * * * *

(a) *Minimum grade and size requirements—All varieties.* (1) U.S. No. 2 or better grade, 1 $\frac{7}{8}$ inches minimum diameter or 4 ounces minimum weight.

(2) U.S. No.1 grade, Size B (1 $\frac{1}{2}$ inches minimum to 2 $\frac{1}{4}$ inches maximum diameter).

(3) U.S. No.1 grade, $\frac{3}{4}$ -inch minimum to 1 $\frac{7}{8}$ inches maximum diameter.

* * * * *

Dated: August 19, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011-22111 Filed 8-29-11; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1150

[Document No. AMS-DA-11-0007; DA-11-02]

National Dairy Promotion and Research Program; Invitation To Submit Comments on Proposed Amendments to the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document invites comments on a proposed amendment to the Dairy Promotion and Research Order (Dairy Order). The proposal would modify the number of National Dairy Promotion and Research Board (Dairy Board) members in eight regions, merge Region 8 and Region 10, merge Region 12 and Region 13, and apportion Idaho as a separate region. The total number of domestic Dairy Board members would remain the same at 36 and the total number of regions would be reduced from 13 to 12. This modification was requested by the Dairy Board, which administers the Dairy Order, to better reflect the geographic distribution of milk production in the United States.

DATES: Comments must be submitted on or before September 14, 2011.

ADDRESSES: Comments on this proposed rule should be identified with the docket number AMS-DA-11-0007; DA-11-02. Commenters should identify the date and page number of the issue of the Proposed Rule. Interested persons may comment on this proposed rule using either of the following procedures:

- *Mail:* Comments may be submitted by mail to Whitney A. Rick, Chief, Promotion and Research Branch, Dairy Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2958-S, Stop 0233, Washington, DC 20250-0233.

- *Fax:* Comments may be faxed to (202) 720-0285.

- *E-mail:* Comments may be e-mailed to Whitney.Rick@ams.usda.gov.

- *Internet:* <http://www.regulations.gov>.

All comments to this proposed rule, submitted by the above procedures will

be available for viewing at: <http://www.regulations.gov>, or at USDA, AMS, Dairy Programs, Promotion and Research Branch, Room 2958-S, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to 4 p.m., Monday through Friday, (except on official Federal holidays). Persons wanting to view comments in Room 2958-S are requested to make an appointment in advance by calling (202) 720-6909.

FOR FURTHER INFORMATION CONTACT:

Whitney A. Rick, Chief, Promotion and Research Branch, Dairy Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2958-S, Stop 0233, Washington, DC 20250-0233. Phone: (202) 720-6909. E-mail: Whitney.Rick@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This proposed rule is issued pursuant to the Dairy Production Stabilization Act (Dairy Act) of 1983 [7 U.S.C. 4501-4514], as amended.

Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have a retroactive effect. If adopted, nothing in this rule would preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

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

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service has

considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. The purpose of the Regulatory Flexibility Act is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

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

The Small Business Administration [13 CFR 121.201] defines small dairy producers as those having annual receipts of not more than \$750,000 annually. Most of the producers subject to the provisions of the Dairy Order are considered small entities.

The proposed rule would amend the Dairy Order by modifying the number of National Dairy Promotion and Research Board (Dairy Board) members in eight regions, merge Region 8 and Region 10, merge Region 12 and Region 13, and apportion Idaho as a separate region. The total number of domestic Dairy Board members would remain the same at 36 and the total number of regions would be reduced from 13 to 12. This modification was requested by the Dairy Board, which administers the Dairy Order, to better reflect the geographic distribution of milk production in the United States.

The Dairy Order is administered by a 38-member Dairy Board, 36 members representing 13 geographic regions within the United States and 2 representing importers. The Dairy Order provides in section 1150.131 that the Dairy Board shall review the geographic distribution of milk production throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of the regions and/or modification of the number of members from the regions in order to better reflect the geographic distribution of milk production volume in the United States. The Dairy Board is required to conduct the review at least every 5 years and not more than every 3 years. The Dairy Board was last

modified in 2008 based on 2007 milk production.

Based on a review of the 2010 geographic distribution of milk production, the Dairy Board has concluded that the number of Dairy Board members for eight regions should be changed. Additionally, the Dairy Board proposes to merge Region 8 and Region 10, merge Region 12 and Region 13, and apportion Idaho as a separate region. The Dairy Board was last modified in 2008 based on 2007 milk production.

The proposed amendment should not have a significant economic impact on persons subject to the Dairy Order. The proposed changes merely would allow representation of the Dairy Board to better reflect geographic milk production in the United States.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. chapter 35], the information collection requirements and record keeping provisions imposed by the Dairy Order have been previously approved by OMB and assigned OMB Control No. 0581-0093. No relevant Federal rules have been identified that duplicate, overlap, or conflict with this rule.

Statement of Consideration

The Dairy Order is administered by a 38-member Dairy Board, 36 members representing 13 geographic regions within the United States and 2 representing importers. The Dairy Order provides in section 1150.131 that the Dairy Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of the regions and/or modification of the number of producer members from regions in order to best reflect the geographic distribution of milk production in the United States. The Dairy Board is required to conduct the review at least every 5 years and not more than every 3 years. The Dairy Board was last modified in 2008 based on 2007 milk production.

Since the Dairy Board's last reapportionment, the Dairy Order was amended by a final rule [76 FR 14777, March 18, 2011] to implement an assessment on imported dairy products to fund promotion and research and to add importer representation, initially two members, to the Dairy Board. Additionally, the final rule amended the term "United States" in the Dairy Order

to mean all States, the District of Columbia, and the Commonwealth of Puerto Rico. Assessments on producers in these areas were effective April 1, 2011. These amendments to the Dairy Order were implemented pursuant to the Farm Security and Rural Investment Act of 2008 (2008 Farm Bill) (Pub. L. 110-246).

In order to complement the current geographical makeup of the existing regions of the Dairy Board, the final rule added these four new jurisdictions to the region of closest proximity. Alaska was added to Region 1, currently comprised of Oregon and Washington; Hawaii was added to Region 2, currently California; and the District of Columbia and the Commonwealth of Puerto Rico were added to Region 10, currently comprised of Florida, Georgia, North Carolina, South Carolina and Virginia. These regional modifications were

effective March 18, 2011, and are reflected in this proposed rule.

The final rule also modified the language in section 1150.131 of the Dairy Order to remove the specific formula for calculating the factor of pounds of milk per member, which divided total pounds of milk produced by 36, as the Dairy Board is now comprised of 38 members (36 domestic producers and 2 importer representatives). While the Dairy Order no longer specifies the procedure for calculating the factor of pounds of milk per member, for the purposes of the current reapportionment analysis, the procedure will remain the same.

The final rule also added new language that requires the Secretary to review the average volume of imports of dairy products into the United States and, if warranted, reapportion the importer representation on the Dairy Board to reflect the proportional shares

of the United States market served by domestic production and imported dairy products. This review will take place at least once every 3 years, after the initial appointment of importer representatives on the Dairy Board.

The last reapportionment, conducted in 2008, was calculated by using 2007 milk production data and dividing by 36 to determine a factor of pounds of milk represented by each domestic Dairy Board member. The resulting factor was then divided into the pounds of milk produced in each region to determine the number of Dairy Board members for each region. Accordingly, the same process using 2010 milk production data was employed for the current reapportionment calculations. Table 1 summarizes by region the volume of milk production distribution for 2010, the percentage of total milk production and the current number of Dairy Board seats per region.

TABLE 1—CURRENT REGIONS AND NUMBER OF BOARD SEATS

Current regions and states	Milk production (mil. lbs.)	Percentage of total milk production	Current number of board seats
1. Alaska, Oregon, Washington	8,307.1	4.3	1
2. California, Hawaii	40,410.3	21.0	8
3. Arizona, Colorado, Idaho, Montana, Nevada, Utah, Wyoming	22,592.4	11.6	4
4. Arkansas, Kansas, New Mexico, Oklahoma, Texas	20,321	10.4	4
5. Minnesota, North Dakota, South Dakota	11,370	5.8	2
6. Wisconsin	26,035	13.5	5
7. Illinois, Iowa, Missouri, Nebraska	8,867	4.6	2
8. Alabama, Kentucky, Louisiana, Mississippi, Tennessee	2,624	1.4	1
9. Indiana, Michigan, Ohio, West Virginia	17,188	8.9	3
10. District of Columbia, Florida, Georgia, North Carolina, Puerto Rico, South Carolina, Virginia	7,039	3.6	1
11. Delaware, Maryland, New Jersey, Pennsylvania	11,965	6.2	2
12. New York	12,713	6.6	2
13. Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	4,036.5	2.1	1
Total	193,468.3	100	36

* Milk Production, Disposition, and Income, 2010 Summary, NASS, 2011.

** Puerto Rico—Various Agricultural Statistics, 2010 Summary, NASS, 2011.

In 2010, total milk production was 193,468 million pounds and each of the Dairy Board members would represent 5,374 million pounds of milk. For 2007, total milk production was 185,558 million pounds of milk and each of the Dairy Board members represented 5,154 million pounds of milk.

Based on the 2010 milk production data, the Dairy Board proposes that member representation in Region 1 (Alaska, Oregon, and Washington) be increased by one member. Milk production in Region 1 increased to 8,307 million pounds in 2010, up from 7,764 million pounds in 2007, indicating two Dairy Board members (8,307 divided by 5,374 = 1.545)

compared to one Dairy Board member based on 2007 milk production data.

Milk production in Region 2 (California and Hawaii) decreased from 40,683 million pounds in 2007 to 40,410 million pounds in 2010. The Dairy Board proposes that seven Dairy Board members (40,410 divided by 5,374 = 7.519) represent Region 2, compared to eight Dairy Board members based on 2007 milk production data.

Milk production in Region 3 (Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming) increased from 21,212 million pounds in 2007 to 22,592 million pounds in 2010. Specifically, in Idaho, milk production increased from 10,905 million pounds in 2007 to 12,779 pounds in 2010 and represents more than half of the production of Region 3.

Due to the increase in Idaho production, the Dairy Board proposes apportioning Idaho as its own region with two Dairy Board members.

Milk production in Region 8 (Alabama, Kentucky, Louisiana, Mississippi, and Tennessee) decreased from 3,119 million pounds in 2007 to 2,624 million pounds in 2010. The Dairy Board concluded that Region 8 no longer supports one Dairy Board member (2,624 divided by 5,374 = 0.488) and proposes to merge Region 8 into Region 10 (District of Columbia, Florida, Georgia, North Carolina, Puerto Rico, South Carolina, and Virginia) to create a new region with two Dairy Board members.

Similarly, milk production in Region 13 (Connecticut, Maine, Massachusetts,

New Hampshire, Rhode Island, and Vermont) decreased from 4,046 million pounds in 2007 to 4,036 million pounds in 2010. The Dairy Board concluded that Region 13 no longer supports one Dairy Board member (4,036 divided by

5,374 = 0.751) and proposes to merge Region 13 into Region 12 (New York), creating a new region with three Dairy Board members.

Table 2 summarizes by region, the volume of milk production distribution

for 2010, the percentage of total milk production and the proposed regions and States and proposed Dairy Board members.

TABLE 2—PROPOSED REGIONS AND NUMBER OF BOARD SEATS

Proposed regions and states	Milk production (mil. lbs.)	Percentage of total milk production	Proposed number of board seats
1. Alaska, Oregon, Washington	8,307.1	4.3	2
2. California, Hawaii	40,410.3	21.0	7
3. Arizona, Colorado, Montana, Nevada, Utah, Wyoming	9,813.4	5.0	2
4. Arkansas, Kansas, New Mexico, Oklahoma, Texas	20,321	10.4	4
5. Minnesota, North Dakota, South Dakota	11,370	5.8	2
6. Wisconsin	26,035	13.5	5
7. Illinois, Iowa, Missouri, Nebraska	8,867	4.6	2
8. Idaho	12,779	6.6	2
9. Indiana, Michigan, Ohio, West Virginia	17,188	8.9	3
10. Alabama, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, Virginia	9,663	5.0	2
11. Delaware, Maryland, New Jersey, Pennsylvania	11,965	6.2	2
12. Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont	16,749.5	8.7	3
Total	193,468.3	100	36

* Milk Production, Disposition, and Income, 2010 Summary, NASS, 2011.

** Puerto Rico—Various Agricultural Statistics, 2010 Summary, NASS, 2011.

A 15-day comment period is provided for interested persons to comment on this proposed rule. Twelve terms of existing Dairy Board members will expire on October 31, 2011. Thus a 15-day comment period is provided to provide for a timely appointment of new Dairy Board members based on the current geographic distribution of milk production in the United States.

List of Subjects in 7 CFR Part 1150

Dairy products, Milk, Promotion, Research.

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

PART 1150—DAIRY PROMOTION PROGRAM

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

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

2. In § 1150.131, paragraph (b) is amended by revising paragraphs (b) introductory text, (b)(1), (b)(2), (b)(3), (b)(8), (b)(10), (b)(12), and removing paragraph (b)(13) to read as follows:

§ 1150.131 Establishment and membership.

(a) * * *

(b) Thirty-six members of the Board shall be United States producers. For purposes of nominating producers to the Board, the United States shall be

divided into twelve geographic regions and the number of Board members from each region shall be as follows:

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

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

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

* * * * *

(8) Two members from region number eight comprised of the following State: Idaho.

* * * * *

(10) Two members from region number 10 comprised of the following States: Alabama, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Commonwealth of Puerto Rico, South Carolina, Tennessee and Virginia.

* * * * *

(12) Three members from region number 12 comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.

Dated: August 22, 2011.

David Shipman,

Acting Administrator.

[FR Doc. 2011–22154 Filed 8–29–11; 8:45 am]

BILLING CODE 3410–02–P; 3410–20–P

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC–2009–0279]

New International Commission on Radiological Protection; Recommendations on the Annual Dose Limit to the Lens of the Eye

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is continuing its stakeholder outreach of possible changes to the radiation protection standards by seeking public comment on the newly released International Commission on Radiological Protection (ICRP) recommendations for the limitation of annual dose to the lens of the eye. This significant new recommendation has not yet been the subject of any stakeholder or public interactions on any potential changes to the NRC’s radiation protection regulations. The NRC has not initiated rulemaking on this subject, and is seeking early input and views on the benefits and impacts of options to be considered before making any decision on whether to consider this issue for future rulemaking. Stakeholders and the public are encouraged to submit comments

concerning potential impacts, burdens, benefits, and concerns on the issues discussed in this notice.

DATES: Submit comments by October 31, 2011. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: Please include Docket ID NRC-2009-0279 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see Section I, "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. Members of the public are invited and encouraged to submit comments by any of the following methods:

- *Federal rulemaking Web site:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2009-0279. Address questions about NRC dockets to Carol Gallagher; telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Solomon Sahle, telephone: 301-415-3781, e-mail: Solomon.Sahle@nrc.gov, or Dr. Donald Cool, telephone: 301-415-6347, e-mail: Donald.Cool@nrc.gov, of the Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

SUPPLEMENTARY INFORMATION:

I. Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that

you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

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

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

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

- *Federal rulemaking Web site:* Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2009-0279.

II. Background

Regulations issued by the NRC are found in Chapter I of Title 10, "Energy," of the Code of Federal Regulations (10 CFR). Chapter I is divided into Parts 1 through 199, and contains requirements that are binding for all individuals and entities that possess, use, or store nuclear materials or operate nuclear facilities under the NRC's jurisdiction. Of these, the regulations that are most relevant to the subject of this notice are contained in 10 CFR part 20, "Standards for Protection against Radiation." Through the existing compatibility criteria, the NRC Agreement States have certain requirements that are essentially identical to those contained in 10 CFR part 20 for their licensees. Additional requirements, specific to particular uses or classes of facilities, are found in other portions of the NRC's regulations. For example, 10 CFR part 35, "Medical Use of Byproduct Material," contains requirements related to the medical use of radioactive material, and 10 CFR part

50, "Domestic Licensing of Production and Utilization Facilities," contains additional requirements for power reactors. Other portions of the NRC's regulations also may contain radiation protection criteria, and cross references to 10 CFR part 20.

The ICRP Publication 103 (December 2007) contains the latest in a series of revised ICRP recommendations for radiation protection. On December 18, 2008, the NRC staff provided a Policy Issue Notation Vote Paper (SECY-08-0197; ADAMS Accession No. ML083360582) to the Commission, which presented the regulatory options of moving, or not moving, towards a greater degree of alignment of the NRC regulatory framework with ICRP Publication 103. In a Staff Requirements Memorandum (SRM) dated April 2, 2009 (ADAMS Accession No. ML090920103), the Commission approved the staff's recommendation to begin engaging with stakeholders and interested parties to initiate development of the technical basis for possible revision of the NRC's radiation protection regulations, as appropriate and where scientifically justified, to achieve greater alignment with the recommendations in ICRP Publication 103.

This notice of solicitation of comment represents the third in a series of such requests. Previous notices were published in the **Federal Register** on July 7, 2009 (74 FR 32198), and September 27, 2010 (75 FR 59160). In addition, the NRC staff held a series of facilitated public workshops in October and November 2010, to engage the views of a wide range of stakeholders on the key issues presented by the ICRP recommendations.

On April 21, 2011, the ICRP issued a statement on tissue reactions (see <http://www.icrp.org/docs/ICRP%20Statement%20on%20Tissue%20Reactions.pdf>) stating that it has reviewed recent epidemiological evidence suggesting that there are some tissue reaction effects, particularly those with very late manifestation, where threshold doses are or might be lower than previously considered. For the lens of the eye, the threshold in absorbed dose for radiation-induced cataract formation is now considered by the ICRP to be 0.50 Gy (50 rem). Consequently, for occupational exposure in planned exposure situations, the ICRP is now recommending a limit on equivalent dose for the lens of the eye of 20 mSv (2 rem) per year, averaged over defined periods of 5 years, with no single year exceeding 50 mSv (5 rem). The ICRP's recommended limits for dose for the

lens of the eye are numerically equal to its current recommendation for the limit on effective dose, which is 20 mSv (2 rem) per year, averaged over 5 years, with no single year exceeding 50 mSv (5 rem).

The supporting information reviewed by the ICRP was provided for public consultation in December 2010 (<http://www.icrp.org/docs/Tissue%20Reactions%20Report%20Draft%20for%20Consultation.pdf>). This draft report will be revised in light of the comments received by the ICRP during the public consultation period, and is expected to become a final ICRP report towards the end of 2011.

The international radiation protection community is currently examining the issue of revising the dose limits for the lens of the eye. In particular, the International Atomic Energy Agency has specifically considered and is now incorporating, the new limits into the revision of the International Basic Safety Standards for Protection against Ionizing Radiation and for the Safety of Radiation Sources.

Protection of the eye against the effects of ionizing radiation is designed primarily to prevent the formation of cataracts. The sensitive part of the eye for this health effect is the lens, and radiation dose to the eye is defined as the lens dose equivalent (LDE) at a tissue depth of 0.3 cm (10 CFR 20.1003). Cataract formation falls under the class of radiation effects referred to as deterministic (or tissue reactions in current ICRP terminology). At doses above the threshold, the severity of cataract formation increases with dose, but the radiation-induced incidence below the threshold dose is believed to be essentially zero. Currently, 10 CFR part 20 limits annual occupational exposures to the lens of the eye to 150 mSv (15 rem) per year (10 CFR 20.1201).

The NRC is supplementing its standard rulemaking process by conducting enhanced public participatory activities before the initiation of any formal rulemaking process, to solicit early and active public input on major issues associated with radiation protection regulations. As a first step, the NRC has prepared an issues paper that describes issues and alternatives related to limits for the lens of the eye. The intent of this paper is to foster discussion about these issues and alternatives before a rulemaking to set standards would begin. The content of the issues paper is contained in Section IV of this document. The NRC will also utilize its rulemaking Web site to make the issues paper available to the public and to solicit public comments.

III. Request for Written and Electronic Comments

The NRC is soliciting comments on the items presented in the issues paper in Section IV of this notice. Comments may be submitted either in writing or electronically as indicated in the **ADDRESSES** section of this document.

In addition to inviting public comments on the issues presented in Section IV, the NRC is soliciting specific comments related to: (1) Quantitative and qualitative information on the costs and benefits resulting from consideration of the factors described in the issues paper; (2) operational data on radiation exposures and administrative control methods that might result in increased or reduced exposures when implementing the associated change in a dose limit; (3) whether the presented factors are appropriate; and (4) whether other factors should be identified and considered, including providing quantitative and qualitative information for these factors. The Commission believes that the stakeholders' comments will help to quantify the potential impact of these changes and will assist the NRC, as it continues to consider alternatives for the radiation protection framework.

The NRC does not plan to provide specific responses to the comments received during this solicitation. Based on the comments received, the NRC staff will prepare policy issues for Commission consideration on whether to proceed with the development of a proposed rule or take other regulatory action. If the Commission decides to proceed further with a proposed rulemaking, any proposed rule will be published in the **Federal Register** for public review and comment.

IV. Issues Paper on the Dose Limit to the Lens of the Eye

Introduction

On April 21, 2011, the ICRP issued a statement on tissue reactions, indicating that it has now reviewed recent epidemiological evidence suggesting that there are some tissue reaction effects, particularly those with very late manifestation, where threshold doses are or might be lower than previously considered. For the lens of the eye, the threshold in absorbed dose for radiation-induced cataract formation is now considered to be 0.5 Gy (50 rem). Consequently, for occupational exposure in planned exposure situations, the ICRP is now recommending a limit on equivalent dose for the lens of the eye of 20 mSv (2 rem) per year, averaged over defined

periods of 5 years, with no single year exceeding 50 mSv (5 rem).

Issues and Options

To understand the magnitude of the doses incurred by the lens of the eye in the various industries regulated by the NRC, the NRC staff initially queried the Radiation Exposure Information and Reporting System (REIRS) database for occupational dose records over the past 16 years (1994–2010). Under 10 CFR 20.2206, seven NRC-licensed industry groups must report occupational radiation exposure data. These licensed industries are commercial nuclear power reactors; industrial radiographers; fuel processors (including uranium enrichment facilities), fabricators, and reprocessors; manufacturers and distributors of byproduct material; independent spent fuel storage installations; facilities for land disposal of low-level waste; and geological repositories for high-level waste. Currently, there are no NRC-licensed facilities for land disposal of low-level waste or geological repositories for high-level waste. Therefore, these licensee categories do not submit occupational radiation exposure reports to the REIRS database. Other categories of NRC licensees (*e.g.*, medical licensees) are not currently required to submit reports of occupational exposure. While Agreement State licensees are not required to provide reports to the NRC, some licensees within the industrial radiography and nuclear pharmacy categories have voluntarily submitted occupational radiation exposure reports to the REIRS database.

Annually, the NRC receives approximately 200,000 occupational radiation exposure reports to the REIRS database (NUREG-0713, "Occupational Radiation Exposure at Commercial Nuclear Power Reactors and Other Facilities" (ADAMS Accession No. ML110820543). The reports are generally submitted electronically as an NRC Form 5 record of occupational exposure for a monitoring period. The form includes fields to report deep dose equivalent (DDE), lens dose equivalent (LDE), committed effective dose equivalent (CEDE), total effective dose equivalent (TEDE), and shallow dose equivalent (SDE). For the purpose of this overview, the staff assumes that the reported DDE and LDE are taken from the same measurement, and that there is relatively infrequent direct measurement of LDE within the 200,000 records submitted annually.

In terms of the new ICRP recommendations for the lens of the eye, the staff focused on REIRS data for the

past 5 years (2006–2010) and found that current practices have resulted in upwards of 1,000 cases where a 20 mSv (2 rem) per year eye dose level was exceeded. None of these situations exceeded the current annual limit for the lens of the eye of 150 mSv (15 rem). The initial examination of REIRS data did not determine whether the same individual exceeded a 2 rem per year average over the 5-year period. The REIRS database did not contain a record where the deep dose equivalent exceeded a value of 50 mSv (5 rem) in a single year.

It can be concluded, based on this preliminary analysis, that current radiation protection practices would result in a considerable number of instances where dose to the lens of the eye exceeds 20 mSv (2 rem) per year. It should be noted that the reported TEDE and LDE values, above 20 mSv (2 rem) per year, are not necessarily associated with the same individuals each year. To obtain data on accumulated DDE for individuals, the NRC staff initially analyzed data for the past 16 years and found that no individual in any of the NRC-licensed industries reporting to REIRS, including individuals in those categories as reported by Agreement State licensees, has exceeded a cumulative exposure of 0.5 Sv (50 rem) during this period (1994–2010).

The information available to the NRC staff indicates that the majority of NRC-regulated workers are usually exposed to fairly uniform radiation fields. In this exposure environment, and without the use of shielding for portions of the body, the equivalent dose to the lens of the eye is typically similar to the TEDE. Therefore, measures to minimize radiation exposure, in general, will also result in a reduction in dose to the lens of the eye. Likewise, in many instances, an annual whole body dose that exceeds an annual level of 20 mSv (2 rem) would likely mean that the lens dose would also exceed 20 mSv (2 rem).

There are other types of licensed uses for which reporting of dose is not currently a requirement. For example, the NRC staff has been made aware of possible eye dose issues associated with licensees using depleted uranium in the fabrication of shielding, counterweights, etc. Further, some types of exposure, such as to machine-produced radiations (e.g., x-rays), are not the subject of NRC jurisdiction, and thus exposures in these categories are not reported to the NRC. However, the occupational dose to individuals exposed to both NRC-licensed radioactive materials, as well as non-NRC-licensed sources (e.g., x-rays), is regulated to the 10 CFR part 20 dose limits. Exposures to the lens of the

eye may be particularly important in some of these fields, and others, such as medical interventional radiology and cardiology, which are subject to regulation by the States, but are not necessarily under NRC jurisdiction.

In situations where there may be a non-uniform radiation field, or where shielding reduces the exposure to significant portions of the body, the dose to the lens of the eye might be greater than the TEDE. In such circumstances, specific additional protection measures might be necessary to reduce exposure to the lens of the eye. The NRC staff understands that the use of leaded safety glasses has proven effective in significantly reducing dose to the lens of the eye from soft x-rays, and use of such glasses with side shields is effective in situations where there is significant scatter of low energy radiation, such as in interventional radiology and cardiology, where shielding is already provided for the torso to reduce the effective dose. The use of leaded safety glasses might not be effective for use by industrial radiographers, where the greater energies of the radiation make it difficult or impractical to provide significant shielding to the lens of the eye.

In considering possible changes, the NRC staff must consider the implications of the dose limits for the lens of the eye in connection with all of the other issues that have been previously discussed with stakeholders, including the implications of a change to the dose limit for TEDE, and the implications of strengthening or modifying the requirements for optimization analysis using planning values to ensure that exposures are As Low As Is Reasonably Achievable.

As in all regulatory proceedings, the NRC could pursue several possible options. The NRC staff has identified the following three options for initial consideration and assessment in considering a revision to associated regulations and regulatory guidance.

1. No change: Continue with the existing regulatory requirement to limit dose to the lens of the eye to 150 mSv (15 rem) per year.

2. Change the current requirements by adopting the ICRP- recommended dose values.

3. Change the current requirements to adopt a single, reduced dose limit for the lens of the eye. For example, a single limit of 50 mSv (5 rem) or 20 mSv (2 rem).

Questions

The NRC staff is seeking stakeholder input on the issues, implications, and

options relating to possible changes to the NRC regulatory requirements to reflect the ICRP's recommendations for lowering the dose limit for the lens of the eye. The NRC is soliciting specific comments related to: (1) Quantitative and qualitative information on the costs and benefits resulting from consideration of the factors described in this issues paper, (2) operational data on radiation exposures and administrative control methods that might result in increased or reduced exposures in implementing the associated changes in a dose limit; (3) whether the presented factors are appropriate; and (4) whether other factors should be identified and considered, including providing quantitative and qualitative information for these factors. The following questions identify areas in which the NRC staff is seeking specific views and inputs. However, stakeholders are invited to identify and address other areas and implications not specifically mentioned here or in the issues paper.

1. To what extent has dose to the lens of the eye been an issue in the implementation of your radiation protection program, and would a change in the limits cause operational and administrative impacts? What other types of impacts would you foresee?

2. What types of specific administrative and monitoring methods would be available in your use of radiation or radioactive materials to reduce exposures to the lens of the eye, and what would be the costs and operational impacts of implementing such methods?

3. What might be the anticipated impacts of a rule change on recordkeeping and reporting?

4. Are there technological implementation issues, such as limits of detection as compared to currently used radiation monitoring methods, or availability of dosimetry, that would make adoption of the ICRP recommendations difficult or impractical in certain circumstances? If possible, please provide a typical example of such a circumstance.

5. How does the recommended limit to the lens of the eye influence your views on possible changes to the limits on TEDE, given that these two quantities are expected to be essentially the same for many exposure situations?

6. What alternatives to adoption of the new limits would you suggest in achieving the desired outcome of limiting exposure of the lens of the eye over the working lifetime of an employee?

7. What should be the relationship between the U.S. regulatory requirements and those adopted

internationally? What impacts, either positive or negative, would result from an alignment of NRC regulatory requirements and guidance with international standards?

8. Should licensees be required to monitor and report LDE for foreign workers and report the values upon request? Are there other impacts (e.g., operational, administrative, costs, etc.) that should be anticipated if the U.S. regulatory structure were to be different from that being used in other countries?

9. Are there any other NRC regulations and regulatory guidance that might need to be reviewed and revised as a result of ICRP recommendations in reducing the allowable dose to the lens of the eye?

10. How are licensees monitoring to demonstrate compliance with the existing dose limits for the lens of the eye?

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

For the Nuclear Regulatory Commission.

Josephine M. Piccone,

Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2011-21900 Filed 8-29-11; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 870

[Docket No. FDA-2011-N-0505]

Effective Date of Requirement for Premarket Approval for Cardiovascular Permanent Pacemaker Electrode; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a proposed rule that appeared in the *Federal Register* of August 8, 2011 (76 FR 48058). The document proposed to require the filing of a premarket approval application or a notice of completion of a product development protocol for the class III preamendments device: Cardiovascular permanent pacemaker electrode. The document was published with an incorrect Internet address for the first reference in the References section. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Elias Mallis, Center for Devices and

Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4622, Silver Spring, MD 20993-0002, 301-796-6216.

SUPPLEMENTARY INFORMATION: In FR Doc. 2011-19959, appearing on page 48058, in the *Federal Register* of Monday, August 8, 2011, the following correction is made:

1. On page 48062, in the first column, under "XIII. References," the first reference is corrected to read "1. Geiger, D.R., "FY 2003 and 2004 Unit Costs for the Process of Medical Device Review," September 2005, <http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/Overview/MedicalDeviceUserFeeandModernizationActMDUFMA/ucm109216>."

Dated: August 24, 2011.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2011-22107 Filed 8-29-11; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 203

[Docket No. FR-5461-P-01]

RIN 2502-AJ01

Federal Housing Administration (FHA): Suspension of Section 238(c) Single-Family Mortgage Insurance in Military Impacted Areas

AGENCY: Office of the Assistant Secretary of Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would suspend FHA's mortgage insurance program for military impacted areas under section 238(c) of the National Housing Act (Act). This single-family mortgage insurance program, established by regulation in 1977, has been significantly underutilized for the past several years. Additionally, these mortgage loans are insured under comparable terms and conditions as loans insured under HUD's primary single-family mortgage insurance program under section 203(b) of the National Housing Act. Accordingly, those borrowers who would be served under section 238(c) of the Act are served equally well under the section 203(b) mortgage insurance program. The suspension of this mortgage insurance program is consistent with the President's budget request for Fiscal Year 2012.

DATES: *Comment Due Date:* October 31, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0001.

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

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Karin Hill, Director, Office of Single

Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9278, Washington, DC 20410-8000; telephone number 202-708-2121 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Section 238(c) of the National Housing Act (12 U.S.C. 1715z-3(c)) (Act) was added by the Housing and Community Development Act of 1977 (Pub. L. 95-128) to authorize HUD to insure mortgages executed in connection with the construction, repair, rehabilitation, or purchase of property located near any installation of the Armed Forces of the United States in federally impacted areas in which conditions are such that one or more of the applicable insuring requirements under another single-family mortgage insurance program cannot be met. In addition, insurance may only be provided under section 238(c) if:

(1) HUD finds that the benefits to be derived from providing the insurance outweigh the risk of probable costs to the government; and (2) the Secretary of the Department of Defense certifies that there is no present intention to curtail substantially the personnel assigned or to be assigned to the installation. HUD is authorized to establish premiums and other charges to assure that the mortgage insurance program authorized under section 238(c) of the Act is actuarially sound, and to prescribe terms and conditions relating to the insurance found to be necessary and appropriate to the implementation of section 238(c). HUD's regulation implementing section 238(c) is codified at 24 CFR 203.43e. The regulation, promulgated in 1977, closely tracks the language of section 238(c) of the Act, and the section 238(c) mortgage insurance program is not subject to any regulatory requirements different from HUD's principal single-family mortgage insurance program authorized under section 203(b) of the Act.¹

Although established to ensure the availability of affordable housing in

¹ From 1977 to 1983, mortgages insured under section 238(c) were subject to a higher mortgage insurance premium than other FHA single-family mortgage insurance programs (0.5 percent vs. 1.0 percent). In 1983, HUD reduced the mortgage insurance premium for section 238(c) mortgages to conform to other FHA programs because HUD determined that "the actuarial experience under Section 238(c) provides no basis for charging a higher mortgage insurance premium in federally impacted areas" (see 48 FR 35088-01).

military impacted areas, the program has been minimally utilized by eligible borrowers. Section 238(c) mortgage insurance has been available in only six counties throughout the country, three in Georgia and three in New York. From January 1, 2005, to June 30, 2010, FHA insured 4,542 single-family home loans in these six counties, and only 2,309 were endorsed under section 238(c) of the Act. The 2,309 loans endorsed since 2005 represent only .05 percent of all FHA-insured loans endorsed during that span.

The President's budget request for Fiscal Year (FY) 2011 acknowledged the underutilization of the section 238(c) program and advised that HUD would take action to halt the availability of the program in light of the significant underutilization. The FY 2011 budget request found at <http://www.gpoaccess.gov/usbudget/fy11/index.html> states the following:

The Budget assumes that HUD will administratively suspend the Section 238(c) program in 2011. The Section 238(c) program provides single family mortgage insurance similar to MMI for a small number of families in areas affected by military installations. The elimination of Section 238(c) will not negatively impact the availability of FHA insured financing in the six counties currently covered under this program. (See HUD Appendix to the Budget at page 620 at <http://www.gpoaccess.gov/usbudget/fy11/appendix.html>).²

II. This Proposed Rule

Consistent with the President's budget request, HUD proposes to suspend the section 238(c) program and remove § 203.43e from its codified regulations. HUD's proposed removal of the regulations at § 203.43e is not inconsistent with suspension of the section 238(c) mortgage insurance program. As noted in Section I of this preamble, the regulatory language tracks the statutory language. As also noted earlier in this preamble, section 238(c) mortgage insurance operates in a comparable manner as HUD's primary single-family mortgage insurance. If HUD subsequently determines that there is a demand for this program and that military families would be better served by this program, HUD can reactivate the program on the basis of the statutory language and does not need a regulation to make insurance available under this program. If such a situation occurs, HUD would notify the public through **Federal Register** notice that the program has been activated, so that eligible

² The President's Budget for FY 2012, found at <http://www.whitehouse.gov/omb/budget/Overview>, contains identical language to the paragraph cited above in the HUD Appendix to the FY 2012 Budget at page 591.

borrowers would be able to inquire about the availability of insurance under this program from their lenders. HUD notes that the removal of the regulations at § 203.43e would have no impact on loans already endorsed for FHA insurance under the section 238(c) program.

The proposed suspension of this underutilized mortgage insurance program, and the proposed removal of the regulations at 24 CFR 203.43e, is not only consistent with the President's budget requests for FY 2011 and 2012, but with the President's Executive Order (EO) 13563, entitled "Improving Regulation and Regulatory Review," signed by the President on January 18, 2011, and published on January 21, 2011, at 76 FR 3821. This EO requires executive agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." For the reasons discussed in the Background section of this preamble, HUD has determined that the underutilization of the section 238(c) mortgage insurance program renders the program and its regulations outmoded and HUD, therefore, proposes to suspend the program and remove the regulations.

III. Findings and Certification

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The proposed rule would not modify or add any new regulatory burdens on FHA-approved mortgage lenders. Rather, the proposed rule would remove § 203.43e from HUD's regulations, in conformity to HUD's (and the Administration's) decision to no longer exercise its authority to insure mortgages under section 238(c) of the Act. As more fully discussed above in the preamble to this rule, the mortgage insurance authority provided by section 238(c) of the Act has been minimally sought by eligible borrowers and consequently minimally utilized by lenders and other small entities participating in the FHA programs. Further, as noted above, section 238(c) mortgage insurance operated in a manner comparable to FHA's mortgage insurance program under section 203(b)

of the Act, HUD's primary single-family mortgage insurance program.

Accordingly, for the above reasons, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Environmental Impact

This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the principal FHA single-family mortgage insurance program is 14.117.

List of Subjects in 24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

Accordingly, for the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 203 to read as follows:

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

1. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, 1715z–16, and 1715u; 42 U.S.C. 3535(d).

§ 203.43e [Removed]

2. Remove § 203.43e.

Dated: August 24, 2011.

Carol J. Galante,

*Acting Assistant Secretary for Housing—
Federal Housing Commissioner.*

[FR Doc. 2011–22189 Filed 8–29–11; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R06–OAR–2010–0776; FRL–9456–7]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Louisiana; Baton Rouge Ozone Nonattainment Area; Redesignation to Attainment for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request from the State of Louisiana to redesignate the Baton Rouge, Louisiana moderate 1997 8-hour ozone nonattainment area to attainment of the 1997 8-hour ozone standard. In proposing to approve this request, EPA also proposes to approve as a revision to the Louisiana State Implementation Plan (SIP), a 1997 8-hour ozone maintenance plan with a 2022 Motor Vehicle Emissions Budget (MVEB) for the Baton Rouge Nonattainment Area (BRNA or BR). EPA is also proposing to approve revisions to the Louisiana SIP that meets the Reasonably Available Control Technology (RACT) requirements (for nitrogen oxides (NO_x) and volatile organic compounds (VOCs)) for the 1-hour and 1997 8-hour ozone

standard requirements, and to approve a state rule establishing a maintenance plan contingency measure. In prior, separate rulemaking actions, EPA finalized its action to terminate the 1-hour ozone anti-backsliding section 185 penalty fee requirement. EPA has proposed to approve the Control Technique Guideline Rules (CTG Rules Update) that are necessary for redesignation. We are proposing that if the CTG Rules Update is finalized, the area will have a fully approved SIP that meets all of its applicable 1997 8-hour requirements and 1-hour anti-backsliding requirements under section 110 and Part D of the Federal Clean Air Act (CAA or Act) for purposes of redesignation.

DATES: Comments must be received on or before September 29, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2010–0776, by one of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *U.S. EPA Region 6 "Contact Us" Web site:* <http://epa.gov/region6/r6comment.htm>. Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

- *E-mail:* Mr. Guy Donaldson at donaldson.guy@epa.gov. Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.

- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2010–0776. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Do not submit through <http://www.regulations.gov> or e-mail, information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Louisiana Department of Environmental Quality, 602 N. Fifth Street, Baton Rouge, LA 70802.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Rennie, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7367; fax number 214-665-7263; e-mail address rennie.sandra@epa.gov.

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

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I. What are the actions EPA is proposing?

EPA is proposing to take several related actions pursuant to the Act for the BRNA moderate 1997 8-hour ozone nonattainment area, consisting of Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge Parishes in Louisiana. EPA is proposing to find that the BRNA has met the requirements for redesignation under section 107(d)(3)(E) of the Act, and is therefore proposing to approve a request from the State of Louisiana to redesignate the BRNA to attainment of the 1997 8-hour ozone standard. EPA is also proposing to approve, pursuant to section 175A of the Act, the area's 1997 8-hour ozone maintenance plan as a revision to the Louisiana SIP; to approve the plan's associated 2022 MVEB; to approve additional submissions to meet applicable VOC and NO_x RACT requirements; and to approve a State Rule revision that establishes a

contingency measure for the maintenance plan. In a separate rulemaking, EPA has finalized an action to terminate CAA section 185 penalty fee requirements for the 1-hour ozone standard. (July 7, 2011, 76 FR 39775). EPA is proposing to find that the BR area will satisfy all moderate area requirements for the 1997 8-hour ozone NAAQS and severe area 1-hour ozone anti-backsliding requirements applicable for purposes of the area's redesignation for the 1997 8-hour ozone standard once the CTG Rule Update is finalized. A fuller discussion of how the BRNA met these requirements is discussed in detail later in this document. The Technical Support Document (TSD), for this action also provides further information on how the BRNA area satisfies the 8-hour moderate area requirements and 1-hour severe area requirements for anti-backsliding purposes.

Based upon the above, EPA is proposing to approve the State of Louisiana's request, submitted on August 31, 2010, and supplemented on February 14, 2011, through the Louisiana Department of Environmental Quality (LDEQ), to redesignate the BRNA to attainment of the 1997 8-hour ozone standard.

II. What is the background for these actions?

A. What are the National Ambient Air Quality Standards?

Section 109 of the Act requires EPA to establish NAAQS for pollutants that "may reasonably be anticipated to endanger public health and welfare," and to develop a primary and secondary standard for each NAAQS. The primary standard is designed to protect human health with an adequate margin of safety, and the secondary standard is designed to protect public welfare and the environment. EPA has set NAAQS for six common air pollutants, referred to as criteria pollutants: Carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. These standards present state and local governments with the minimum air quality levels they must meet to comply with the Act. Also, these standards provide information to residents of the United States about the air quality in their communities. A State's SIP addresses these requirements, as required by section 110 and other provisions of the Act. The SIP is a set of air pollution regulations, control strategies, other means or techniques, and technical analyses developed by the state, to ensure that the state meets the NAAQS.

B. What is ozone and why do we regulate it?

Ozone, a gas composed of three oxygen atoms, at the ground level is generally not emitted directly by sources such as from a vehicle's exhaust or an industrial smokestack; rather, ground level ozone is produced by a chemical reaction between nitrogen oxides (NO_x) and VOCs in the presence of sunlight and high ambient temperatures. NO_x and VOCs are referred to as precursors of ozone. Motor vehicle exhaust and industrial emissions, gasoline vapors, and chemical solvents all contain NO_x and VOCs. Urban areas tend to have high concentrations of ground-level ozone, but areas without significant industrial activity and with relatively low vehicular traffic are also subject to increased ozone levels because wind carries ozone and its precursors many miles from the sources. The Act establishes a process for air quality management through the NAAQS.

Repeated exposure to ozone pollution may cause lung damage. Even at very low concentrations, ground-level ozone triggers a variety of health problems including aggravated asthma, reduced lung capacity, and increased susceptibility to respiratory illnesses like pneumonia and bronchitis. It can also have detrimental effects on plants and ecosystems.

C. What is the background for the Baton Rouge area under the 1-hour ozone NAAQS?

EPA first designated the Baton Rouge area as an ozone nonattainment area in 1978. 43 FR 8964, 8998 (March 3, 1978). The BR 1-hour ozone nonattainment area contains five parishes: East Baton Rouge; West Baton Rouge; Ascension; Iberville; and Livingston Parishes (40 CFR 81.319). In 1991, the BR area was designated nonattainment by operation of law and EPA classified the BR area as a "serious" ozone nonattainment area with a statutory attainment deadline of November 15, 1999. 56 FR 56694 (November 6, 1991). EPA approved the serious attainment demonstration SIP and its associated elements, e.g., attainment Motor Vehicle Emissions Budgets (MVEB), the Reasonably Available Control Measures (RACM) demonstration, on July 2, 1999. See 64 FR 35930. The BR area, however, did not attain by the serious area statutory deadline of November 15, 1999. Before this deadline however, EPA had issued a guidance memorandum that allowed an area to retain its existing classification and receive a later attainment deadline if the EPA found

that area met all of its existing classification requirements, approved a demonstration that the area would attain but for the transport from another area, and approved the attainment demonstration SIP with its associated elements. See EPA's "Guidance on Extension of Attainment Dates for Downwind Transport Areas" (the Extension Policy) (Richard D. Wilson, Acting Assistant Administrator for Air and Radiation) July 16, 1998. On October 2, 2002, EPA approved the revised attainment demonstration SIP and its associated elements, found the area met all of the serious area requirements, found there was transport from Texas affecting the BR area reaching attainment, and extended the attainment date for the BR area to November 15, 2005, without reclassifying the area from serious to severe, consistent with the policy. 67 FR 61786 (October 2, 2002).

On December 11, 2002, the U.S. Court of Appeals for the Fifth Circuit vacated EPA's attainment date extension policy, which had been applied to extend the 1-hour ozone attainment deadline for the Baton Rouge area without reclassifying the area. *Sierra Club v. EPA*, 314 F.3d 735 (5th Cir. 2002). Thereupon EPA on April 24, 2003, withdrew the action extending the attainment deadline for Baton Rouge, finalized its finding that the area failed to attain the 1-hour ozone standard by the serious area deadline, and reclassified the Baton Rouge area by operation of law, to severe nonattainment for the 1-hour ozone standard. See 68 FR 20077.¹ As a result of its reclassification to severe, the State was required, among other things, to submit by June 23, 2004, a new 1-hour severe attainment demonstration SIP with an attainment date of November 15, 2005, with a 25 ton per year major stationary source threshold, additional reasonably available control technology (RACT) rules for sources subject to the new lower major stationary source

¹ Petitions for review of the October 2, 2002, rulemaking were filed in the U.S. Court of Appeals for the Fifth Circuit (*Louisiana Environmental Action Network (LEAN) v. EPA*, No. 02-60991). The issues raised concerned EPA's decision to approve Louisiana's substitute contingency measures plan, the revised attainment demonstration SIP with a later attainment deadline without reclassifying the area to severe, and the associated precursor trading provision of the NSR rules. On February 25, 2003, the court granted EPA's partial voluntary remand to allow EPA the time to meet the December 2002 court decision by withdrawing its approval of the revised attainment demonstration SIP that extended the attainment deadline without reclassifying the area and the associated NSR precursor trading provision. The court also addressed the substitute contingency measures claim, and vacated and remanded EPA's approval of the contingency measures.

threshold, a new source review (NSR) offset requirement of at least 1.3 to 1, a rate of progress in emission reductions of ozone precursors of at least 3 percent of baseline emissions per year from November 15, 1999, until the attainment year, additional transportation control measures (TCMs) needed to offset growth in emissions due to growth in vehicle miles traveled (VMT), and a fee requirement for major stationary sources of volatile organic compounds (VOC) and nitrogen oxides (NO_x) should the area fail to attain by 2005. The state was required to implement the EPA-triggered failure-to-attain contingency measures, submit a replacement for, *i.e.*, backfill for, the triggered failure-to-attain contingency measures, and to meet the remaining severe area requirements under section 182(d) of the Act. The State submitted severe area rules that addressed the 25 tpy and major source offset requirements,² a VMT offset analysis, and a substitute contingency measure to replace the serious area contingency measure that was previously approved into the serious area attainment demonstration.

Upon reclassification to severe, under section 211(k) of the Act, the use of reformulated gasoline (RFG) was to be required in the BRNA one year after the effective date of the reclassification. The Louisiana Department of Environmental Quality, the City of Baton Rouge, and the Chamber of Greater Baton Rouge all formally requested a waiver and/or delay of implementation of the RFG requirement in the Baton Rouge severe ozone nonattainment area. EPA denied these requests. The City and the Chamber filed a Petition for Review in the U.S. Court of Appeals for the Fifth Circuit. The parties filed a joint motion for a voluntary remand to EPA to allow it to reconsider its decision in light of new information. On August 2, 2004, the Fifth Circuit Court of Appeals approved the joint motion, remanding the matter to EPA and staying the litigation and enforcement of the RFG requirement for the BRNA during the remand. The Court's stay of enforcement of the RFG requirement in the BRNA currently remains in effect.

On February 10, 2010 EPA determined that the BRNA area was attaining the 1-hour ozone standard based on quality-assured, certified data for the 2006–2008 ozone monitoring seasons. This determination suspended the 1-hour attainment demonstration requirement, 1-hour rate of progress requirement, the 1-hour contingency measures, and other SIP planning

requirements related to attainment of the 1-hour ozone NAAQS. See 75 FR 6570. Lastly, on July 7, 2011, EPA finalized its action to terminate the CAA section 185 penalty fee requirements for the Baton Rouge 1-hour ozone standard. For a more detailed rationale, see our proposed and final actions at 76 FR 17368 and 76 FR 39775.

D. What is the background for the BRNA under the 1997 8-hour ozone NAAQS?

On July 18, 1997, EPA promulgated a revised 8-hour ozone standard of 0.08 parts per million (ppm), which is more protective than the previous 1-hour ozone standard (62 FR 38855).³ The EPA published the 1997 8-hour ozone designations and classifications on April 30, 2004 (69 FR 23858). The BRNA was designated nonattainment and initially classified as marginal. The area includes five parishes (counties): Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge (these constitute the former 1-hour ozone nonattainment area). The effective date of designation for the 1997 8-hour ozone NAAQS was June 15, 2004. Under the marginal nonattainment designation, the latest attainment date for the BRNA was June 15, 2007. The BRNA did not monitor attainment of the 1997 8-hour ozone NAAQS by the June 15, 2007 deadline, based upon complete, quality-assured and certified ambient air quality monitoring data for the 2004–2006 ozone seasons.

Therefore, EPA determined that the BRNA had failed to attain the 1997 8-hour ozone standard by the applicable attainment deadline and the area was reclassified by operation of law as a moderate 1997 8-hour ozone nonattainment area, effective April 21, 2008 (73 FR 15087). This determination was based on ambient air quality data from the 2004–2006 monitoring period. In a subsequent rulemaking (September 9, 2010, 75 FR 54778) EPA determined that (based on monitoring data for 2006–2009 monitoring periods and preliminary 2010 data) the BRNA has since attained the 1997 8-hour ozone standard. Recent certified air quality data for 2010 indicate that the BRNA

³ On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. On January 6, 2010, EPA proposed to set the level of the primary 8-hour ozone standard within the range of 0.060 to 0.070 ppm, rather than at 0.075 ppm. EPA anticipates that by August 2011 it will have completed reconsideration of the standard and thereafter will proceed with designations. The actions addressed in today's proposed rulemaking relate only to redesignation for the 1997 8-hour ozone standard. EPA's actions with respect to this new standard do not affect EPA's action here.

continues to attain the 1997 8-hour ozone standard. See Section V.A.

The deadline for submission of requirements to meet the area's new 8-hour moderate nonattainment area classification was January 1, 2009 (73 FR 14391). The LDEQ, on December 14, 2009, submitted a request that EPA determine that the BRNA was monitoring attainment for the 1997 8-hour ozone standard. As stated earlier, EPA finalized a determination of attainment on September 9, 2010. This determination suspended the requirement for a 1997 8-hour attainment demonstration, 8-hour rate of progress plan and 8-hour contingency measures. (See 75 FR 54778). On August 31, 2010, the state submitted a request for redesignation to attainment. As stated previously, the request included a maintenance plan with associated MVEB.

III. What are the impacts of the court decisions on EPA's phase 1 and 2 implementation rules upon the BRNA redesignation request?

A. Summary of the Court Decisions

The following sets forth EPA's views on the effect of the U.S. Court of Appeals for the District of Columbia rulings on this proposed redesignation action. For the reasons set forth below, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action or prevent EPA from proposing or ultimately finalizing this redesignation. EPA believes that the Court's December 22, 2006, June 8, 2007, and July 10, 2009, decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

EPA published a first phase rule governing implementation of the 1997 8-hour ozone standard (Phase 1 Rule) on April 30, 2004 (69 FR 23951). The Phase 1 Rule addresses classifications for the 1997 8-hour NAAQS and for revocation for the 1-hour NAAQS; how anti-backsliding principles will ensure continued progress toward attainment of the 1997 8-hour NAAQS; attainment dates; and the timing of emissions reductions needed for attainment. The Phase 1 Rule revoked the 1-hour ozone standard. The Phase 1 Rule also provided that 1-hour ozone nonattainment areas are required to adopt and implement "applicable requirements" according to the area's classification under the 1-hour ozone

² However, the State subsequently reversed these rules when the 1-hour ozone standard was revoked.

standard for anti-backsliding purposes. See 40 CFR 51.905(a)(i). On May 26, 2005, we determined that an area's 1-hour designation and classification as of June 15, 2004 would dictate what 1-hour obligations remain as "applicable requirements" under the Phase 1 Rule. 40 CFR 51.900(f). (70 FR 30592). As discussed previously, the Baton Rouge area's classification under the 1-hour standard as of June 15, 2004 was "severe."

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia vacated EPA's Phase 1 Rule in *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the Court clarified that the Phase 1 rule was vacated only with regard to those parts of the rule that had been successfully challenged. See 489 F.3d 1245 (D.C. Cir. 2007), cert. denied, 128 S.Ct. 1065 (2008). By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 rule that had not been successfully challenged. The June 8, 2007 opinion reaffirmed the December 22, 2006 decision that EPA had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area new source review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme nonattainment areas that fail to attain the 1-hour standard by the 1-hour attainment date; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS or for failure to attain that NAAQS; and (4) the court clarified that the Court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

EPA published a second rule governing implementation of the 1997 8-hour ozone standard (Phase 2 Rule) on November 29, 2005 (70 FR 71612), as revised on June 8, 2007 (72 FR 31727). The Phase 2 Rule addressed, among other things, the Clean Data Policy as codified in 40 CFR 51.918. The Court upheld the Clean Data Policy, agreeing with the Tenth Circuit that EPA's interpretation of the Act was reasonable. *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009). See *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996).

B. Summary of EPA's Analysis of the Impact of the Court Decisions on the BRNA Area

1. Requirements under the 1997 Eight-Hour Ozone Standard

For the 1997 8-hour ozone standard, the BRNA ozone nonattainment area was originally classified as marginal nonattainment under subpart 2 of the CAA and reclassified to moderate on March 21, 2008 (73 FR 15087). The June 8, 2007, opinion clarifies that the Court did not vacate the Phase 1 Rule's provisions with respect to classifications for areas under subpart 2. The Court's decision, therefore, upholds EPA's classifications for those areas classified under subpart 2 for the eight-hour ozone standard, and all eight-hour ozone requirements for these areas remain in place.

2. Requirements Under the One-Hour Ozone Standard

In its June 8, 2007, decision, the Court limited its vacatur so as to uphold those provisions of EPA's anti-backsliding requirements that were not successfully challenged. Therefore, an area must meet the anti-backsliding requirements, see 40 CFR 51.900, *et seq.*; 70 FR 30592, 30604 (May 26, 2005), which apply by virtue of the area's classification for the one-hour ozone NAAQS. As set forth in more detail below, the area must also address several additional anti-backsliding provisions identified by the Court in its decisions. We address later on in this notice how the 1-hour anti-backsliding obligations (as interpreted and directed by the court) are met in the context of a redesignation action for the 1997 8-hour NAAQS.

IV. What are the CAA criteria for redesignation?

The Act sets forth the requirements for redesignating a nonattainment area to attainment. Specifically, CAA section 107(d)(3)(E) allows for redesignation provided that (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under CAA section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of CAA section 175A; and (5) the State

containing such area has met all requirements applicable to the area under CAA section 110 and part D.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

1. "Ozone and Carbon Monoxide Design Value Calculations," Memorandum from Bill Laxton, June 18, 1990.
2. "Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas," Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;
3. "Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations," Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;
4. "Procedures for Processing Requests to Redesignate Areas to Attainment", Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992;
5. "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (ACT) Deadlines," Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;
6. "Technical Support Documents (TSDs) for Redesignation of Ozone and Carbon Monoxide (CO) Nonattainment Areas", Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;
7. "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992", Memorandum from Michael Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;
8. "Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas," Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993;
9. "Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment," Memorandum from Mary D. Nichols, Assistant Administrator for

Air and Radiation, October 14, 1994; and

10. "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

V. What is EPA's analysis of the state's redesignation request and maintenance plan and what is the basis for EPA's proposed actions?

A. Has the BRNA attained the ozone NAAQS?

EPA has previously determined that that the BRNA ozone nonattainment area has attained both the 1- hour and 1997 8-hour ozone standards. As set forth below, data available subsequent to those determinations shows that the area continues to attain both standards.

1. Attainment of the 8-Hour NAAQS

EPA determined that the BRNA area was attaining the 1997 8-hour standard

based on complete quality-assured, certified data for the 2006–2009 ozone monitoring seasons. For a more detailed rationale, see our final action at 75 FR 54778 (September 9, 2010). Since that time, complete, quality-assured and certified monitoring data for the 2010 calendar year have become available that show the area is still attaining the 1997 8-hour standard. Draft air quality monitoring data⁴ indicate the area is still attaining the 1997 8-hour ozone standard. The fourth high values for 8-hour ozone for 2010, and the 3-year average of these values (*i.e.*, design value), are summarized in Table 1:

TABLE 1—BRNA AREA, FOURTH HIGHEST 8-HOUR OZONE CONCENTRATIONS AND DESIGN VALUES DATA SUMMARY (PPM)¹

Site	4th Highest daily max			Design values three year averages
	2008	2009	2010	2008–2010
Plaquemine (22–047–0009)	0.076	0.071	0.074	0.073
Carville (22–047–0012)	0.073	0.076	0.072	0.073
Dutchtown (22–005–0004)	0.074	0.074	0.078	0.075
Baker (22–033–1001)	0.071	0.071	0.075	0.072
LSU (22–033–0003)	0.072	0.084	0.080	0.078
Grosse Tete (22–047–0007)	0.071	0.070	0.074	0.071
Port Allen (22–121–0001)	0.072	0.072	0.071	0.071
Pride (22–033–0013)	0.074	0.072	0.071	0.072
French Settlement (22–063–0002)	0.075	0.075	0.076	0.075
Capitol (22–033–0009)	0.067	0.076	0.076	0.073

¹ Unlike for the 1-hour ozone standard, design value calculations for the 8-hour ozone standard are based on a rolling three-year average of the annual 4th highest values (40 CFR part 50, Appendix I).

In addition, as discussed below with respect to the maintenance plan, Louisiana has committed to continue monitoring in this area in accordance with 40 CFR part 58.

Should the area violate the 1997 8-hour ozone standard before the proposed redesignation is finalized, EPA will not proceed with final redesignation.

The ozone monitoring network run by LDEQ in the BRNA has monitored attainment with the 1997 8-hour ozone standard based on data from 2006 through 2010. The 1997 ozone NAAQS is 0.08 parts per million based on the three-year average of the fourth-highest daily maximum 8-hour average ozone concentration measured at each monitor within an area. The 1997 ozone standard is considered to be attained at 84 parts per billion (ppb). The design value for the monitoring period 2006–2008 was 0.083 ppb. For the monitoring period 2007–2009, it was 0.080 ppb. For the monitoring period 2008–2010, the

design value for the BRNA was 0.078 ppb. Draft data available for 2011 are consistent with continued attainment. In summary, the data show BRNA has attained the 1997 8-hour ozone NAAQS.

2. Attainment of the 1-Hour NAAQS

On February 10, 2010 EPA determined that the BRNA area was attaining the 1-hour ozone standard based on quality-assured, certified data for the 2006–2008 ozone monitoring seasons. For a more detailed rationale, see our final action at 75 FR 6570. Since that time, complete, quality-assured and certified data that have become available showing the area continues to attain the 1-hour ozone standard as shown in Table 2.

TABLE 2—SUMMARY OF 1-HOUR DESIGN VALUES THROUGH 2010

Monitoring period	Design value (ppb)
2006–2008	114
2007–2009	114
2008–2010	107

B. Has the state of Louisiana met all applicable requirements of section 110 and part D of the CAA and does the BRNA have a fully approved SIP under section 110(k) of the CAA for purposes of redesignation to attainment?

EPA has reviewed the Louisiana SIP for the BR area with respect to SIP requirements applicable for purposes of redesignation under part D of the Act for both the 1-hour ozone NAAQS and the 1997 8-hour ozone NAAQS. EPA believes that, with the exception of certain 1-hour and 8-hour ozone RACT requirements that will be acted on in a separate rulemaking, the Louisiana SIP

⁴ <http://www.deq.louisiana.gov/portal/DIVISIONS/Assessment/AirFieldServices/>

[AmbientAirMonitoringProgram/AirMonitoringData.aspx](http://www.AmbientAirMonitoringProgram/AirMonitoringData.aspx).

for the BRNA currently contains approved SIP measures that meet the part D requirements applicable for purposes of redesignation. We are also proposing to find that the area meets the severe area 1-hour ozone and 1997 8-hour RACT requirements, provided that EPA finally approves in a separate rulemaking action the RACT requirements for the source categories covered by the CTG Rules Update. As discussed previously, EPA, in a separate final rulemaking, has approved the termination of the section 185 penalty fee requirement. The 1-hour and 1997 8-hour ozone applicable requirements are discussed in detail below.

In evaluating a request for redesignation, EPA's long-held position is that those requirements expressly linked by statutory language with the attainment and reasonable further progress requirements do not apply if EPA determines that the area is attaining the standard. Additionally, it is EPA's interpretation of CAA section 107(d)(3)(E) that applicable requirements of the Act that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Under this interpretation, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant requirements of the Act that come due prior to the submittal of a complete redesignation request. See *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004). See also 68 FR 25424, 25427 (May 12, 2003) (redesignation of St. Louis, Missouri); September 4, 1992 Calcagni memorandum; September 17, 1993 Michael Shapiro memorandum, and 60 FR 12459, 12465–66 (March 7, 1995) (redesignation of Detroit-Ann Arbor, MI).

The applicable 1997 8-hour ozone standard requirements for the BRNA area are those for a moderate nonattainment area.

Because EPA found the BRNA monitored attainment of the 1-hour and 1997 8-hour standards (see citations in section V.A. above), it suspended the requirements for the state to submit certain planning SIPs related to attainment, including attainment demonstration requirements, the reasonably available control measures (RACM) requirement of section 172(c)(1) of the Act, the reasonable further progress (RFP) and attainment demonstration requirements of sections 172(c)(2) and (6) and 182(b)(1) of the Act, and the requirement for contingency measures of section 172(c)(9) of the Act as long as the area

continues to monitor attainment of those standards. These requirements will cease to apply upon redesignation to attainment.

In addition, in the context of redesignations, EPA has interpreted requirements related to attainment as not applicable for purposes of redesignation. For example, in the General Preamble EPA stated that:

[T]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans * * * provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas. [General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990," (General Preamble) 57 FR 13498, 13564 (April 16, 1992)]

See also Calcagni memorandum dated Sept 4, 1992 ("The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard." From the memorandum, section 4.b.i.).

In prior separate actions, EPA has finalized the termination of the requirement for the 1-hour ozone 185 fees program. EPA has proposed approval of the CTG Rules Update. EPA is thus proposing to find that upon final approval of the CTG Rules Update, the BRNA will have a fully approved SIP under 110(k) for redesignation purposes and it will meet all CAA 110 and part D applicable requirements for purposes of redesignation for the 1997 8-hour ozone standard.

1. The BRNA Has Met All Requirements of Section 110 and Part D of the CAA Applicable for Purposes of Redesignation for the 8-Hour NAAQS

a. Section 110 and General SIP Requirements

Section 110(a) of Title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a State must have been adopted by the State after reasonable public notice and hearing, and, among other things, must: Include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; provide for implementation of a source permit program to regulate the modification

and construction of any stationary source within the areas covered by the plan; include provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, NSR permit programs; include criteria for stationary source emission control measures, monitoring, and reporting; include provisions for air quality modeling; and provide for public and local agency participation in planning and emission control rule development.

We believe that the section 110 elements that are not connected with nonattainment plan submissions and not linked with an area's attainment status are not applicable requirements for purposes of redesignation. A State remains subject to these requirements after an area is redesignated to attainment. Only the section 110 and part D requirements that are linked with a particular area's designation and classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176 (October 10, 1996)) and (62 FR 24826 (May 7, 1997)); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458 (May 7, 1996)); and Tampa, Florida, final rulemaking (60 FR 62748 (December 7, 1995)). See also the discussion on this issue in the Cincinnati, Ohio 1-hour ozone redesignation (65 FR 37890 (June 19, 2000)), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399 (October 19, 2001)).

We have reviewed Louisiana's SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of the Louisiana SIP addressing section 110 elements under the 1-hour ozone standard (40 CFR 52.970–.999). In addition, EPA has proposed approval of a section 110(a)(2) Infrastructure SIP for PM2.5 and the 1997 8-hour ozone standard. (April 18, 2011, 76 FR 21682) Final action on the April 18, 2011 proposal is not required for purposes of redesignation.

b. Part D SIP Requirements

EPA has reviewed the Louisiana SIP for the BRNA area with respect to SIP requirements applicable for purposes of

redesignation under part D of the Act for both the 1-hour ozone NAAQS and the 1997 8-hour ozone NAAQS. EPA believes that the Louisiana SIP for the BRNA area contains approved SIP measures that meet the part D requirements applicable for purposes of redesignation. EPA has approved or proposed to approve all of the required Part D elements. We are proposing to find the NO_x and VOC RACT requirements have been met as part of this redesignation action. The VOC RACT finding is contingent on our finalizing our proposed approval of the rules implementing RACT controls on the source categories covered by the CTG Rules Update. As discussed previously, we have finalized a separate action approving the termination of the 185 fee requirement. Upon final approval of the CTG Rules Update, the BRNA area will meet all of the requirements applicable to the area under part D for purposes of redesignation. The 1-hour and 1997 8-hour ozone applicable requirements are discussed in detail below.

(i) Has the BRNA met the part D nonattainment area requirements under the 1-hour ozone standard?

The Baton Rouge 1-hour ozone nonattainment area was reclassified as severe for that standard, effective June 23, 2003. Thus, the 1-hour ozone standard requirements applicable to the area are those that apply to nonattainment areas classified as severe. Upon reclassification to severe, under section 211(k) of the Act, the use of reformulated gasoline also was to be required in the BRNA one year after the effective date of the reclassification. However, the state never implemented RFG in the BR area. As noted earlier, enforcement of the RFG requirement in the BRNA is currently stayed by court order. As such, the state has not relied on the RFG program in the past for emissions reduction and does not rely on RFG in its maintenance plan for attainment purposes. Since it is a program implemented by EPA and not by the State, we do not consider RFG a necessary requirement for redesignation. A detailed analysis of the relevant requirements and their status is provided below.

The anti-backsliding provisions at 40 CFR 51.905(a)(1) prescribe 1-hour ozone NAAQS requirements that continue to apply after revocation of the 1-hour ozone NAAQS for former 1-hour ozone nonattainment areas. Section 51.905(a)(1) provides that:

The area remains subject to the obligations to adopt and implement the applicable requirements defined in section 51.900(f),

except as provided in paragraph (a)(1)(iii) of this section and except as provided in paragraph (b) of this section.

Section 51.900(f), as amended by 70 FR 30592, 30604 (May 26, 2005), states:

Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the area's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS:

(1) Reasonably available control technology (RACT).

(2) Inspection and maintenance programs (I/M).

(3) Major source applicability cut-offs for purposes of RACT.

(4) Rate of Progress (ROP) reductions.

(5) Stage II vapor recovery.

(6) Clean-fuel vehicle program under section 182(c)(4) of the CAA.

(7) Clean fuels for boilers under section 182(e)(3) of the CAA.

(8) Transportation Control Measures (TCMs) during heavy traffic hours as provided under section 182(e)(4) of the CAA.

(9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.

(10) TCMs under section 182(c)(5) of the CAA.

(11) Vehicle Miles Travelled (VMT) provisions of section 182(d)(1) of the CAA.

(12) NO_x requirements under section 182(f) of the CAA.

(13) Attainment demonstration or alternative as provided under section 51.905(a)(1)(ii).

As explained earlier in this action, in addition to applicable requirements listed under section 51.900(f), the State must also comply with the additional 1-hour anti-backsliding requirements discussed in the Court's decisions in *South Coast Air Quality Management Dist. v. EPA*: (1) NSR requirements based on the area's 1-hour ozone nonattainment classification; (2) section 185 source penalty fees; (3) contingency measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA for areas not making reasonable further progress toward attainment of the one-hour ozone NAAQS, or for failure to attain the NAAQS; and, (4) transportation conformity requirements for certain types of Federal actions.

The following discusses how the applicable CAA requirements have been met in the BRNA.

40 CFR 51.905 (1), (3), and (12). RACT, Major source applicability cut-offs for purposes of RACT, and NO_x requirements under section 182(f) of the CAA. Sections 172(c)(1) and 182 of the CAA require areas that are classified as moderate or above for ozone nonattainment to adopt Reasonably Available Control Technology (RACT) requirements for sources that are subject to Control Techniques Guidelines

(CTGs) issued by EPA and for "major sources" of volatile organic compounds (VOCs) and nitrogen oxides (NO_x), which are ozone precursors. See 42 U.S.C. sections 7502(c)(1) and 7511a(b) and (f). RACT is defined as the lowest emissions limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53762; September 17, 1979). A CTG provides information on the available controls for a source category and provides a "presumptive norm" RACT. In this action, EPA is addressing RACT for both NO_x and VOCs in the BR area for the 1997 8-hour ozone standard, and for the 1-hour standard.

The Phase 1 Rule provides that 1-hour ozone nonattainment areas designated as nonattainment for the 8-hour ozone NAAQS are required to adopt and implement "applicable requirements" according to the area's classification under the 1-hour ozone standard at the time of designation under the 8-hour standard (see 40 CFR 51.905(a)(i)). The BR area was classified as a severe nonattainment area for the 1-hour ozone NAAQS at the time of the 8-hour designation and an outstanding "applicable requirement" for the BR area is VOC and NO_x RACT. Louisiana previously adopted rules to address RACT requirements for all source categories covered by EPA CTGs that had been issued up to that time, and to address major sources at the serious area major source threshold of 50 tons per year (tpy). The reclassification of the area from serious to severe for the 1-hour ozone standard, on April 24, 2003 (68 FR 20077), required Louisiana to ensure that RACT was in place on non-CTG sources down to 25 tpy. Louisiana has submitted SIP revisions to address the NO_x and VOC RACT requirement for non-CTG sources down to 25 tpy for BR for purposes of the 1-hour ozone requirement and to address NO_x and VOC RACT for the 8-hour ozone NAAQS. On June 15, 2005, Louisiana submitted rule revisions lowering the major source NO_x and VOC applicability from 50 to 25 tpy for purposes of non-CTG RACT. We approved these rule revisions as part of a larger package on July, 5, 2011 (76 FR 38977).

For the 1997 8-hour ozone RACT requirements, according to EPA's Phase 2 Rule (70 FR 71612, November 29, 2005), areas classified as moderate nonattainment or higher must submit a demonstration, as a revision to the SIP, that their current rules fulfill 1997 8-hour ozone RACT requirements for all

CTG categories and all major non-CTG sources. The State may either demonstrate the existing SIP approved RACT rules continue to be RACT or submit revised RACT rules (See EPA's Phase 2 Rule: 70 FR 71612, as further explained in a memo from William T. Harnett dated May 19, 2006, which is included in the docket). Since BR is classified as moderate for the 1997 8-hour ozone standard, for purposes of meeting the 8-hour RACT requirement, the BR area must demonstrate RACT level controls for sources covered by a CTG document, and for each major non-CTG source.

Louisiana has submitted several SIP revisions to address the 1997 8-hour ozone standard RACT requirements for NO_x and VOCs for BR. These revisions are being addressed by EPA through two actions.

First, on June 20, 2009 and August 20, 2010, Louisiana submitted SIP revisions to control VOC emissions in response to CTGs issued in 2006, 2007, and 2008. On March 17, 2011, we proposed to approve these SIP revisions, which we refer to as the CTG Rules Update (76 FR 14602). As part of the CTG Updates proposed rule, we also proposed approval, through parallel processing, of a revision proposed by Louisiana on January 20, 2011. If EPA issues a final approval of the rules addressed in the CTG Rules Update by the time this redesignation goes final, then Louisiana will have met for BR the requirement to adopt RACT rules for sources addressed in any newly issued CTGs.

Second, we are proposing in this action to approve the RACT demonstration submitted by LDEQ on August 20, 2010, and a supplement on May 16, 2011, which provides an analysis demonstrating how the BR area meets RACT requirements for all other CTG and non-CTG sources through the currently SIP-approved RACT rules. EPA reviewed and evaluated LDEQ's RACT determination for both NO_x and VOCs. This review and evaluation is provided in the RACT TSD which accompanies this action.

The State submittal included among other things, the following components:

(a) A RACT demonstration including adopted State rules, which have been federally approved, addressing RACT requirements for CTG and ACT source categories. See the RACT TSD for more information.

(b) An analysis of RACT for all major sources not covered by a CTG or ACT and how these are controlled to meet RACT. This information was provided in the August 2010 submittal, and also in an Addendum to Appendix F dated May 16, 2011.

To ensure RACT was in place for major sources, the State identified all sources that emit or have the potential to emit at least 25 tons/year of VOC in the BR 1997 8-hour ozone nonattainment area. The State provided a list of each major source in a source category covered by a CTG/ACT and the rules applicable to those major sources.

The State's RACT SIP analysis was available for public comment prior to adoption by the State. For the RACT portion of its August 2010 submittal, the State received a comment letter from EPA which was addressed in the adopted rulemaking with an amendment for the RACT analysis. EPA evaluated the following elements of LDEQ's RACT SIP submittal for the BR Area:

- State Rules Addressing NO_x RACT Requirements and VOC RACT Requirements for sources Covered by a CTG/ACT.
- Potential Major VOC Emissions Sources possibly not covered by a CTG/ACT.

EPA reviewed LDEQ's RACT analysis including the State's Rules and evaluation of major sources. Also, EPA reviewed LDEQ's emissions inventory database for potential sources missing from the LDEQ analysis. Based on this review, LDEQ's RACT analysis, including its identification of all sources requiring RACT, appeared to be thorough. Additional discussion of our review and evaluations is available in the TSD.

In today's proposal, we are proposing that if we take final action to approve the CTG Rules Update, and determine in this final rule that the existing SIP-approved rules remain RACT, then Louisiana's SIP would meet the NO_x and VOC RACT requirements for 8-hour ozone standard for all CTG categories and for major sources of NO_x and VOCs. We are also proposing that based on our July 5, 2011 approval (76 FR 38977) of the lower major-source threshold of 25 tpy, that the state has met its outstanding 1-hour RACT obligation for the BR area. Additional detail is provided in the TSD.

40 CFR 51.905 (2). Inspection and maintenance programs (I/M). The BRNA is required to implement a vehicle inspection and maintenance program in the five-parish area. EPA approved this program on September 26, 2002 (67 FR 60594) and a revision to the program on November 13, 2006 (71 FR 66113).

40 CFR 51.905 (4). Rate of progress reductions. We approved the post-1996 ROP Plan and its associated MVEB and a revised 1990 base year emissions inventory on August 2, 1999 (64 FR 35930) for the BRNA serious 1-hour

ozone nonattainment area. This plan covered the 3-year period between 1996 and 1999, achieving 9 percent reductions no later than November 15, 1999. As discussed previously, ROP is not a required element for redesignation request. With the Clean Data determinations for the 8-hour and 1-hour ozone standards, EPA suspended the obligations to submit SIP provisions to meet the 1-hour and 8-hour Rate of Progress requirements. If EPA finalizes approval of this redesignation, these obligations will be terminated.

40 CFR 51.905 (5) Stage II vapor recovery. EPA approved Louisiana Stage II Vapor Recovery rules for the BRNA on March 25, 1994 (59 FR 14112).

40 CFR 51.905 (6) Clean-Fuel Vehicle program under section 182(c)(4) of the CAA. The State met this requirement with a substitute program, which we approved on July 19, 1999 (64 FR 38577). This program imposes controls beyond the Act's requirements (*i.e.*, RACT) for storage tanks in the BRNA by requiring guide pole and stilling well controls on external floating roof tanks. The resultant long term emission reductions were greater than the Louisiana Clean Fuel Fleet program emission reductions in the ozone nonattainment area. We had previously approved a Clean Fuel Fleet program on December 22, 1995 (60 FR 54305).

40 CFR 51.905 (7) Clean fuels for boilers under section 182(e)(3) of the CAA. This is an extreme area requirement and therefore does not apply to the BRNA severe area.

40 CFR 51.905 (8) Transportation Control Measures (TCMs) during heavy traffic hours as provided under section 182(e)(4) of the CAA. This is an extreme area requirement and therefore does not apply to the BRNA severe area.

40 CFR 51.905 (9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA. EPA approved a Louisiana SIP revision for enhanced ambient monitoring on June 19, 1996 (61 FR 31037) as meeting section 182(c)(1) of the CAA. The monitoring network meets the requirements in 40 CFR part 58 and section 182(c)(1) for enhanced monitoring.

40 CFR 51.905 (10) TCMs under section 182(c)(5) of the CAA. As required by the Clean Air Act section 176(c) (42 U.S.C. 7506(c)), the Louisiana Department of Environmental Quality demonstrated conformity of area transportation plans to the motor vehicle emissions budgets established in the BRNA Attainment Demonstration approved by EPA on October 2, 2002 (67 FR 61786).

40 CFR 51.905 (11) Vehicle miles traveled (VMT) provisions of section

182(d)(1) of the CAA. EPA approved the VMT Offset Analysis on November 21, 2006 (71 FR 67308).

40 CFR 51.905 (13) Attainment demonstration or alternative as provided under section 51.905(a)(1)(ii). Louisiana elected the option to submit an 8-hour ozone attainment demonstration SIP to demonstrate attainment of the 1997 8-hour ozone standard by the area's 8-hour ozone attainment date with associated MVEBs and an RACM analysis. The SIP was submitted to EPA on August 31, 2010. EPA has not acted on it. As discussed previously, EPA's long-held position is that an attainment demonstration with the RACM analysis is not an applicable requirement for purposes of evaluating an ozone redesignation request where the area is attaining the standard. (General Preamble, 57 FR 13564). See also 40 CFR 51.918. Upon redesignation, the obligation is terminated. Moreover EPA has determined that the area has attained the 1-hour and 1997 8-hour ozone standards, and thus the area's obligation to submit either attainment demonstration has been suspended. See Our Clean Data Determinations at 75 FR 6570 and 75 FR 54778. Upon our final approval of the redesignation request the requirement to have an approved 1-hour and 8-hour attainment demonstration will be terminated.

(ii) South Coast Anti-Backsliding Measures

NSR. EPA has also determined that areas being redesignated need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the standard without a part D NSR program in effect, since PSD requirements will apply after redesignation. The rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation dated October 14, 1994, titled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." The State's PSD program becomes effective in the area immediately upon redesignation to attainment.⁵ Louisiana has demonstrated that BRNA will be able to maintain the standard without a part D NSR program in effect, and therefore, Louisiana need not have a fully approved part D NSR program prior to approval of the redesignation request. Consequently, EPA concludes

⁵ If the State believes that a rule change is required, it must adopt and submit it to EPA for approval as a SIP revision. Upon EPA's approval of the SIP revision submittal, PSD applies in the area.

that an approved NSR program is not an applicable requirement for purposes of redesignation, where it is not required for maintenance, as is the case here. See the more detailed explanations of this issue in the following rulemakings: Detroit, Michigan (60 FR 12467–12468 (March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 Fr 53665, 53669, October 23, 2001); Grand Rapids, Michigan (61 FR 31831, 31836–31837, June 21, 1996).⁶

Section 185 fees. On July 7, 2011 (76 FR 39755), EPA finalized approval of a determination to terminate the CAA section 1-hour ozone 185 penalty fees program requirement for the BRNA. EPA's rulemaking cited a January 5, 2010 guidance document regarding section 185, but the rulemaking proposal also set forth separately in detail EPA's proposed rationale for terminating 1-hour ozone anti-backsliding 185 requirements when EPA determines that an area has attained the 1-hour standard and when that attainment is due to permanent and enforceable requirements. 76 FR 17368 (March 29, 2011). EPA proposed and explained both its interpretation of the termination requirements, derived from statutory criteria for redesignation, and the application of this interpretation to the specific circumstances of the Baton Rouge area. EPA explained that the Baton Rouge area met the core redesignation requirements that would have been applicable were EPA still redesignating areas for the 1-hour standard—a process EPA discontinued six years ago because it was unnecessary and not consistent with revocation of the 1-hour standard.

EPA published notice of its proposed termination and EPA's underlying rationale in the **Federal Register**, and established a 30-day period for public comments to be submitted. No adverse comments were received; however,

⁶ The interpretation that NNSR does not apply to areas designated attainment for a NAAQS and thus is not needed in the SIP for such an area is consistent with *Greenbaum v. EPA*, 370 F.3d 527, at 536 ("It would make little sense for [NSR] to be included in the post-attainment SIP, as the Clean Air Act * * * explicitly states that attainment area SIPs must include a PSD program."). As the DC Circuit held in *Alabama Power*, 636 F.3d 323, at 365 (D.C. Cir. 1979), the applicability of PSD is geographically limited by the language of CAA section 165(a), which states that unless specified conditions are met, "[n]o major emitting facility * * * may be constructed in any area to which this part [Part C] applies" (emphasis added). Thus, with respect to ozone, EPA's interpretation is that areas designated attainment for the 1997 8-hour standard are subject to section 165(a), not the 172(c)(5) SIP requirement.

commenters submitted 13 sets of comments in support of EPA's proposal.

On June 23, 2011, EPA signed a final rulemaking that terminated the 1-hour anti-backsliding section 185 requirements for the Baton Rouge area. Subsequently, on July 1, 2011, the DC Circuit issued a ruling in *Natural Resources Defense Council v. EPA*, No. 10–1056 (D.C. Cir.), vacating the guidance document. The Court's opinion, however, did not address the rationale or circumstances pertaining to the termination of the 1-hour anti-backsliding 185 requirements for any area including the Baton Rouge area. In the case of Baton Rouge, EPA, after providing for notice and comment on its proposed rationale and how it applies to the facts of Baton Rouge, determined that the area has attained the 1-hour ozone standard, and that this attainment is due to permanent and enforceable emissions reductions. In its proposed rulemaking, EPA explained how and why these findings justify termination of the section 185 requirements for Baton Rouge. See 76 FR 17368. EPA believes that the procedure and substance of the Baton Rouge rulemaking are outside the scope of the agency action of which the Court disapproved in its July 1 ruling, and that therefore the Baton Rouge termination determination survives and withstands the Court's ruling regarding EPA's guidance.

In its Baton Rouge proposal, EPA proposed its interpretation of the statutory requirements. EPA stated its belief that a state could meet its 185 1-hour anti-backsliding obligations through a SIP revision containing either the fee program prescribed in section 185, or an equivalent alternative program. It stated: "EPA believes that an alternative program may be acceptable if it is consistent with the principles of section 172(e) of the CAA, which allows EPA through rulemaking to accept alternative programs that are "not less stringent" where EPA has revised the NAAQS to make it less stringent. EPA explained that in its Phase 1 ozone implementation rule for the 1997 ozone NAAQS (69 FR 23951 April 30, 2004), EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply the same principle for the transition from the 1-hour NAAQS to the 1997 8-hour NAAQS. 76 FR 17369–70. As part of applying the principle in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA went on to state that it would

"consider alternative programs to satisfy the section 185 fee program SIP revision requirement. States choosing to adopt an alternative program to the section 185 fee program must demonstrate that the alternative program is no less stringent than the otherwise applicable section 185 fee program and EPA must approve such demonstration after notice and comment rulemaking."

In the Baton Rouge proposed rulemaking, EPA proposed that if it determined that the area is attaining the 1-hour ozone NAAQS, based on permanent and enforceable emissions reductions, the area's existing SIP could be considered an adequate alternative program. EPA explained that under these circumstances, the Baton Rouge area's existing SIP measures, in conjunction with other enforceable Federal measures, would be adequate to achieve attainment, which is the purpose of the section 185 program. EPA stated that "the section 185 fee program is an element of an area's attainment demonstration, and its object is to bring about attainment after a failure of an area to attain by its attainment date. Thus, areas that have attained the 1-hour ozone standard, the standard for which the fee program was originally required, as a result of permanent and enforceable emission reductions, would have a SIP that is not less stringent than the SIP required under section 185." 76 FR 17370.

EPA further explained its position:

"We believe that it is reasonable for the fee program obligation that applies for purposes of anti-backsliding to cease upon a determination, based on notice-and-comment rulemaking, that an area has attained the 1-hour ozone standard due to permanent and enforceable measures. This determination centers on the core criteria for redesignations

under CAA section 107(d)(3). We believe these criteria provide reasonable assurance that the purpose of the 1-hour anti-backsliding fee program obligation has been fulfilled in the context of a regulatory regime where the area remains subject to other applicable 1-hour anti-backsliding and 8-hour measures." 76 FR 17370.

In the proposed rulemaking, EPA referred to the January 5, 2010 guidance as "expressing [EPA's] views" as to "potential rationales" (76 FR 17371, emphasis added) for terminating 1-hour ozone section 185 requirements. With respect to the 1-hour section 185 anti-backsliding requirements for Baton Rouge, however, EPA stated that its proposed rulemaking notice for that area "formally sets forth EPA's legal interpretation concerning the basis for terminating those obligations", thereby making the specific rationale for Baton Rouge subject to notice and comment rulemaking. EPA then discussed at length the facts supporting its proposed finding that the Baton Rouge area had continuously attained the 1-hour ozone standard during the 2006–2008 time period, and that the state had shown that this attainment is due to permanent and enforceable emissions limitations, thereby supporting the conclusion that the State SIP had supplied an adequate alternative program under the specific circumstances presented. 76 FR 17371–72.

The Court's opinion does not preclude EPA from terminating the 1-hour section 185 anti-backsliding requirement for areas like Baton Rouge, that EPA has determined through notice and comment rulemaking, have attained the 1-hour ozone standard due to permanent and enforceable emissions reductions.

We therefore believe that, for the purpose here of evaluating applicable requirements pertaining to redesignation, Louisiana's obligation to satisfy the 1-hour ozone anti-backsliding requirement for section 185 fees has been terminated.

Contingency Measures. Sections 172(c)(9) and 182(c)(9) of the CAA require ozone plans for nonattainment areas to contain measures to be implemented in the event that any RFP or attainment deadline is missed. As explained in a March 26, 2009 (74 FR 13166) proposal, it is EPA's position that contingency measures are not an applicable requirement for purposes of evaluating an ozone redesignation request when an area is attaining the relevant standard. EPA's long-held position is that those requirements expressly linked by statutory language with the attainment and reasonable further progress do not apply when an area requesting redesignation is attaining the standard. Pursuant to EPA's determination that the BRNA attained the 1-hour ozone standard (February 10, 2010, 75 FR 13166), the requirement to submit the 1-hour contingency measures was suspended. This obligation will be terminated upon a final approval of the redesignation request.

For more detail regarding the applicable 1-hour ozone requirements and EPA's approval actions, see the Technical Support Document (TSD), which is included in the electronic docket. Listed below are the severe ozone 1-hour area requirements that have already been met by the BR area for the purposes of this redesignation.

Requirement Clean Air Act as amended in 1990 section	EPA Approval/other justification
182(a)(2)(A) RACT corrections	August 26, 1996 (61 FR 38590).
182(a)(2)(B) I/M Program	Required under section 182(c)(3). August 20, 1999 (64 FR 45454).
182(a)(2)(C) Permit programs and 182(a)(4) General Off-set requirement.	EPA has determined that areas being redesignated need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the standard without a part D NSR program in effect, since PSD requirements will apply after redesignation.
182(a)(3)(B) Emissions Statements	February 6, 1995 (60 FR 02014).
182(b)(1) Plan Provisions for Reasonable Further Progress.	This is covered by the requirement in 182(c)(2).
182(b)(2) Reasonably Available Control Technology	May 5, 1994 (59 FR 23164). August 26, 1996 (61 FR 38590). December 31, 1996 (61 FR 55894). February 2, 1998 (62 FR 63658). November 8, 1998 (63 FR 47429).
182(b)(3) Gasoline Vapor Recovery	March 25, 1994 (59 FR 14112).
182(b)(4) Motor Vehicle Inspection and Maintenance	Required under section 182(c)(3). August 20, 1999 (64 FR 45454).
182(c)(1) Enhanced Monitoring	June 19, 1996 (61 FR 31035).
182(c)(2) Attainment and Reasonable Further Progress Demonstrations.	December 23, 1996 (61 FR 54737). August 2, 1999 (64 FR 35930).

Requirement Clean Air Act as amended in 1990 section	EPA Approval/other justification
182(c)(3) Enhanced Vehicle Inspection and Maintenance Program.	August 20, 1999 (64 FR 45454).
182(c)(4) Clean-Fuel Vehicle Programs	Clean Fuel Fleet Substitute Program, July 19, 1999.
182(c)(5) Transportation Control	October 2, 2002 (67 FR 61786).
182(c)(6) De Minimis Rule	This requirement is related to the NSR program that is not an applicable requirement for redesignation.
182(c)(7) Special Rule for Modifications of Sources Emitting Less Than 100 Tons.	This requirement is related to the NSR program that is not an applicable requirement for redesignation.
182(c)(8) Special Rule for Modifications of Sources Emitting 100 Tons or More.	This requirement is related to the NSR program that is not an applicable requirement for redesignation.
182(c)(9) Contingency Provisions	September 26, 2002 (67 FR 60590). This requirement was suspended pursuant to the 1-hour determination of attainment. February 10, 2010 (75 FR 6570).
182(c)(10) General Offset Requirement	September 30, 2002 (67 FR 61260).
182(d)(1) Vehicle Miles Traveled	November 21, 2006 (71 FR 67308).
182(d)(2) Offset Requirement	This requirement is related to the NSR program that is not an applicable requirement for redesignation.
182(d)(3) Enforcement Under Section 185	July 7, 2011 (76 FR 39775).

(iii) Part D SIP Requirements Under 1997 8-Hour Standard: Part D, Subpart 2 Applicable SIP Requirements

The only moderate area requirements applicable for purposes of redesignation for the 1997 8-hour ozone standard under part D, section 182(b) that became due prior to the submission of the complete redesignation request are the control techniques guidelines (CTGs) to meet requirements for RACT under section 182(b)(2). The State submitted several SIP revisions addressing the CTG rules requirements, and provided a SIP revision addressing NO_x and VOC RACT requirements in BR on August 31, 2010. The CTG Rules Update was proposed for approval in a separate rulemaking published in the **Federal Register** on March 17, 2011 (76 FR 14602). If EPA finalizes its proposed approval of the CTG Rules Update together with the NO_x and VOC RACT requirements which are addressed in today's action, the area will have met all the requirements applicable under its prior severe 1-hour classification and current moderate 1997 8-hour classification for purposes of redesignation of the 1997 8-hour ozone standard. Additional information about the CTG Rules Update and RACT Update requirements is provided in the discussion above, as well as in the TSD.

(iv) Section 176 Conformity Requirements

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under title 23 of the United States Code

(U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other Federally supported or funded projects (general conformity). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability that the CAA required the EPA to promulgate.

EPA believes it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) because state conformity rules are still required after redesignation and Federal conformity rules apply where state rules have not been approved. See *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001) (upholding this interpretation). See also 60 FR 62748 (December 7, 1995, Tampa, Florida).

(v) NSR Requirements

As with the nonattainment NSR requirements for the 1-hour ozone standard, EPA has determined that areas being redesignated need not have an approved 1997 8-hour nonattainment NSR program prior to redesignation, provided that the area demonstrates maintenance of the standard without a part D NSR program in effect, since PSD requirements will apply after redesignation. The rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled "Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment." Louisiana demonstrated in the accompanying maintenance plan that BR will be able to maintain the standard without a part D NSR program in effect, and therefore, Louisiana need not have

a fully approved part D NSR program prior to approval of the redesignation request. Louisiana's PSD program will become effective in BRNA upon redesignation to attainment (unless a rule change is necessary; see footnote 4). See rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–70, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

(vi) Section 182(a)(1) Inventory Requirements

The moderate area requirements at section 182(a) and 40 CFR 51.915 require that the BR 1997 8-hour ozone area meet the emissions inventory requirements of section 182(a)(1). An emissions inventory is an estimation of actual emissions of air pollutants in an area. The emissions inventory consists of VOC and NO_x emissions, as they are ozone precursors. EPA approved a base year inventory for 2002 on September 3, 2009 (74 FR 45561) under 182(b) for moderate areas. A more detailed discussion of the emission inventory for the BRNA can be found in the analysis of the maintenance plan for this redesignation below.

2. The BRNA Has a Fully Approved SIP Under Section 110(k) of the CAA

EPA proposes to find that the area has an approved SIP for all the 1997 8-hour ozone requirements applicable for purposes of redesignation. This proposal is contingent on our final approval of the NO_x and VOC RACT analyses and provisions that are addressed in today's action and in the CTG Rules Update. EPA is proposing to find that, upon EPA's final approval of

the BR emissions inventory, the VOC and NO_x RACT analysis, and the CTG Rules Update, the BR area will meet all requirements applicable to the area for purposes of redesignation for the 1997 8-hour ozone standard under section 110 and part D and have a fully approved applicable implementation plan for the area under section 110(k). As noted earlier, implementation of RFG is not required for purposes of redesignation.

EPA may rely on prior SIP approvals in approving a redesignation request; see Calcagni Memorandum at p. 3; *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984, 989–90 (6th Cir. 1998); *Wall*, 265 F.3d 426, plus any additional measures it may approve in conjunction with a redesignation action. See 68 FR 25426 (May 12, 2003) and citations therein. Following passage of the CAA of 1970, Louisiana adopted and submitted, and EPA fully approved at various times, provisions addressing the various 1-hour ozone standard SIP elements applicable in the BR area as discussed above.

As indicated, EPA believes that the section 110 elements not connected with nonattainment plan submissions and not linked to the area’s nonattainment status are not applicable requirements for purposes of

redesignation. As set forth above, with the exceptions noted, the area has met all other applicable requirements for purposes of redesignation for the 1997 8-hour ozone standard.

C. Are the air quality improvements in the BR nonattainment area due to permanent and enforceable emission reductions resulting from the implementation of State and Federal regulations and other permanent and enforceable emission reductions?

EPA proposes to find that Louisiana has demonstrated that the observed ozone air quality improvement in the BR area is due to permanent and enforceable reductions in emissions resulting from implementation of emissions controls contained in the SIP, Federal control measures, and other State-adopted control measures.

1. Emissions Reductions as Shown by Emissions Inventory Data

EPA believes that the improvement in air quality in the Baton Rouge area during the 2002–2008 timeframe, which resulted in attainment of both the 1-hour and 1997 8-hour ozone standards, is due to emissions reductions from permanent and enforceable measures. Table 3 shows the changes in emissions for NO_x and VOC’s from 2002 to 2008.

TABLE 3—SUMMARY OF TOTAL EMISSION REDUCTIONS

	NO _x TPD	VOC TPD
Base Year (2002) Inventory	200.3	211.0
2008 Emissions	143.8	101.3

Emissions of both VOC and NO_x have been reduced during the time period leading up to December 31, 2008, the date when Baton Rouge reached attainment for the 1-hour standard.

The State also analyzed the changes in VOC and NO_x emissions in the BR area between the original base year of 2002 and the year 2006 during which the area attained the standard. The 2006 inventory was generated from the approved 2002 base year inventory (September 3, 2009, 74 FR 45561). The 2002 and 2006 emissions for the BRNA area were determined using EPA accepted methods and guidance.⁷ The State documented the VOC and NO_x emission control measures that have been implemented in the BR area for at least the past 3 years. Comparing the 2002 and 2006 NO_x and VOC emissions to the projected future year emissions, a downward trend is observed. Broken out by source category, the reduction in emissions is shown in Table 4.

TABLE 4—A COMPARISON OF VOC AND NO_x EMISSIONS IN THE BRNA AREA BY SOURCE CATEGORY FROM THE YEAR 2002 AND THE YEAR 2006

[Tons per average ozone season day]

Source category	VOC Emissions (tpd)			NO _x Emissions (tpd)		
	2002	2006	Percent change	2002	2006	Percent change
Point	40.17	33.10	– 17.6	117.91	73.40	– 37.75
Area	29.71	31.59	+5.95	3.90	4.06	+4.10
Non-Road Mobile	22.97	13.60	– 22.38	43.59	36.75	– 15.69
On-Road Mobile	14.99	17.60	+16.75	34.01	29.30	– 13.85
Total	107.84	95.89	– 11.08	199.41	143.50	– 28.04

2. Impact of Emissions Controls Implementation: Trend Analysis

The State provided design value data from 1997 through 2008 to illustrate the downward trend in ozone since 2005. (See Chart 1 on page 9 of the state’s submittal.) In addition, it provided a table of design values by monitor for the 2006–2008 monitoring period that also shows the general downward trend in emissions during that time period. (Table 1, *Ibid.*)

3. Permanent and Enforceable Emissions Controls Implemented

The Baton Rouge nonattainment area control strategy is primarily NO_x-driven, therefore no major VOC rules have been adopted other than those required to meet updated CTGs as required by the Act. LDEQ attributes the reductions in emissions primarily to the stationary source NO_x control measures implemented no later than May 1, 2005, which were required by the State’s

rules. The following is a discussion of the permanent and enforceable emission controls that have been implemented in the BR area. In Louisiana’s 8-hour ozone redesignation request, the State documented all of the emission control rules or programs that have impacted VOC or NO_x emissions during the period 1990–2008.

⁷ EPA. 2007. Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone PM_{2.5}, and Regional

Haze. Prepared by the U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Analysis Division, Air

Quality Modeling Group, Research Triangle Park, NC (EPA-454/B-07-002, April 2007).

a. Reasonably Available Control Techniques

Louisiana notes that a number of VOC and NO_x RACT rules which were developed in prior years have continued to provide additional VOC and NO_x emission reductions during more recent years. For VOC controls, with the exception of the source categories covered by the most recently published CTGs (see a discussion of the new CTG RACT rules below), Louisiana has adopted and implemented VOC RACT rules for source categories covered by older (prior to 2006) CTGs and for major non-CTG sources in the five-parish BRNA. All VOC RACT rules are contained in Chapter 21 of Louisiana Administrative Code (LAC 33:III Chapter 21), and all NO_x RACT rules are contained in Chapter 22 of the LAC (LAC 33:III Chapter 22). All of these VOC and NO_x RACT rules have been

approved by the EPA as revisions of the Louisiana SIP.

b. ROP Plans and Attainment Demonstration Plan

EPA approved a serious area attainment plan and ROP plans as noted above under the 1-hour ozone standard requirements for serious areas. October 22, 1996 (61 FR 54737) and July 2, 1999 (64 FR 35930). Measures in these plans include Stage II Vapor Recovery, marine vapor recovery, tank vent recovery, emission reductions from vents to flares, tank fitting controls, fugitive emission controls, secondary roof seals on tanks, as well as some federally required controls pursuant to NESHAPs and NSPS. All these measures continue to produce reductions today.

c. NO_x Control Rules

NO_x emission reductions were achieved through the implementation of

NO_x control measures for stationary sources which were adopted by the state effective on February 20, 2002, and approved by EPA on September 27, 2002 (67 FR 60877), and adopted by the state on August 20, 2003 and approved by EPA on July 5, 2011 (76 FR 38977). These rules were implemented between February 20, 2002, and May 1, 2005.

The rules established emission factors (standards) for NO_x sources within the BRNA. These revisions achieved approximately 40 TPD of additional NO_x reductions in the BRNA beginning with the compliance date of May 1 2005 and continuing to date. These rules are still part of the state's rules and are enforceable at the state and Federal level. The specific standards are listed below.

NO _x Reduction measures 2002–2008	NO _x Standard
Electric Power Generating System Boilers:	
Coal-fired > 40 to < 80 MMBtu/hr	0.50 lb/MMBtu.
Coal-fired > 80 MMBtu/hr	0.21 lb/MMBtu.
No. 6 fuel oil-fired > 40 to < 80 MMBtu/hr	0.30 lb/MMBtu.
No. 6 fuel oil-fired > 80 MMBtu/hr	0.18 lb/MMBtu.
All others (gaseous or liquid) > 40 to < 80 MMBtu/hr	0.20 lb/MMBtu.
All others (gaseous or liquid) > 80 MMBtu/hr	0.10 lb/MMBtu.
Industrial Boilers > 40 to < 80 MMBtu/hr	0.20 lb/MMBtu.
Industrial Boilers > 80 MMBtu/hr	0.10 lb/MMBtu.
Process Heater/Furnaces:	
Ammonia reformers > 40 to < 80 MMBtu/hr	0.30 lb/MMBtu.
Ammonia reformers > 80 MMBtu/hr	0.23 lb/MMBtu.
All others > 40 to < 80 MMBtu/hr	0.18 lb/MMBtu.
All others > 80 MMBtu/hr	0.08 lb/MMBtu.
Stationary Gas Turbines:	
Peaking Service, Fuel Oil-fired > 5 to < 10 MW	0.37 lb/MMBtu.
Peaking Service, Fuel Oil-fired > 10 MW	0.30 lb/MMBtu.
Peaking Service, Gas-fired > 5 to < 10 MW	0.27 lb/MMBtu.
Peaking Service, Gas-fired > 10 MW	0.20 lb/MMBtu.
All Others > 5 to < 10 MW	0.24 lb/MMBtu.
All Others > 10 MW	0.16 lb/MMBtu.
Stationary Internal Combustion Engines:	
Lean-burn engines > 150 to < 320 Hp	10 g/Hp-hr.
Lean-burn engines > 320 Hp	4 g/Hp-hr.
Rich-burn engines > 150 to < 300 Hp	2 g/Hp-hr.
Rich-burn engines > 300 Hp	2g/Hp-hr.

The bulk of the NO_x emissions between 2002 and 2006 came from the source categories listed in the table above. In 2006, stationary (point) sources made up over 51 percent of the entire NO_x inventory for the BRNA, which is a decrease from over 59 percent in 2002. In addition, Louisiana adopted and implemented emission control rules requiring existing sources of VOC to meet, at minimum, RACT. These requirements apply to sources in categories covered by CTGs and other major non-CTG sources. These rules were adopted and implemented prior to

2002. (62 FR 63658, February 2, 1998; 63 FR 47429, November 8, 1998).

d. Federal Emission Control Measures

LDEQ notes that on-road Federal emission control measures have had positive impacts on VOC and NO_x emissions in the BR area for reaching attainment. Table 5 shows the Federal emissions reductions programs in the BR area for fuels and motor vehicles:

TABLE 5—BR FEDERAL EMISSION REDUCTIONS PROGRAMS

- Federal Measures:
- Tier 2 Fuel and Vehicle Emission Standards
 - Onboard Refueling Vapor Recovery (ORVR) for light-duty vehicles
 - Heavy-Duty Engine and Vehicle and Fuel Standards
 - Federal controls on certain nonroad engines
 - Federal control through Maximum Achievable Control Technology (MACT) of Hazardous Air Pollutants emissions
 - Volatile Organic Compound Emission Standards for Consumer Products

TABLE 5—BR FEDERAL EMISSION REDUCTIONS PROGRAMS—Continued

- Volatile Organic Compound Emission Standards for Architectural Coatings
- Locomotives and Marine Compression-Ignition Engines

Summary

The above discussion shows that state, local and Federal emission controls have contributed to the ozone air quality improvement in the BR area that resulted in attainment of the 1997 8-hour ozone standard. Emissions inventory data demonstrates that NO_x and VOC emissions have dropped substantially between 2002 and 2008 for stationary sources primarily but also for mobile sources. These substantial decreases in ozone precursors can be directly attributed to State and Federal measures. As noted above, Louisiana has committed to retaining in the SIP all existing emission control measures that affect ozone levels in the BR area after the BRNA is redesignated to attainment of the 1997 eight-hour ozone NAAQS. All changes in existing rules subsequently determined to be necessary must be submitted to the EPA for approval as SIP revisions.

EPA thus proposes to find that the improvement in air quality in the BR area is due to permanent and enforceable emissions reductions. Section 107(d)(3)(E)(iii).

D. Does the BRNA have a fully approvable maintenance plan pursuant to section 175A of the CAA?

In conjunction with its request to redesignate the BR 1997 8-hour ozone nonattainment area, the State of Louisiana included a SIP revision to provide for the maintenance of the 1997 8-hour ozone NAAQS in the BR area for at least 10 years after redesignation to attainment. Section 107(d)(3)(E)(iv). As discussed below, EPA has reviewed this maintenance plan and is proposing to approve it as meeting the requirements of section 175A of the CAA.

1. What is required in an ozone maintenance plan?

Section 175A of the CAA sets forth the required elements of air quality maintenance plans for areas seeking redesignation to attainment of a NAAQS. Under section 175A, a maintenance plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the Administrator approves the redesignation to attainment. The State must commit to submit a revised maintenance plan within eight years after the redesignation. This revised

maintenance plan must provide for maintenance of the ozone standard for an additional 10 years beyond the initial 10 year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency measures as EPA deems necessary to assure prompt correction of any future NAAQS violation. The September 4, 1992, Calcagni memorandum provides additional guidance on the content of maintenance plans.

An ozone maintenance plan should, at minimum, address the following: (1) The attainment VOC and NO_x emission inventories; (2) a maintenance demonstration showing maintenance for the 10 years of the maintenance period; (3) a commitment to maintain the existing monitoring network; (4) factors and procedures to be used for verification of continued attainment; and, (5) contingency measures to correct a future violation of the NAAQS.

2. What is the attainment inventory for the BRNA?

Sections 182(a)(1) of the CAA requires that the SIP include a comprehensive, accurate and current inventory of actual emissions from sources of relevant pollutants in the nonattainment area. The emission inventory for an ozone nonattainment area contains both VOC and NO_x emissions, which are precursors to ozone formation. LDEQ prepared a comprehensive emission inventory for the BR area including point, area, on-road, and off-road mobile sources for the year 2006. Table 6 lists the 2006 emissions inventory for the BR area. EPA reviewed the 2006 inventory and determined that it was developed in accordance with EPA guidelines⁸. For a full discussion of our evaluation, please refer to Part II of the TSD, found in the electronic docket.

TABLE 6—BR 2006 EMISSION INVENTORY

Source type	NO _x	VOC
2006 Inventory (Tons/Day)		
Point	73.4	33.1
Nonpoint	4.06	31.59
On-road Mobile	29.3	17.60
Non-road Mobile	36.75	13.59
Total	143.51	95.88

⁸ Emission Inventory Improvement Program (EIIP), EPA-454/R-97-004a-g, <http://www.epa.gov/ttn/chieff/eiip/techreport/>; AP-42, <http://www.epa.gov/ttn/chieff/ap42/index.html>; Air Emissions Reporting Requirements (AERR Rule), http://www.epa.gov/ttn/chieff/aerr/final_published_aerr.pdf

Louisiana developed its 2006 Emissions Inventory from the previously approved 2002 baseline inventory (September 3, 2009, 74 FR 45561). The State relied on this 2006 inventory in preparing the attainment demonstration modeling that is included in Appendix D of the State's submittal.

The 2006 and projected year emissions for the BRNA 5-parish area were determined using the following procedures:

Point Source Emissions. Point source VOC and NO_x emissions for 2006 were calculated using methodologies according to Federal guidelines and using AP-42 or other approved methods. The State collected emissions data, which are estimates of actual emissions, provided by the facilities. A list of those facilities is provided in Appendix C of the LDEQ submittal.

Area Source Emissions. Area source emissions from the 2002 National Emission Inventory (NEI) were used as the starting point for the 2006 Louisiana area emissions. Projection years' emissions were initially grown using the EPA's Economic Growth Analysis System (EGAS) version 5.0 growth factors. The methodologies used to develop area sources inventory are described in Appendix D of the submittal.

On-road Emissions. Mobile source emissions were calculated based on Parish-specific inputs provided by several state agencies. MOBILE6 was then used to generate emission factors. A detailed description of on-road emission estimates is found in Appendix D of the LDEQ submittal.

Non-road Emissions. For all non-road mobile categories except aircraft, locomotives, and commercial marine vessels, the emissions were calculated using the EPA's National Mobil Inventory Model (NMIM) to generate Louisiana state-wide parish level emissions estimates. Airport and locomotive emissions were derived from 2006 LDEQ inventory. Marine emissions were developed from CENRAP inventories. A detailed description of non-road emission estimates is found in Appendix D of the submittal.

3. Has the state of Louisiana committed to maintain the ozone monitoring system in the BRNA?

The State of Louisiana has committed to continue operation of an EPA-approved ozone monitoring network and to work with EPA pursuant to 40 CFR part 58 with regard to the continued adequacy of the network, including whether additional

monitoring is needed, and when a monitor site can be discontinued.

4. Has the state demonstrated maintenance in the BRNA?

As part of its request to redesignate the BR 1997 8-hour ozone standard nonattainment area, the State of Louisiana included a SIP revision to incorporate a maintenance plan as required under section 175A and section 107(d)(3)(E)(iv) of the CAA. The maintenance plan includes a demonstration based on a comparison of emissions in one of the attainment years (2008) and projected emissions to demonstrate maintenance of the 1997 8-hour ozone NAAQS in the BR area for at least 10 years after the anticipated redesignation year. CAA

107(d)(3)(E)(iv). To demonstrate maintenance of the 1997 8-hour ozone standard, LDEQ projected VOC and NO_x emissions to 2022 and to several interim years, 2012, 2016, and 2020. These emissions were compared to the 2008 attainment year and 2006 base year emissions (both years in the 2006–2008 attainment period) to show that emissions of NO_x and VOC, remain below the attainment levels for the entire demonstrated maintenance period.

In projecting data for the maintenance year 2022 inventory, LDEQ used several methods to project data from the base year 2006 to the years 2008, 2012, 2016, 2020, and 2022. These projected inventories were developed using EPA-

approved technologies and methodologies. Point source and non-point source projections were derived from the Emissions Growth Analysis System version 6.0 (EGAS 6.0). Non-road mobile projections were derived from EGAS 6.0, and from NONROAD 2005.

To demonstrate declines in future emissions, LDEQ provided a comparison between the 2006 inventory and the emission growth projections for the years 2008, 2012, 2016, 2020, and 2022. Table 7 summarizes the 2006 and 2008 attainment years, interim years during the maintenance period, horizon year 2022, the end year for the maintenance period, and net changes in VOC and NO_x emissions by source type.

TABLE 7—SUMMARY OF FUTURE VOC AND NO_x EMISSIONS FOR THE BRNA AREA
[Tons per average ozone season day]

Source category	2006		2008		2012		2016		2020		2022		Net change 2022–2006	
	VOC	NO _x	VOC	NO _x	VOC	NO_{x}	VOC	NO_{x}	VOC	NO_{x}	VOC	NO_{x}	VOC	NO_{x}
Point	33.10	73.40	32.22	67.71	32.22	67.71	32.22	67.71	32.22	67.71	32.22	67.71	-0.88	-5.69
Nonpoint	31.59	4.06	32.35	4.16	33.63	4.36	35.59	4.53	37.54	4.74	38.51	4.83	6.92	0.78
Nonroad	13.60	36.75	12.59	37.45	11.22	38.51	10.27	39.59	9.78	41.36	9.99	40.60	-3.61	3.85
Onroad	17.60	29.30	17.82	28.35	10.64	18.63	9.70	12.08	7.82	8.33	7.55	6.96	-10.1	-22.34
Total	95.89	143.51	94.98	137.66	87.70	129.18	87.77	123.84	87.36	122.14	88.27	120.10	-7.67	-23.40

Federal rules implemented after attainment of the 1997 8-hour ozone standard contribute to continued maintenance in the area. These measures include:

Non-Road Diesel Rule. EPA promulgated this rule in 2004. It applies to diesel engines used in industries, such as construction, agriculture, and mining. It is estimated that compliance with this rule will cut NO_x emissions from non-road diesel engines by up to 90 percent beginning with the 2008 Model Year equipment. This rule will be fully implemented in 2014.

Locomotives and Marine Compression-Ignition Engines. This EPA rule was adopted March 14, 2008, and includes new emission standards for locomotives and marine diesel engines that will reduce NO_x emissions by about 80 percent compared with engines meeting the current standards. The new requirements have three parts: Tightening emission standards for existing locomotives and large marine engines when they are remanufactured, effective in 2008; beginning in 2009, phasing in Tier III standards for new locomotives and marine diesel engines; and establishing more stringent Tier IV standards for new locomotives and marine diesel engines; these standards will be phased in beginning in 2014.

EPA evaluated the BRNA maintenance emission inventory component of the redesignation request and determined that LDEQ demonstrated that emissions levels of VOC and NO_x in the 2022 maintenance year will decrease from the 2006 baseline year by 7.67 and 23.40 tons per average ozone season day respectively. Overall VOC and NO_x emissions levels will remain below the 2006–2008 attainment year levels throughout the maintenance period. EPA also determined that LDEQ has adequately calculated and documented emissions by using methods consistent with EPA’s guidance. (See footnote 7).

As shown in the table and discussion above, the State demonstrated that the total future year ozone precursor emissions will be less than the 2008 attainment year’s emissions. The attainment inventory submitted by the LDEQ for this area is consistent with EPA guidance. (See footnote 7). Considering emissions projections, EPA finds that the expected future emissions levels in 2012, 2016, 2020, and 2022 have been shown to be lower than emissions levels in 2006 and 2008.

The NO_x projections in Louisiana’s maintenance demonstration relied in part on reductions due to the Clean Air Interstate rule (CAIR). CAIR, however,

was remanded back to EPA, and EPA on July 6, 2011 issued the final Cross-State Air Pollution Rule⁹ (CSAPR) to replace CAIR. EPA believes the reductions for Louisiana due to the CSAPR are similar in magnitude to those projected by CAIR. Louisiana’s Ozone season NO_x budget for CAIR was 17,085 tpy for EGUs from 2009 to 2014 and lowered to 14,238 tpy NO_x for 2015 and later. The CSAPR ozone season NO_x limit is 13,432 tpy, which is 806 tpy less NO_x than the CAIR budget. So with the reductions from the CSAPR, we believe that Louisiana’s maintenance demonstration 10 year projection remains valid.

Pre-control modeling in support of the CSAPR indicates that the Baton Rouge area will not be in attainment of the 1997 8 hour ozone standard in 2012 because of impacts from upwind states. For this reason, upwind States with a significant impact on the Baton Rouge area are required to reduce their NO_x emissions. The CSAPR modeling indicates the Baton Rouge area will be in attainment in 2014 after institution of the CSAPR controls. The 2014 control case modeling is projected off a center weighted average of design values

⁹The Cross State Air Pollution Rule was proposed August 2, 2010 as the “Transport Rule.” We refer to the rule as the CSAPR.

during the period 2003–2007. Additional CSAPR modeling, however, projecting off a single year's design value for 2005 (years 2003–2005) projects that the area will not be in attainment in 2014. This variation in model projections, depending on the projection year, is an indication the Baton Rouge area could have some difficulty in maintaining attainment in years when meteorology particularly favors ozone production. The maintenance plan, however, indicates that NO_x emissions will continue to decrease over the life of the plan, continuing to improve Baton Rouge's ability to maintain attainment in the future. In addition, section 175 requires that the area have contingency measures that must be implemented, if due to meteorological fluctuations, the area does come out of attainment. We discuss the adequacy of these contingency measures elsewhere in the notice. Therefore, after considering the CSAPR modeling but also considering the projected decline in emissions and the fact that the maintenance plan has contingency measures, we believe it is appropriate to approve the maintenance plan for the Baton Rouge area.

The fact that EPA is proposing to redesignate Baton Rouge to attainment does not remove the need to address emissions in upwind States that impact ozone levels in Baton Rouge. As discussed above, Baton Rouge is projected to be nonattainment without the CSAPR reductions. The reductions in the CSAPR along with other State and Federal measures are projected to bring the area into attainment. Furthermore, without a cap on emissions in upwind States with a significant impact, emissions might in fact grow, increasing the possibility that Baton Rouge will not be able to maintain attainment. Furthermore, since upwind States are not required to have contingency measures, it is incumbent on EPA to ensure that States with significant impacts are appropriately controlled.

LDEQ also provided attainment demonstration modeling in support of its redesignation request. The attainment demonstration modeling can be found in Appendix D of the Redesignation Request and Maintenance Plan. The modeling demonstration was conducted according to EPA guidance.¹⁰ The modeling simulation was for June

2006 using a nested 36/12/4 km grid system, with the 4-km grid focused on Louisiana and the immediate Gulf coast area. The weight of evidence assembled from the modeling analyses and projection methodologies described in the report demonstrated that the 1997 8-hour ozone standard would be attained in the Baton Rouge area by 2009. The area did indeed attain the standard by the close of the ozone season on December 31, 2008. This modeling has a refined grid focused on the Baton Rouge area, and thus it provides further support that the Baton Rouge area has attained due to permanent and enforceable reductions and should remain in attainment during the term of the maintenance plan.

EPA proposes to find that LDEQ has demonstrated maintenance of the ozone standard in the BR area during the 10 year maintenance period, based on projections that total VOC and NO_x emissions during this period will remain below the 2006 and 2008 attainment levels emissions.

5. What is the contingency plan for the BRNA?

a. Verification of Continued Attainment

Louisiana has the legal authority to enforce and implement the requirements of the ozone maintenance plan for the BR area. This includes the authority to adopt, implement, and enforce any subsequent emissions control contingency measures determined to be necessary to correct future ozone attainment problems.

Louisiana will track the progress of the maintenance plan through continued ambient ozone monitoring in accordance with the requirements of 40 CFR part 58, and by performing future reviews of actual emissions for the area using the latest emissions factors, models, and methodologies. The State will work with EPA to ensure that the air monitoring network continues to be effective and will quality assure the data according to Federal requirements as one way to verify continued attainment. In addition the State will compare emission inventory data submitted to the National Emission Inventory with the emission growth data submitted in the maintenance plan to ensure emission reductions continue the downward trend.

b. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan

include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The State should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Louisiana has adopted a contingency plan for the BR area to address possible future ozone air quality problems.

The triggering mechanism for activation of contingency measures in the BR maintenance plan is a monitored violation of the 1997 8-hour ozone standard. If contingency measures are triggered, LDEQ has committed to adopt additional measures, if needed beyond the adopted measures included in the submittal, and to implement the measures as expeditiously as practicable, but no later than 24 months following the trigger.

The following contingency measures are identified for possible implementation, but may not be limited to:

- Extending the applicability of the State's current NO_x rule in LAC 33:III.2201 by adding a new Section, LAC 33:III.2202, that would extend LAC 33:III.2201's application to include the months of April and October each year (currently LAC 33:III.2201 applies from May 1 to September 30). This would assist in reducing incidences of high ozone days in the BRNA. See the TSD for AQ 350. Because the state has adopted this rule and submitted it to EPA, we are proposing to approve this rule revision in this rulemaking. In addition, the state will consider other measures such as lowering the NO_x emissions factors of LAC 33:III.2205.D and/or requiring more stringent monitoring of elevated flares, as well as measures targeting the following:

- Diesel retrofit/replacement initiatives;
- Programs or incentives to decrease motor vehicle use;
- Implementation of fuel programs including incentives for alternative fuels;

¹⁰ EPA. 2007. Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone PM2.5, and Regional Haze. Prepared by the U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Analysis Division, Air Quality Modeling Group, Research Triangle Park, NC (EPA-454/B-07-002, April 2007).

- Employer-based transportation management;
- Anti-idling ordinances;
- Programs to limit or restrict vehicle use in areas of high emission concentration during periods of peak use.

Given the substantial amount of industrial emissions in the Baton Rouge Area, and the fact the area's ozone problem is mostly driven by NO_x emissions, these potential contingency measures would be appropriate for adequately correcting an attainment problem.

These contingency measures and schedules for implementation are consistent with EPA's longstanding guidance regarding contingency measures for maintenance plans under section 175A. The State will continue to operate appropriate ambient ozone monitoring sites in the BR area to verify continued attainment of the 1997 ozone NAAQS. The air monitoring results will reveal changes in the ambient air quality as well as assist the State in determining which contingency measures will be most effective if necessary.

As required by section 175A(b) of the CAA, Louisiana commits to submit to the EPA an updated ozone maintenance plan eight years after redesignation of the BR area to cover an additional ten-year period beyond the initial ten-year maintenance period. As required by section 175A(d) of the CAA, Louisiana has also committed to retain VOC and NO_x control measures contained in the SIP prior to redesignation.

EPA finds that the maintenance plan adequately addresses the five basic components of a maintenance plan: attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and contingency measures. The maintenance plan SIP revision submitted by Louisiana for BR meets the requirements of section 175A of the Act. Therefore, EPA is proposing to approve the maintenance plan for the BR area for the 1997 8-hour ozone standard as a revision to the Louisiana SIP.

c. Controls to Remain In Effect

Louisiana commits to maintain all of the current emission control measures for VOC and NO_x after the BR area is redesignated to attainment. Louisiana, through LDEQ's Secretary, has the legal authority and necessary resources to actively enforce against any violations of the State's air pollution emission control rules. After the BR area is redesignated to attainment, LDEQ will implement NSR for major stationary sources and major modifications through the PSD program.

VI. What is EPA's evaluation of the BR area's motor vehicle emissions budgets?

A. What are the transportation requirements for approvable MVEBs?

A maintenance plan must include a MVEB for transportation conformity purposes. "Conformity" to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. It is a process required by section 176(c) of the Act for ensuring that the effects of emissions from all on-road sources are consistent with attainment or maintenance of the standard. EPA's transportation conformity rules at 40 CFR part 93 require that transportation plans, and programs, result in emissions that do not exceed the MVEB established in the SIP. The maintenance plan established an MVEB for 2022, which is the last year of the maintenance plan.

The MVEB is the level of total allowable on-road emissions established by the maintenance plan. Maintenance plans must include the estimates of motor vehicle VOC and NO_x emissions that are consistent with maintenance of attainment, which then act as a budget or ceiling for the purpose of determining whether transportation plans, and programs conform to the maintenance plan. In this case, the MVEB sets the maximum level of on-road transportation emissions that can be produced, when considered with emissions from all other sources, which

demonstrates continued maintenance of attainment of the 1997 8-hour ozone NAAQS.

B. What is the status of EPA's adequacy determination?

When reviewing submitted "control strategy" SIPs or maintenance plans containing a MVEB, EPA determines whether the MVEB contained therein is "adequate" for use in determining transportation conformity. Once EPA finds a budget adequate, the budget must be used by local, state and Federal agencies in determining whether proposed transportation plans and programs "conform" to the SIP as required by section 176(c) of the Act.

EPA's substantive criteria for determining "adequacy" of a MVEB are set out in 40 CFR 93.118(e)(4), which was promulgated in the Transportation Conformity Rule Amendments for the "New 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; transportation conformity rule amendments—Response to Court Decision and Additional Rule Change," on July 1, 2004 (69 FR 40004).

As discussed earlier, Louisiana's maintenance plan submission includes NO_x and VOC budgets for the year 2022. EPA reviewed the budgets through the adequacy process. The availability of the SIP submission with this 2022 MVEB was announced for public comment on EPA's adequacy Web page on, at: <http://www.epa.gov/otaq/stateresources/transconf/currsips.htm#baton>. The EPA public comment period on the adequacy of the 2022 MVEB for BR closed on April 4, 2011. EPA did not receive any adverse comments on the MVEB. On May 16, 2011, EPA made a finding of adequacy for the 2022 MVEB included in this 8-hour ozone maintenance plan (76 FR 28223).

C. Is the MVEB approvable?

Table 8 shows the total projected transportation emissions for 2022, as submitted by Louisiana.

TABLE 8—PROJECTED TRANSPORTATION EMISSIONS
[Tons per avg. ozone season day]

Pollutant	2006	2008	2012	2016	2020	2022
NO _x	29.30	28.35	18.63	12.08	8.33	6.96
VOC	17.60	17.82	10.64	9.70	7.82	7.55

These transportation emissions are also represented in Table 7 of this notice as the "mobile" emissions portion of emission inventory data for the BR area.

As shown in Table 8, substantial reductions in both NO_x and VOC transportation emissions are projected between 2006 and 2022. Further, as

previously stated in this action, EPA finds that the State has demonstrated the future combined emissions levels of NO_x and VOC in 2008, 2012, 2016,

2020, and 2022 are expected to be similar to or less than the emissions levels in 2006. The projected transportation emissions for 2022 were used by Louisiana as the basis of the 2022 NO_x and VOC MVEB for the BR area. These emissions are consistent with the maintenance plan demonstrating continued compliance with the 1997 8-hour ozone NAAQS for the 10-year period following redesignation to attainment.

The submitted NO_x and VOC MVEB for the BR area is defined in Table 9 below.

TABLE 9—NO_x AND VOC MVEB
[Summer season tons per day]

Pollutant	2022
NO _x	6.96
VOC	7.55

Through this rulemaking, EPA is proposing to approve Louisiana's 2022 MVEB for VOCs and NO_x for the BR area for transportation conformity purposes, because EPA has determined that the area maintains the 1997 8-hour ozone standard with the emissions at the levels of the budget. The submittal has met the adequacy criteria in 40 CFR 93.118(e)(4), and EPA has completed a comprehensive review of the maintenance plan, concluding that the overall plan demonstrates maintenance, is approvable and the budgets are consistent with the overall plan. Therefore, the budgets can be proposed for approval.

VII. What are EPA's proposed actions?

EPA is proposing several related actions under the Act for the BR 1997 8-hour moderate ozone nonattainment area, consisting of Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge Parishes. Consistent with the Act, EPA is proposing to approve a request from the state of Louisiana to redesignate the BR area to attainment of the 1997 8-hour ozone standard.

In this notice, EPA is also proposing to approve the NO_x and VOC RACT requirements for the BRNA for the 1-hour and 1997 8-hour ozone standards that accompanied the State's August 10, 2010 redesignation request. In prior separate rulemaking actions, EPA terminated the 1-hour ozone anti-backsliding section 185 penalty fee requirement, and proposed to approve the CTG Rules Update. We are proposing to determine that if EPA finally approves the CTG Rules Update VOC and NO_x provisions submitted with the redesignation request, the BR

area will meet all of the applicable CAA requirements under section 110 and Part D for purposes of redesignation for the 1997 8-hour ozone NAAQS, including the applicable CAA requirements for a moderate 1997 8-hour ozone area and applicable anti-backsliding requirements for a 1-hour ozone severe area.

Further, EPA is proposing to approve into the SIP, as meeting section 175A and 107(d)(3)(E)(iv) of the Act, Louisiana's maintenance plan for the BR area for the 1997 8-hour ozone NAAQS. The maintenance plan shows maintenance of the standard through 2022. Additionally, EPA is proposing to approve the 2022 MVEB for NO_x and VOC submitted by Louisiana for the BR area in conjunction with its redesignation request and maintenance plan.

Consequently, EPA is proposing to approve the State's request to redesignate the area from nonattainment to attainment for the 1997 8-hour ozone NAAQS. After evaluating Louisiana's redesignation request, EPA has determined that upon final approval of the above-identified SIP elements and the maintenance plan, the area will meet the redesignation criteria set forth in sections 107(d)(3)(E) and 175A of the Act. The final approval of this redesignation request would change the official designation in 40 CFR part 81 for the BR area from nonattainment to attainment for the 1997 8-hour ozone standard.

VIII. Statutory and Executive Order Reviews

Under the Clean Air Act, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the Clean Air Act for areas that have been redesignated to attainment. Moreover, 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, these actions merely do not impose additional requirements beyond those imposed by state law and

the Clean Air Act. For that reason, these actions:

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

In addition, 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.

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: August 16, 2011.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2011-21728 Filed 8-29-11; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110818511-1510-01]

RIN 0648-BB32

Fisheries of the Northeastern United States; Northeast Skate Complex Fishery; Secretarial Emergency Action

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

ACTION: Proposed temporary rule; request for comments.

SUMMARY: NMFS proposes emergency regulations to adjust catch limits in the Northeast Skate Complex Fishery. The proposed action was developed by NMFS to increase the fishing year (FY) 2011 catch limits for the skate fishery, which should extend the fishing season over a longer duration than occurred in FY 2010, thus ensuring a more steady market supply. The proposed increases in catch limits are supported by new scientific information indicating significant increases in skate biomass.

DATES: Public comments must be received no later than 5 p.m., eastern standard time, on September 14, 2011.

ADDRESSES: A supplemental environmental assessment (EA) was prepared 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 the supplemental EA and the Initial Regulatory Flexibility Analysis (IRFA), are available on request from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also available online at <http://www.nero.noaa.gov>.

You may submit comments, identified by NOAA-NMFS-2011-0197, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal e-Rulemaking Portal <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal,

first click the “submit a comment” icon, then enter “NOAA-NMFS-2011-0197” in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.

- **Fax:** (978) 281-9135, Attn: Tobey Curtis.

- **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 Skate Emergency Action.”

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov>. All personal identifying information (*e.g.*, name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Tobey Curtis, Fishery Policy Analyst, (978) 281-9273; fax: (978) 281-9135.

SUPPLEMENTARY INFORMATION:

Background

In the Northeast U.S., skate fisheries are managed by the New England Fishery Management Council (Council). In 2003, NMFS implemented the Northeast Skate Complex Fishery Management Plan (Skate FMP) to manage a complex of seven skate species: Winter (*Leucoraja ocellata*); little (*L. erinacea*); thorny (*Amblyraja radiata*); barndoor (*Dipturus laevis*); smooth (*Malacoraja senta*); clearnose (*Raja eglanteria*); and rosette (*L. garmani*) (see 68 FR 49693, August 19, 2003). The FMP established biological reference points and overfishing definitions for each species based on abundance indices in the NMFS Northeast Fisheries Science Center bottom trawl survey.

Amendment 3 to the Skate FMP, which was implemented in July 2010, instituted an annual catch limit (ACL)

and accountability measures (AMs) for the skate fishery (75 FR 34049, June 16, 2010), and set fishery specifications for FY 2010-2011 (through April 30, 2012). The ACL was set equal to the acceptable biological catch (ABC) recommendation of the Council’s Scientific and Statistical Committee (SSC) (41,080 mt). Amendment 3 also implemented an annual catch target (ACT), which is 75 percent of the ACL, and annual total allowable landings (TALs) for the skate wing and bait fisheries (TAL = ACT – dead discards and state landings), and three seasonal quotas for the bait fishery. An incidental possession limit may be implemented when landings approach the TAL, preventing excessive quota overages.

In FY 2010, the combination of increased landings of skate wings and a delay in implementation of Amendment 3 possession limits (5,000 lb (2,270 kg) of wings per trip) resulted in the wing fishery reaching the TAL trigger in early September. Consequently, the wing fishery was limited to the incidental possession limit of 500 lb (227 kg) of skate wings per trip from September 3, 2010, through the end of FY 2010 on April 30, 2011.

Asserting that the imposition of the incidental skate wing possession limit so early in the FY caused disruptions in the supply of skate wings, economic hardship on fishing vessels and dealers, and threatened to undermine the market position of U.S. suppliers, members of the skate wing fishing industry requested that the Council consider options to mitigate the potential for this situation to be repeated in FY 2011. In November 2010, the Council initiated Framework 1 to reduce the skate wing possession limits, and increase the TAL trigger point, in order to maximize the duration of the skate fishing season in FY 2011. Framework 1 was partially approved by NMFS and implemented on May 17, 2011 (76 FR 28328).

Since the implementation of Framework 1, new scientific information on skate catch and biomass became available, which allowed the SSC to revise its recommendation for skate ABC. The ABC is calculated by multiplying the median catch/biomass ratio by the most recent 3-yr average skate biomass. Therefore, significant increases in the survey biomass of little and winter skates through autumn 2010 support increases in the ABC.

Additionally, new research on the discard mortality of winter and little skates in trawl gear indicates that the assumed discard mortality rate of 50 percent is too high, and that the dead discard portion of the catch has been overestimated in the past. Updates to

estimates on state waters and transfer at sea landings were also incorporated. Collectively, this new information resulted in a revised ABC recommendation of 50,435 mt.

This new ABC recommendation is being used by the Council to develop skate fishery specifications for FYs 2012–2013. However, due to continued high rates of skate wing landings under Framework 1 possession limits, and the likelihood that the skate wing fishery would once again be closed early in FY 2011, the Council, at its June 2011 meeting, requested that NMFS take emergency action, pursuant to section

305(c) of the Magnuson-Stevens Act, to implement the revised skate ABC for the remainder of FY 2011. This would increase available landings of skates, and result in the lengthening of the season for the skate wing fishery, thereby helping to avoid the economic impacts associated with a potential closure.

Proposed Measures

Based on the new ABC recommendation from the SSC, this emergency action proposes the following changes to the regulations governing the skate fishery (see Table 1):

1. That the skate ABC and ACL be increased from 41,080 mt to 50,435 mt for FY 2011;

2. That the ACT be increased from 30,810 mt to 37,826 mt; and

3. That the TAL be increased from 13,848 mt to 21,561 mt, reflecting the higher ACT as well as a lower assumed skate discard rate and improved estimates of state landings.

The skate wing fishery would be allocated 66.5 percent of the TAL (14,338 mt) and the skate bait fishery would be allocated 33.5 percent of the TAL (7,223 mt)

TABLE 1—NO ACTION AND PROPOSED FY 2011 SKATE ABC AND ASSOCIATED CATCH LIMITS (MT)

	No action	Preferred	Percent change
ABC	41,080	50,435	+23
ACL	41,080	50,435	+23
ACT	30,810	37,826	+23
TAL	13,848	21,561	+56
Wing TAL	9,209	14,338	+56
Bait TAL	4,639	7,223	+56
Assumed Discard Rate	52.0%	36.3%	–30
Assumed State Landings	3.0%	6.7%	+123

This action does not propose changes to any other regulations implemented by Amendment 3 or Framework 1. The wing possession limits would remain at 2,600 lb (1,179 kg) for May 1 through August 31, and 4,100 lb (1,860 kg) for September 1 through April 30. The skate bait possession limit would remain at 20,000 lb (9,072 kg) whole weight per trip for vessels carrying a Skate Bait Letter of Authorization. Finally, if the TAL triggers are reached before the end of the year (85 percent for the wing fishery, 90 percent for the bait fishery), the incidental possession limit would remain at 500 lb (227 kg) of wings (1,135 lb (515 kg) whole wt.). These management measures may be reconsidered as the Council develops fishery specifications for FYs 2012–2013.

The proposed quota increases are expected to result in considerable increases in skate revenues and positive economic impacts for the fishery, while maintaining the conservation objectives of the Skate FMP. Although the landings of skate wings are expected to increase under the proposed changes, overall catch of skates will not likely be significantly affected due to the nature of the skate wing fishery, which is primarily an incidental fishery within the primary fisheries for groundfish and monkfish. Absent this proposed action, once the current, lower possession limit trigger is reached, skates that are caught

above the incidental possession limit of 500 lb (227 kg) in these primary fisheries would be discarded. This proposed action would enable fishermen to retain and land for sale those skates that would otherwise have to be discarded.

Classification

NMFS has preliminarily determined that the new assessment of the status of the skate complex being relied on for the significantly higher ABC recommendation for FY 2012–2013 also justifies the emergency in-season adjustment requested by the Council. 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 Skate FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. NMFS has reviewed the Council’s request for temporary emergency rulemaking with respect to section 305(c) of the Magnuson-Stevens Act and NMFS policy guidance for the use of emergency rules (62 FR 44421, August 21, 1997) and determined that the Council’s request meets both the criteria and justifications for invoking the emergency rulemaking provisions of the Magnuson-Stevens Act. Specifically, the SSC’s revision of its previously

recommended ABC was a recent and unforeseen event that cannot be implemented in a timely way through normal Magnuson-Stevens Act and Skate FMP actions. Through this emergency rulemaking, NMFS is increasing the FY 2011 skate complex ABC, ACL, ACT, and TALs, thereby relieving restrictions imposed by the previous, lower catch levels. Doing so will assist in preventing significant direct economic loss for fishery participants and associated industries that would be subject to lower commercial harvest levels.

The Office of Management and Budget has determined that this proposed rule is not significant for the purposes of Executive Order 12866.

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section of the preamble and in the **SUMMARY** of this proposed rule. A summary of the IRFA follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

All of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration (SBA) size standards for

small fishing businesses (less than \$4.0 million in annual gross sales). Therefore, there are no disproportionate effects on small versus large entities. 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 action does not introduce any new reporting, recordkeeping, or other compliance requirements. 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 proposed increase in the Skate ACL and TALs would impact vessels that hold Federal open access commercial skate permits that participate in the skate fishery. For the purposes of this analysis, each permitted vessel is treated as a single small entity and is determined to be a small entity under the RFA. According to the Framework 1 final rule and Final Regulatory Flexibility Analysis (76 FR 28328, May 17, 2011), as of December 31, 2010, the maximum number of small fishing entities (as defined by the SBA) that may be affected by this action is

2,607 entities (number of skate permit holders). However, during FY 2010, only 503 vessels landed skates for the wing market, and only 56 landed skates for the bait market.

Economic Impacts of the Proposed Action Compared to Significant Non-Selected Alternatives

The purpose of the proposed action is to increase the skate ABC and associated catch limits in order to increase landings, thereby extending the duration of the fishing season and helping to prevent the negative economic impacts that would be associated with an early closure of the directed skate fisheries. Compared to the other alternative considered, the proposed action is expected to maximize profitability for the skate fishery by allowing higher levels of landings for the duration of FY 2011. Therefore, the economic impacts resulting from the proposed action as compared to the No Action Alternative are positive, since the action would provide additional fishing opportunity for vessels participating in the skate fishery for FY 2011.

The proposed action is almost certain to result in greater revenue from skate landings. Based on recent landing information, the skate fishery is able to land close to the full amount of skates

allowable under the quotas. The estimated potential revenue from the sale of skates under the proposed catch limits is approximately \$9.0 million, compared to \$5.8 million if this action were not implemented. Due to the implications of closing the directed skate fisheries early in the fishing year, the higher catch limits associated with the proposed action will result in additional revenue if fishing is prolonged. According to analyses in Framework 1, vessels that participate in the skate fishery derive most (an average of 96 percent) of their revenues from other fisheries (*e.g.*, groundfish, monkfish). Therefore, relative to total fishing revenues, catch limits of other species would be expected to have more significant economic impacts than revenues derived from skates alone. However, as skate prices have begun increasing in recent years, more vessels are deriving a greater proportion of their income from skates.

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

Dated: August 24, 2011.

Samuel D. Rauch III,

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

[FR Doc. 2011-22165 Filed 8-29-11; 8:45 am]

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Notices

Federal Register

Vol. 76, No. 168

Tuesday, August 30, 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

Agricultural Marketing Service

[Doc. Number FV-09-0043]

United States Standards for Grades of Cultivated Ginseng

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS), of the Department of Agriculture (USDA), is soliciting comments on the proposed voluntary United States Standards for Grades of Cultivated Ginseng. AMS received a request from the Ginseng Board of Wisconsin (GBW), to amend the standards to reflect current market values. To ensure the integrity of the standards, the proposed revisions would be based on quality and percentage defects. The new grades would replace the current ones and promote the orderly and efficient marketing of ginseng in an evolving global economy. Other changes would include adding tolerances, reclassifying sizes, removing table "values," and amending definitions. These revisions are needed to determine and complement the new grades.

DATES: Comments must be received by September 29, 2011.

ADDRESSES: Interested persons are invited to submit written comments to the Standardization Branch, Fresh Products Division, Fruit and Vegetable Programs, Agricultural Marketing

Service, U.S. Department of Agriculture, National Training and Development Center, Riverside Business Park, 100 Riverside Parkway, Suite 101, Fredericksburg, VA 22406: Fax (540) 361-1199, or on the Web at: <http://www.regulation.gvo>. Comments should make reference to the dates and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours. Comments can also be viewed on the <http://www.regulations.gov> Web site. The current United States Standards for Cultivated Ginseng, along with the proposed changes, will be available either through the address cited above or by accessing the AMS, Fresh Products Division Web site at: <http://www.ams.usda.gov/freshinspection>.

FOR FURTHER INFORMATION CONTACT: Dr. Carl Newell, at the above address or call (540) 361-1120.

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621-1627), as amended, directs and authorizes the Secretary of Agriculture "to develop and improve standards of quality, condition, quantity, grade and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices." AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities and makes copies of official standards available upon request. The United States Standards for Grades of Fruits and Vegetables not connected with Federal Marketing Orders or U.S. Import Requirements, no longer appear in the Code of Federal Regulations, but are maintained by USDA, AMS, Fruit and Vegetable Programs, and are available on the Internet at <http://www.ams.usda.gov/freshinspection>.

AMS is proposing to revise the voluntary United States Standards for Grades of Cultivated Ginseng using

procedures that appear in part 36, Title 7 of the Code of Federal Regulations (7 CFR part 36).

Background

AMS received a request from the GBW on June 8, 2009, to revise the United States Standards for Grades of Cultivated Ginseng. The GBW represents shippers, processors and all the cultivated ginseng growers in Wisconsin. The initial inquiry requested AMS to add "unless otherwise specified" to the size table to accommodate changing market values. AMS believed that by allowing any specified value would undermine the integrity of the standards. To resolve the issue, AMS met with members of the GBW to revise the standards and develop new grades based solely on quality and percentage defects. The proposal would remove the current grades and replace them with seven new grades: U.S. No. 1 through U.S. No. 7, including tolerances for each grade. Further, the following size classifications would be created: Premium, Select, and Standard. In addition, the "values" would be removed from the size table in §.1330.

Other revisions would include redefining "Wrinkle" as "Texture," removing "similar varietal characteristics," adding a definition for "Length," and rewriting most of the definitions. The grade determination section would also be amended to reflect new calculations without "values." Further, an illustrated ginseng root would be included at the end of the standards.

The revisions are such that the section numbers in the proposed standards do not match the section numbers in the current standards. In an effort to clearly outline these proposed changes, the first column of the following chart shows the section as it currently reads. The second column shows the proposed change and the third column states why the change is being proposed.

UNITED STATES STANDARDS OF CULTIVATED GINSENG

Current Standard	Proposed	Discussion
<p>§.1325 General. The standards apply to cultivated ginseng of similar characteristics, which is clean, well cured, free from external and internal defects, mold, rust and decay. The origin of the ginseng, color and/or wrinkle may be specified with the grade.</p>	<p>§.1325 General. The standards apply to cultivated ginseng, such as American ginseng (<i>Panax quinquefolius</i>) and Asian ginseng (<i>Panax ginseng</i>). Ginseng that grows wild or naturally, rather than being planted and cultivated domestically or commercially, is not covered under these standards.</p>	<p>The information reported in the current General Section would best be given in the Grade Section. The proposed General Section would provide an introduction to what type of ginseng is covered under the standards.</p>
<p>§.1326 U.S. Premium. “U.S. Premium” consists of ginseng which has a graded value of 90 or more.</p>	<p>§.1326 Grades. All grades, U.S. No. 1 through U.S. No. 7, consists of ginseng which are of one root type, clean and well cured; which are free from external and internal defects, mold, and decay. The color and texture of the ginseng shall be specified with the grade; whereas, the origin may be specified with the grade.</p>	<p>The current grades are partially based on market values. Changing market values have caused the standards to become non-competitive in the global market. New grades would be based solely on quality and percentage of defects.</p>
<p>§.1327 U.S. Select. “U.S. Select” consists of ginseng which has a graded value of 75 to 98. §.1328 U.S. Medium. “U.S. Medium” consists of ginseng which has a graded value of 60 to 74. §.1329 U.S. Standard. “U.S. Standard” consists of ginseng which has a graded value of 0 to 59.</p>	<p>§.1327 Tolerances. In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by weight, reported to the nearest tenth of a percent, are provided as specified: (a) U.S. No. 1. 1 percent allowed for defects. (b) U.S. No. 2. More than 1 but not more than 5 percent allowed for defects. (c) U.S. No. 3. More than 5 but not more than 10 percent allowed for defects. (d) U.S. No. 4. More than 10 but not more than 25 percent allowed for defects. (e) U.S. No. 5. More than 25 but not more than 50 percent allowed for defects. (f) U.S. No. 6. More than 50 but not more than 75 percent allowed for defects. (g) U.S. No. 7. More than 75 percent allowed for defects.</p>	<p>The current grades have values assigned to them, originally based on market values. The values would be removed and replaced with grades determined by percentage of defects. The tolerance section would be added to define the percentage of defects allowed in each grade.</p>
<p>§.1330 Size. Size is a factor in determining the grade. Size shall be in inches and fractions thereof, in minimum diameter, maximum diameter, minimum length, maximum length in the following categories: [table]</p>	<p>§.1328 Size Classifications. Size shall be determined in inches and fractions thereof, in diameter and length for the following Whole Root Size Categories listed in Table I. [Table I—Whole Root Size Categories] The following Size Classifications shall be reported in connection with the grade: (a) “Premium” is a lot consisting of more than 50 percent short ginseng of any category. (b) “Select” is a lot consisting of more than 70 percent short and medium ginseng of any category. (c) “Standard” is a lot consisting of more than 80 percent short, medium, and long ginseng of any category.</p>	<p>In the proposed standards, the terms “Premium,” “Select,” and “Standard” would no longer be grades but become size classifications reported in connection with the grade. The term “Medium” would be dropped since it may be confused with medium sized roots defined in Table I. The industry agreed that each grade would be qualified by a size category. The size categories would provide a more accurate description of the lot. The proposed “Table I—Whole Root Categories,” replacing the original table, would remove the “Value” column, “Fiber/Prong” row, and the “Culls/Foreign Material” row. The “Value” column would be removed since the grades would no longer be based on values. The “Fiber/Prong” and “Culls/Foreign Material” rows would be removed since they were only defined by values and not by diameter or length. Also, “Long” would replace “Large” printed in error under “Small” “Length (inches)” in Table I.</p>

UNITED STATES STANDARDS OF CULTIVATED GINSENG—Continued

Current Standard	Proposed	Discussion
<p>§.1331 External Color.</p> <p>(a) "Light" means the color closest to "Light" on Visual Aid GIN. CC-1.</p> <p>(b) "Light Medium" means the color closest to "Light Medium" on Visual Aid GIN. CC-1.</p> <p>(c) "Medium" means the color closest to "Medium" on Visual Aid GIN. CC-1.</p> <p>(d) "Dark Medium" means the color closest to "Dark Medium" on Visual Aid GIN. CC-1.</p> <p>(e) "Dark" means the color closest to "Dark" on Visual Aid GIN. CC-1.</p>	<p>§.1329 External Color.</p> <p>"Color" shall be applied to the lot as a whole using the following terms:</p> <p>(a) "Light" means the color closest to "Light" on Visual Aid GIN. CC-1.</p> <p>(b) "Light Medium" means the color closest to "Light Medium" on Visual Aid GIN. CC-1.</p> <p>(c) "Medium" means the color closest to "Medium" on Visual Aid GIN. CC-1.</p> <p>(d) "Dark Medium" means the color closest to "Dark Medium" on Visual Aid GIN. CC-1.</p> <p>(e) "Dark" means the color closest to "Dark" on Visual Aid GIN. CC-1.</p>	<p>Except for the section number and first line, this section would remain the same. The first line would be added to clarify that color is applied to the lot as a whole and not to individual roots.</p>
<p>§.1332 Wrinkle.</p> <p>(a) "Smooth" means the surface texture closest to "Smooth" on Visual Aid GIN. IDENT-1.</p> <p>(b) "Slight Wrinkle" means surface texture closest to "Slight Wrinkle" on Visual Aid GIN. IDENT-1.</p> <p>(c) "Wrinkle" means surface texture closest to "Wrinkle" on Visual Aid GIN. IDENT-1.</p>	<p>§.1330 Texture.</p> <p>"Texture" shall be applied to the lot as a whole using the following terms:</p> <p>(a) "Smooth" means the surface texture closest to "Smooth" on Visual Aid GIN. IDENT-1.</p> <p>(b) "Slight Wrinkle" means surface texture closest to "Slight Wrinkle" on Visual Aid GIN. IDENT-1.</p> <p>(c) "Wrinkle" means surface texture closest to "Wrinkle" on Visual Aid GIN. IDENT-1.</p>	<p>Except for the section number, title, and first line, this section would remain unchanged. The first line would be added to clarify that texture would be applied to the lot as a whole and not to the individual root. In addition, the title would be changed to "Texture" to remove any confusion between the section and the term "wrinkle" used in the definitions.</p>
<p>§.1533 Sample and Sample Size. * * * * *</p>	<p>§.1331 Sample and Sample Size. * * * * *</p>	<p>Except for the section number, this section would remain unchanged.</p>
<p>§.1334 Grade Determination.</p> <p>(a) Whole Root Score. Separate and/or break prongs and fiber from whole roots, weigh and record. Separate and weigh the culls and foreign material. Sort the balance of the sample into whole root size categories (See §51.1330) and weigh each category. Determine the score for each category by dividing the category value by 450 (if grams) or 16 (if ounces) and multiply the result by the weight of the category. Add the scores for all the categories to determine the Whole Root Score.</p> <p>(b) Deductions. Weigh the External and Internal Defects and determine each percentage of the sample. Divide the External Defects percentage by 2 (i.e., 6% would be recorded as 3) to determine the External Defects deduction. The Internal Defects percentage is equal to the Internal Defects deduction. Add the External and Internal Defects deductions to determine the Total Root Deductions.</p> <p>(c) Graded Value. Subtract the Total Root Deductions from 100 and multiply the results by the Whole Root Score to determine the Graded Value. Locate the Graded Value in §51.1326 to 51.1328 to assign the grade.</p>	<p>§.1332 Size Classification Determination. Separate whole roots from culls and foreign material, weigh and record. Clip or break off prongs and rootlets from whole roots, weigh and record. Sort whole roots into size categories (See §51.1327) by first separating whole roots into diameter categories (Small, Medium, Large, Extra Large). Further separate diameter categories into length categories (Short, Medium, Long), weigh and record. Divide by the total weight of the sample minus the culls and foreign material to calculate the percentage of each length category. Add together the length category percentages using the size classification definitions (See §51.1327 a, b, and c). Example: 19% Small Short, 23% Medium Short, and 10% Large Short totals 52%, making a Premium size lot.</p> <p>§.1332 Grade Determination. Weigh and record the external and internal defects and divide each by the total weight of the sample minus the prongs and rootlets to calculate the external defect percentage and internal defect percentage. Divide the external defect percentage by 2 (i.e., 6% would be recorded as 3%) to determine the External Defect Deduction. The internal deduction percentage is equal to the Internal Defects Deduction. Add the External and Internal Defects Deductions to calculate the Total Defect Percentage. The Total Defect Percentage will determine the grade of the lot (See §51.1326).</p>	<p>The procedure for inspecting ginseng would remain unchanged. However, the formula for determining the grade would be different since the grade would not be based on values. Size would be determined first, followed by inspecting the ginseng for defects. Culls and foreign material would be excluded from the determination of size, whereas prongs and rootlets would be included. Prongs and rootlets would be excluded from the determination of grade, whereas culls and foreign material would be included.</p>
<p>§.1335 Similar varietal characteristics. "Similar varietal characteristics" means the ginseng is the same variety and color.</p>		<p>This definition would be removed, since it would not be a requirement of the grade. Inspectors would not be required to distinguish the subtle differences between varieties. In addition, color would be applied to the lot, not on individual roots.</p>

UNITED STATES STANDARDS OF CULTIVATED GINSENG—Continued

Current Standard	Proposed	Discussion
§.1336 Clean. * * * * *	§.1334 Clean. * * * * *	Except for the section number, this definition would remain unchanged.
§.1337 Well cured. * * * * *	§.1335 Well cured. * * * * *	Except for the section number, this definition would remain unchanged.
§.1338 Prong. “Prong” means a root or portion of a root growing off the main root.	§.1336 Prong. “Prong” means a root or portion of a root growing off the main root. A prong cannot exceed more than one half the diameter of the main root.	The definition would be further qualified, so as not to confuse a prong with a whole root.
§.1339 Whole root. “Whole root” means the main root or upper portion of the main root, and may or may not have prongs and/or fibers attached. Whole roots must have a tapered top or crown.	§.1337 Whole root. “Whole root” means the main root or upper portion of the main root, including any portion growing off the main root that is too large to be a prong. Whole roots must have a tapered top or crown.	This definition would be slightly modified to remove any confusion between a prong and a whole root.
§.1340 Fiber. “Fiber” means small roots less than 1/8 inch in diameter.	§.1338 Rootlet. “Rootlet” means small slender roots less than 1/8 inch in diameter.	The term “fiber” has caused confusion. Therefore, “Rootlet” will be substituted for the term fiber to prevent further misidentification.
§.1341 Diameter. “Diameter” means the greatest dimension at right angles to a line from the root crown or the point of attachment of the prong to the tip. Diameter shall be the greatest dimension, but not at the point of attachment of the prong.	§.1339 Diameter. “Diameter” means the greatest dimension at right angles to a line from the top of the whole root to the tip. Diameter shall not be measured at the point of attachment of a prong or the area where a prong was removed.	This definition would be slightly reworded for clarification.
	§.1340 Length. “Length” means the greatest dimension of the whole root measured in a straight line parallel to the longitudinal axis from the top of the whole root to the tip, not including any portion of the crown or rootlet, if present.	A definition for length is proposed. Length would be measured in a straight line and would not follow the curve of the root.
§.1342 Defects. “Defects” means any mechanical, pathological and/or physiological defect consisting of cuts, external discoloration, internal green or red discoloration, insect, mold, scab or other means that affect the appearance or marketing quality.	§.1341 Defects. “Defects” means any mechanical, pathological and/or physiological defect consisting of cuts, external discoloration, internal green or red discoloration, insect, mold, scab, or other means that affect the appearance or marketing quality of the whole root. In addition, when the cut area left by a clipped or removed prong exceeds one half of the diameter of the root, it shall be a defect.	Rust would be removed from the definition since it is the same as discoloration. Further, at industry’s request, a definition for an area left by clipped or removed prongs would be added.
§.1343 Cull. “Cull” means any unusable portion.	§.1342 Cull. “Cull” means more than 50 percent of the whole root is unusable.	This definition would define “unusable portion” to provide a clearer guide as to what is a cull.
§.1344 Origin. * * * * *	§.1343 Origin. * * * * *	Except for the section number, this definition remains unchanged.
	§.1344 [Reserved]	This section would be reserved if needed at a later time.
	Illustration Ginseng 1	An illustration of a ginseng root would be added at the end of the standards, which defines the parts of the root, what should be clipped, and the correct determination for length and diameter.

The proposed revisions will benefit the industry by allowing the marketing of ginseng in the U.S. to be competitive in a changing and demanding global

market. A 30-day period is provided for interested persons to comment. This period is deemed appropriate in order to implement these changes, if adopted, as

soon as possible to reflect current marketing practices.

Authority: 7 U.S.C. 1621–1627.

Dated: August 19, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011-22117 Filed 8-29-11; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Federal Crop Insurance Corporation, Risk Management Agency (RMA), USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) this notice announces the Risk Management Agency's intention to request an extension and revision to a currently approved information collection for Notice of Funds Availability—Community Outreach and Assistance Partnership Program.

DATES: Comments on this notice will be accepted until close of business, October 31, 2011.

ADDRESSES: Interested persons are invited to submit comments by any of the following methods:

- *By Mail to:* Lana Cusick, Risk Management Education Division, USDA/RMA, 1400 Independence Avenue, SW., Room 6717-S, Stop 0808, Washington, DC 20250-0808.

- *E-Mail:* Lana.Cusick@rma.usda.gov.

All comments will be available for public inspection during regular business hours at the same address. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Contact Lana Cusick, Risk Management Education Division, USDA/RMA, 1400 Independence Avenue, SW. Room 6717-S, Stop 0808, Washington, DC 20250-0808, telephone (202) 720-3325.

SUPPLEMENTARY INFORMATION:

Title: Notice of Funds Availability—Community Outreach and Assistance Partnership Program.

OMB Number: 0563-0066.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The Federal Crop Insurance Corporation administers cooperative agreements that will be used to provide outreach and assistance to under-served

agricultural producers such as women, limited resource, socially disadvantaged and other traditionally under-served farmers and ranchers (under-served agricultural producers). This package will be combined with another currently approved package 0563-0067 entitled, Risk Management and Crop Insurance Education; Risk for Applications when the package comes up for renewal in July 2012. With this submission, RMA seeks to obtain OMB's approval for an information collection project that will assist RMA in operating and evaluating these programs. The primary objective of the information collection projects is to enable RMA to better evaluate the performance capacity and plans of organizations that are applying for funds for cooperative agreements for the Community Outreach and Assistance Partnership Program.

This information collection package will be used for evaluating applications and awarding partnership agreements; applicants are required to submit materials and information necessary to evaluate and rate the merit of proposed projects and evaluate the capacity and qualification of the organization to complete the project

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 6 hours per response per application.

Respondents/Affected Entities: Education institutions, community based and cooperative organizations, and non-profit organizations.

Estimated annual number of respondents: 150.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 150.

Estimated total annual burden on respondents: 900 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will 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 those who are to respond, through use, as appropriate, of automated, electronic, mechanical, or other collection technologies, e.g., permitting electronic submission of responses.

Signed in Washington, DC, on August 23, 2011.

Barbara Leach,

Associate Administrator, Federal Crop Insurance Corporation.

[FR Doc. 2011-22136 Filed 8-29-11; 8:45 am]

BILLING CODE 3410-08-P

DEPARTMENT OF AGRICULTURE

Forest Service

Uinta-Wasatch-Cache National Forest Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Uinta-Wasatch-Cache National Forest Resource Advisory Committee will conduct a meeting in Salt Lake City, Utah. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub.L 110-343) and in compliance with the Federal Advisory Committee Act. The purpose is to finalize the review of project submittals.

DATES: The meeting will be held on September 22, 2011, from 3 to 5:30 p.m.

ADDRESSES: The meeting will be held at the Salt Lake County Government Center, Room S1002, 2001 South State Street, Salt Lake City, Utah. Written comments should be sent to Loyal Clark, Uinta-Wasatch-Cache National Forest, 88 West 100 North, Provo, Utah 84601. Comments may also be sent via e-mail to lfclark@fs.fed.us, via facsimile to 801-342-5144.

All comments, including names and addresses when provided, are placed in the record and are available for inspection and copying. The public may inspect comments received at the Uinta-Wasatch-Cache National Forest, 88 West 100 North, Provo, Utah 84601.

FOR FURTHER INFORMATION CONTACT: Loyal Clark, RAC Coordinator, USDA, Uinta-Wasatch-Cache National Forest, 88 West 100 North, Provo, Utah 84601; 801-342-5117; lfclark@fs.fed.us.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Finalize project recommendations, and (2) schedule site monitoring visits. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: August 24, 2011.

Cheryl F. Probert,

Deputy Forest Supervisor.

[FR Doc. 2011-22085 Filed 8-29-11; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. 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 to present projects and vote on projects.

DATES: The meeting will be held on September 19, 2011 from 1:30 p.m. and end at approximately 4:30 p.m.

ADDRESSES: The meeting will be held in the field during the monitoring trip beginning at the Mendocino NF Supervisor's Office, 825 North Humboldt Ave., Willows, CA. 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 825 N. Humboldt Ave., Willows, CA 95988. Please call ahead to (530) 934-1269 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95988. (530) 934-1269; e-mail rjero@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 accommodation for access to the facility or proceedings

may be made by contacting the person listed For Further Information.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Agenda items to be covered include: (1) Introductions, (2) Approval of Minutes, (3) RAC Administrative Updates, (4) Public Comment, (5) Project Presentations, (6) Vote on New Project Proposals, (7) General Discussion, (8) Adjourn. 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 September 12, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95988 or by e-mail to rjero@fs.fed.us or via facsimile to 530-934-1212.

Dated: August 23, 2011.

Eduardo Olmedo,

District Ranger.

[FR Doc. 2011-22087 Filed 8-29-11; 8:45 am]

BILLING CODE 3410-11-P

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Montana Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92-463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106-393) the Beaverhead-Deerlodge National Forest's Southwest Montana Resource Advisory Committee will meet on Wednesday, September 14, 2011, from 9 a.m. until 5 p.m., in Dillon, Montana. The purpose of the meeting is to review funding proposals for Title II funding.

DATES: Wednesday, September 14, 2011, from 9 a.m. until 5 p.m.

ADDRESSES: The meeting will be held at the Beaverhead-Deerlodge Forest Headquarters located at 420 Barrett Street, Dillon, Montana (MT 59725).

FOR FURTHER INFORMATION CONTACT: Patty Bates, Committee Coordinator, Beaverhead-Deerlodge National Forest,

420 Barrett Street, Dillon, MT 59725, (406) 683-3979; e-mail pbates@fs.fed.us.

SUPPLEMENTARY INFORMATION: Agenda for this meeting includes discussion about new project proposals seeking funding. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee throughout the meeting.

Dated: August 15, 2011.

David R. Myers,

Designated Federal Official.

[FR Doc. 2011-21358 Filed 8-29-11; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Funds Availability for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2011

AGENCY: Rural Housing Service, USDA.

ACTION: Notice; correction.

SUMMARY: This notice corrects the scoring points to a Notice published in the **Federal Register** on July 7, 2011, regarding Funds Availability for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year (FY) 2011. The correction changes the points assigned under section VI. Pre-application Review Information, (A)(1)(v)(a) entitled New Construction Energy Conservation. This notice also extends the pre-application closing deadline to 5 p.m., local time to September 6, 2011.

FOR FURTHER INFORMATION CONTACT: Mirna Reyes-Bible, Finance and Loan Analyst, Multi-Family Housing Preservation and Direct Loan Division, STOP 0781 (Room 1263-S), USDA Rural Development, 1400 Independence Avenue, SW., Washington, DC. 20250-0781, telephone: (202) 720-1753 (this is not a toll free number.), or via e-mail: Mirna.ReyesBible@wdc.usda.gov. If you have questions regarding Net Zero Energy Consumption and Energy Generation please contact Carlton Jarratt, Finance and Loan Analyst, Multi-Family Housing Preservation and Direct Loan Division at (804) 287-1524 or via e-mail: carlton.jarrat@wdc.usda.gov.

Correction

In the notice, beginning on page 39813 in the issue of July 7, 2011, make the following corrections:

In the third column for page 39813, correct the **DATES** section to read:

DATES: The deadline for receipt of all pre-applications in response to this is 5:00 p.m., local time to the appropriate Rural Development State Office on September 6, 2011. * * *

In the third column for page 39817, paragraph (a) entitled New Construction Energy Conservation; replace the entire paragraph (a) with the following:

(a) *Energy Conservation for New Construction* (maximum 32 points). New construction projects may be eligible for up to 32 points when the pre-application includes a written certification by the applicant to participate in the following energy efficiency programs. The points will be allocated as follows:

(1) Participation in the Department of Energy's Energy Star for Homes program (10 points). http://www.energystar.gov/index.cfm?c=bldrs_lenders_raters.nh_multifamily_units.

(2) Participation in the Green Communities program by the Enterprise Community Partners. (10 points) <http://www.enterprisecommunity.org>.

(3) Participation in one of the following two programs will be awarded points for certification.

Note: Each program has four levels of certification. State the level of certification that the applicant plans will achieve in their certification:

- LEED for Homes program by the United States Green Building Council (USGBC): <http://www.usgbc.org/homes>.
 - Certified Level (4 points), OR
 - Silver Level (6 points), OR
 - Gold Level (8 points), OR
 - Platinum Level (10 points), OR
- The National Association of Home Builders (NAHB) ICC 700–2008 National Green Building Standard TM: <http://www.nahb.org>.
 - Bronze Level (4 points), OR
 - Silver Level (6 points), OR
 - Gold Level (8 points), OR
 - Emerald Level (10 points).

(4) Participation in local green/energy efficient building standards; Applicants, who participate in a city, county or municipality program, will receive an additional 2 points. The applicant should be aware of and look for additional requirements that are sometimes embedded in the third-party program's rating and verification systems. (2 points)

Dated: August 23, 2011.

Robert Lewis,

Acting Administrator, Housing and Community Facilities Programs.

[FR Doc. 2011–22133 Filed 8–29–11; 8:45 am]

BILLING CODE 3410-XV-P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Texas 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 meeting of the Texas Advisory Committee (Committee) to the Commission will convene on Thursday, September 15, 2011, at 1:30 p.m. and adjourn at approximately 4:30 p.m. at the Fretz Park Branch Library, 6990 Belt Line Road, Dallas, TX 75234. The purpose of the meeting is for the Committee to discuss its past work on human trafficking and future Committee activity.

Members of the public are entitled to submit written comments. The comments must be received in the Western Regional Office by October 14, 2011. The mailing address is Western Regional Office, U.S. Commission on Civil Rights, 300 N. Los Angeles St., Suite 2010, Los Angeles, CA 90012. Persons wishing to e-mail their comments may do so to atrevino@usccr.gov. Persons that desire additional information should contact Angelica Trevino, Administrative Assistant, Western Regional Office, at (213) 894–3437.

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, August 24, 2011.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2011–22024 Filed 8–29–11; 8:45 am]

BILLING CODE 6335-01-P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Colorado State 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 meeting of the Colorado State Advisory Committee to the Commission will convene at 10 a.m. (MDT) on Monday, September 12, 2011, at Denver Place, 999 18th Street, 2nd Floor Conference Room South Tower, Denver, CO 80202. The purpose of the meeting is to select a project topic.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days of the meeting. Written comments may be mailed to the Rocky Mountain Regional Office, U.S. Commission on Civil Rights, 999–18th Street, Suite 1380S, Denver, CO 80202. They may be faxed to (303) 866–1050, or e-mailed to ebohor@usccr.gov. Persons who desire additional information may contact the Rocky Mountain Regional Office at (303) 866–1040.

Records generated from this meeting may be inspected and reproduced at the Rocky Mountain 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 Rocky Mountain Regional Office at the above e-mail or street address.

Deaf or hearing-impaired persons who will attend the meeting(s) and require the services of a sign language interpreter should contact the Rocky Mountain Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, August 25, 2011.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2011–22129 Filed 8–29–11; 8:45 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE**International Trade Administration****Proposed Information Collection; Comment Request; Trade Fair Certification Program Application**

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before October 31, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Michael Thompson, Trade Fair Certification Program, U.S. Commercial Service, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Suite 800 M, Washington, DC 20230, Phone number: (202) 482-0671; Fax number: (202) 482-7800, or via e-mail: michael.thompson@trade.gov.

SUPPLEMENTARY INFORMATION:**I. Abstract**

The Trade Fair Certification (TFC) Program is a service of the U.S. Department of Commerce (DOC), U.S. Commercial Service (CS) that provides DOC endorsement and support for high quality international trade fairs that are organized by private-sector firms. The TFC Program seeks to broaden the base of U.S. firms, particularly new-to-market companies by introducing them to key international trade fairs where they can achieve their export objectives. Those objectives include one or more of the following: direct sales; identification of local agents or distributors; market research and exposure; and joint venture and licensing opportunities for their products and services. An application, Form ITA-4100P, is required to make a determination that the trade fair organizer is qualified to organize and manage U.S. exhibitions at an international trade fair, and to ensure

that the fair is a good marketing opportunity for U.S. companies.

II. Method of Collection

The application is sent by request to organizers of international trade fairs. Applicants submit completed applications to CS via express mail.

III. Data

OMB Control Number: 0625-0130.

Form Number(s): ITA-4100P.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 96.

Estimated Time Per Response: 3 hours.

Estimated Total Annual Burden Hours: 288.

Estimated Total Annual Cost to Public: \$5,700.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: August 24, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011-22071 Filed 8-29-11; 8:45 am]

BILLING CODE 3510-FF-P

DEPARTMENT OF COMMERCE**International Trade Administration**

[A-423-808, A-580-831, A-791-805, A-583-830, C-791-806]

Continuation of Antidumping and Countervailing Duty Orders: Stainless Steel Plate in Coils From Belgium, the Republic of Korea, South Africa, and Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) that revocation of the antidumping duty (AD) orders on stainless steel plate in coils (SSPC) from Belgium, the Republic of Korea (Korea), South Africa, and Taiwan would likely lead to continuation or recurrence of dumping, that revocation of the countervailing duty (CVD) order on SSPC from South Africa would likely lead to continuation or recurrence of a countervailable subsidy, and the determinations by the International Trade Commission (ITC) that revocation of these AD and CVD orders would likely lead to a continuation or recurrence of material injury to an industry in the United States, the Department is publishing a notice of continuation of these AD orders and CVD order.

DATES: *Effective Date:* August 30, 2011.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood (AD orders) or Eric Greynolds (CVD order), AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-3874 and (202) 482-6071, respectively.

SUPPLEMENTARY INFORMATION:**Background**

On June 2, 2010, the Department published the notice of initiation of the second sunset reviews of the AD and CVD orders on SSPC from Belgium, Italy, Korea, South Africa, and Taiwan pursuant to sections 751(c) and 752 of the Tariff Act of 1930, as amended (the Act), respectively. *See Initiation of Five-Year ("Sunset") Review*, 75 FR 30777 (June 2, 2010).

As a result of its reviews, the Department determined that revocation of the AD orders would likely lead to a continuation or recurrence of dumping and that revocation of the CVD order would likely lead to continuation or recurrence of subsidization, and notified

the ITC of the margins of dumping and the subsidy rates likely to prevail were the orders revoked. *See Stainless Steel Plate in Coils From Belgium, Italy, South Africa, South Korea, and Taiwan: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders*, 75 FR 61699 (Oct. 6, 2010); *see also Stainless Steel Plate in Coils From South Africa: Final Results of Expedited Sunset Review*, 75 FR 62103 (Oct. 7, 2010).

On August 15, 2011, the ITC published its determination, pursuant to sections 751(c) and 752 of the Act, that revocation of the AD and CVD orders on SSPC from Belgium, Korea, South Africa, and Taiwan, would likely lead to a continuation or recurrence of material injury to an industry within a reasonably foreseeable time.¹ *See Stainless Steel Plate From Belgium, Italy, Korea, South Africa, and Taiwan*, 76 FR 50495 (Aug. 15, 2011), and *Stainless Steel Plate in Coils from Belgium, Italy, Korea, South Africa, and Taiwan* (Inv. Nos. 701-TA-379 and 731-TA-788, 790-793 (Second Review), USITC Publication 4248, Aug. 2011).

Scope of the Orders

Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.*, cold-rolled, polished, *etc.*) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of the orders are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to the orders is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.06, 7219.12.00.21, 7219.12.00.26, 7219.12.00.51, 7219.12.00.56, 7219.12.00.66, 7219.12.00.71, 7219.12.00.81, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10,

7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to these orders is dispositive.

Continuation of the Orders

As a result of the determinations by the Department and the ITC that revocation of these AD and CVD orders would likely lead to a continuation or recurrence of dumping or a countervailable subsidy, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the AD and CVD orders on SSPC from Belgium, Korea, South Africa, and Taiwan. U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the orders will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next five-year review of these orders not later than 30 days prior to the fifth anniversary of the effective date of continuation.

These five-year (sunset) reviews and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: August 24, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011-22151 Filed 8-29-11; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; NOAA Satellite Ground Station Customer Questionnaire

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general

public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before October 31, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Marlin Perkins, 301-817-4523 or marlin.o.perkins@noaa.gov or Paul Seymour, 301-817-4521 or paul.seymourf@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved collection. NOAA asks people who operate ground receiving stations that receive data from NOAA satellites to complete a questionnaire about the types of data received, its use, the equipment involved, and similar subjects. The data obtained are used by NOAA for short-term operations and long-term planning. Collection of this data assists in complying with the terms of Memorandum of Understanding (MOU) with the World Meteorological Organization: United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) on area of common interest (2008).

II. Method of Collection

The information is collected via an online questionnaire.

III. Data

OMB Control Number: 0648-0227.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Not-for-profit institutions; business or other for-profit organizations, individuals or households; federal government; state, local or tribal government.

Estimated Number of Respondents: 300.

Estimated Time Per Response: 5 minutes.

Estimated Total Annual Burden Hours: 25.

¹ The ITC also determined that revocation of the AD order on SSPC from Italy would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Estimated Total Annual Cost to Public: \$0 in capital and recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: August 24, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011-22070 Filed 8-29-11; 8:45 am]

BILLING CODE 3510-HR-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XA638

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar

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

ACTION: Notice; receipt of application for letter of authorization; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take, by harassment, marine mammals incidental to conducting operations of Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) sonar for the period beginning August 2012 and ending August 2017. Pursuant to the implementing regulations of the Marine Mammal Protection Act (MMPA), NMFS is announcing our receipt of the Navy's

request for regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the Navy's application and request.

DATES: Comments and information must be received no later than September 29, 2011.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225. The mailbox address for providing e-mail comments is ITP.Cody@noaa.gov. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications> 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.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Availability

An electronic copy of the Navy's application may be obtained by writing to the address specified above (See **ADDRESSES**), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. The Navy released a draft Supplemental Environmental Impact Statement (DSEIS) for the employment of SURTASS LFA sonar on August 19, 2011. A copy of the DSEIS, which would also support NMFS' proposed rulemaking under the MMPA, is available at <http://www.surtass-lfa-eis.com>.

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than

commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as " * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

With respect to military readiness activities, the MMPA defines "harassment" as:

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On August 17, 2011, NMFS received an application from the Navy requesting authorization to take individuals of 94 species of marine mammals (70 cetaceans and 24 pinnipeds), by harassment, incidental to upcoming training, testing, and routine military operations (all categorized as military readiness activities) using SURTASS LFA sonar over the course of five years.

The Navy states that these training, testing, and routine military activities may expose some of the marine mammals present in the operational areas to sound from low-frequency active sonar sources. Because marine mammals may be harassed due to noise disturbance incidental to the use of SURTASS LFA sonar during training, testing, and routine military operations, the Navy requests authorization to take individuals of 94 species of marine mammals by Level B Harassment. Further, the Navy states that the probability of taking marine mammals by Level A Harassment is less than 0.001 percent. However, because the probability is not zero, the Navy has

included Level A harassment in its authorization request.

This will be NMFS' third rule making for SURTASS LFA sonar operations under the MMPA. NMFS published the first rule effective from August 2002 through August 2007 on July 16, 2002 (67 FR 46712), and published the second rule effective from August 2007 through August 2012 on August 21, 2007 (72 FR 46846). For this third rule making, the Navy is proposing to conduct the same types of sonar activities in the proposed rule making as they have conducted over the past nine years in the previous two rule makings.

Specified Activities

The Navy proposes to deploy the system on a maximum of four U.S. Naval ships: the USNS ABLE, the USNS EFFECTIVE, the USNS IMPECCABLE and the USNS VICTORIOUS) in certain areas of the Pacific, Atlantic, and Indian Oceans and the Mediterranean Sea. Nominal at-sea missions for each vessel using SURTASS LFA sonar would last up to 294 days, with 240 days of active sonar transmissions and 54 days of transit. The maximum number of actual transmission hours per vessel would not exceed 432 hours annually. The application describes the activity types, the equipment and platforms involved, and the duration and potential locations of the specified activities.

Included within a larger suite of proposed mitigation measures for marine mammals that potentially could be affected during SURTASS LFA sonar operations, the Navy proposes to restrict the use of SURTASS LFA sonar such that it will not operate in Arctic and Antarctic waters, and sound pressure levels (SPL) will not exceed 180 decibels (dB) re 1 μ Pa (rms) within 12 nautical miles of any coastline or within designated offshore biologically important areas for marine mammals.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the Navy's request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by the Navy's SURTASS LFA sonar activities.

Dated: August 24, 2011.

James H. Lecky,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2011-22163 Filed 8-29-11; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Patent and Trademark Resource Centers Metrics

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), 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 this new information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before October 31, 2011.

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

- *E-mail:*

InformationCollection@uspto.gov. Include "Patent and Trademark Resource Centers Metrics comment" in the subject line of the message.

- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

- *Federal Rulemaking Portal:* <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Martha Sneed, Director, Public Search Services Division, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1451, Alexandria, VA 22313-1451, by telephone at 703-756-1236, or by e-mail to *Martha.Sneed@uspto.gov*. Additional information about this collection is also available at <http://www.reginfo.gov> under "Information Collection Review."

SUPPLEMENTARY INFORMATION:

I. Abstract

The USPTO has undertaken a revitalization of the Patent and Trademark Depository Library Program to reflect the new 21st Century electronic approach to customer services. As a part of this revitalization, the name will change to Patent and Trademark Resource Center Program and the nationwide network of libraries will be known as Patent and Trademark Resource Centers (PTRCs). In addition, to enable the USPTO to more effectively train the PTRCs and the public to better use the tools and data available to them

and to ascertain what types of new and different services the PTRCs should offer, the USPTO is requiring the centers to provide metrics on the PTRC outreach services and use of the patent and trademark services.

Recognition as a PTRC is authorized under the provisions of 35 U.S.C. 2(a)(2), which provides that the USPTO shall be responsible for disseminating to the public information with respect to patents and trademarks. In order to be designated as a PTRC, libraries must fulfill the following requirements: assist the public in the efficient use of patent and trademark information resources; provide free access to patent and trademark resources provided by the USPTO; provide metrics on the use of patent and trademark services provided by the member library as stipulated by the USPTO; provide metrics on outreach efforts conducted by the member library as stipulated by the USPTO; and send representatives to attend the USPTO-hosted PTRC training seminars.

Since the PTRC requirements stipulate that the participating libraries must submit information (metrics) in order to be designated as a PTRC, the USPTO is submitting this new information collection for review under the PRA. The information collected will enable the USPTO to more effectively train the PTRC staff who, in turn, provide assistance and training to public customers in the areas of patent and trademarks. As the PTRCs continue to move away from the physical distribution of hard copy information, the USPTO is interested in what types of new and different services the PTRC of the future should offer its customers. Collection of this information will enable the USPTO to more effectively service its current customers while planning for the future.

The USPTO has developed a worksheet to collect the metrics concerning the use of the patent and trademark services and the public outreach efforts from the libraries. On the USPTO's behalf, the metrics will be collected on a quarterly basis through a third-party vendor. The information will only be collected electronically. The PTRCs will be given a password to input their information.

II. Method of Collection

The metrics will be submitted electronically to the USPTO.

III. Data

OMB Number: 0651-00xx.

Form Number(s): N/A.

Type of Review: New information collection.

Affected Public: Non-profit organizations.

Estimated Number of Respondents: 81 libraries, for 324 responses per year. The USPTO estimates that there will be 81 libraries reporting their metrics once per quarter, for a total of 324 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the

public approximately 30 minutes (0.50 hours) to gather the necessary information, prepare the worksheet, and submit it to the USPTO.

Estimated Total Annual Respondent Burden Hours: 162 hours.

Estimated Total Annual Respondent Cost Burden: \$4,374. The USPTO expects that the information in this collection will be prepared by

librarians, at an estimated hourly rate of \$27. This is the mean hourly wage for librarians as reported in the 2009 Bureau of Labor Statistics. Therefore, the USPTO estimates that the respondent cost burden for this collection will be approximately \$4,374 per year.

Item	Estimated time for response (minutes)	Estimated annual responses	Estimated annual burden hours
PTRC Metric Worksheet	30	324	162
Totals .....	.....	324	162

Estimated Total Annual Non-hour Respondent Cost Burden: \$0. There are no fees or capital start-up, maintenance, operation, or postage costs for this collection.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, e.g., the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: August 24, 2011.

Susan K. Fawcett,
Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2011-22044 Filed 8-29-11; 8:45 am]

BILLING CODE 3510-16-P

ACTION: Notice and request for comments.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection requirement for use through December 31, 2011. DoD proposes that OMB extend its approval for three additional years.

DATES: DoD will consider all comments received by October 31, 2011.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704-0214, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* dfars@osd.mil. Include OMB Control Number 0704-0214 in the subject line of the message.
- *Fax:* (703) 602-0350.
- *Mail:* Defense Acquisition Regulations System, Attn: Manuel Quinones, OUSD(AT&L)DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

Comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Manuel Quinones, (703) 602-8383. The information collection requirements addressed in this notice are available electronically on the World Wide Web at: <http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>.

Paper copies are available from Manuel Quinones, OUSD(AT&L)DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

SUPPLEMENTARY INFORMATION:
Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 217, Special Contracting Methods, and related provisions and clauses at DFARS 252.217-7012, Liability and Insurance; DFARS 252.217-7026, Identification of Sources of Supply; and 252.217-7028, Over and Above Work; OMB Control Number 0704-0214.

Needs and Uses: DFARS Part 217 prescribes policies and procedures for acquiring supplies and services by special contracting methods. Contracting officers use the required information as follows:

The clause at DFARS 252.217-7012 is used in master agreements for repair and alteration of vessels. Contracting officers use the information required by paragraph (d) of the clause to determine that the contractor is adequately insured. This requirement supports prudent business practice, because it limits the Government's liability as a related party to the work the contractor performs. Contracting officers use the

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Special Contracting Methods

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

information required by paragraphs (f) and (g) of the clause to keep informed of lost or damaged property for which the Government is liable, and to determine the appropriate course of action for replacement or repair of the property.

Contracting officers use the information required by the provision at DFARS 252.217-7026 to identify the apparently successful offeror's sources of supply so that competition can be enhanced in future acquisitions. This collection complies with 10 U.S.C. 2384, Supplies: identification of supplier and sources, which requires the contractor to identify the actual manufacturer or all sources of supply for supplies furnished under contract to DoD.

Contracting officers use the information required by the clause at 252.217-7028 to determine the extent of "over and above" work before the work commences. This requirement allows the Government to review the need for pending work before the contractor begins performance.

Contracting officers use the information required by DFARS 217.7004(a) where offerors shall state prices for the new items being acquired both with and without any exchange (trade-in allowance).

Contracting officers use the information from 217.7404-3(b), to evaluate a contractor's "qualifying proposal" in accordance with the definitization schedule. This requirement will require receipt of a qualifying proposal containing sufficient information for the DoD to do complete a meaningful analyses and audit of the information in the proposal, and any other information that the contracting officer has determined DoD needs to review in connection with the contract.

Contracting officers use the information from 217.7505(d), where the offeror supply's with its proposal, price and quantity data on any Government orders for the replenishment part issued within the most recent 12 months.

Affected Public: Businesses or other for-profit entities.

Annual Burden Hours: 861,942.

Number of Respondents: 51,839.

Responses per Respondent: 1.7.

Annual Responses: 88,091.

Average Burden per Response: 9.78 hours.

Frequency: On occasion.

Summary of Information Collection

Each provision or clause requires the offeror or contractor to submit certain information:

Paragraph (d)(3) of the clause at DFARS 252.217-7012 requires the contractor to show evidence of insurance under a master agreement for vessel repair and alteration.

Paragraphs (f) and (g) of the clause at DFARS 252.217-7012 require the contractor to notify the contracting officer of any property loss or damage for which the Government is liable, and to submit to the contracting officer a request for reimbursement of the cost of replacement or repair with supporting documentation.

The provision at 252.217-7026 requires the apparently successful offeror to identify its sources of supply.

Paragraphs (c) and (e) of the clause at DFARS 252.217-7028 require the contractor to submit to the contracting officer a work request and a proposal for "over and above" work.

Paragraph (a) of DFARS 217.7004 requires that solicitations which contemplate exchange (trade-in) of personal property and application of the exchange allowance to the acquisition of similar property (see 40 U.S.C. 481), shall include a request for offerors to state prices for the new items being acquired both with and without any exchange (trade-in allowance).

Paragraph (b) of 217.7404-3, Uninitiated Contract Actions, requires the contractor to submit a "qualifying proposal" in accordance with the definitization schedule. A qualifying proposal is defined in 217.7401(c) as a proposal containing sufficient information for the DoD to do complete and meaningful analyses and audits of the information in the proposal, and any other information that the contracting officer has determined DoD needs to review in connection with the contract.

Paragraph (d) of 217.7505, Acquisition of Replenishment Parts permits contracting officers to include in sole-source solicitations that include acquisition of replenishment parts, a provision requiring that the offeror supply with its proposal, price and quantity data on any Government orders for the replenishment part issued within the most recent 12 months (see 10 U.S.C. 2452 note, Spare Parts and Replacement Equipment, Publication of Regulations).

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2011-22128 Filed 8-29-11; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its Legal Collection, OMB Control Number 1910-0800. The proposed collection will enable DOE to continue to maintain DOE control and oversight of DOE contractor's invention reporting and related matters.

DATES: Comments regarding this collection must be received on or before September 29, 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, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202-395-4650.

ADDRESSES: Written comments should be sent to the DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503, and to John Lucas, U.S. Department of Energy, Washington, DC 20585; (202) 586-2802 (telephone); (202) 586-2805 (fax); john.t.lucas@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: John T. Lucas, U.S. Department of Energy, Washington, DC, 20585; (202) 586-2802 (telephone); (202) 586-2805 (fax); john.t.lucas@hq.doe.gov.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. 1910-0800; (2) *Information Collection Request Title:* Legal Collection; (3) *Type of Request:* Renewal; (4) *Purpose:* To continue to maintain DOE control and oversight of DOE and its contractor's invention reporting and related matters. Likely respondents are DOE contractors; (5) *Annual Estimated Number of Respondents:* 1817; (6) *Annual Estimated Number of Total Responses:* 1817; (7) *Annual Estimated Number of Burden Hours:* 15,127; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* \$1,034,525.

Statutory Authority: 42 U.S.C. 5908 (a), (b) and (c); 10 CFR part 781; 10 CFR 784.

Issued in Washington, DC, on August 24, 2011.

Robert J. Marchick,

Acting Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, Washington, DC 20585.

[FR Doc. 2011-22118 Filed 8-29-11; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

[OE Docket No. EA-184-B]

Application to Export Electric Energy; Morgan Stanley Capital Group Inc.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: Morgan Stanley Capital Group Inc. (MSCG) has applied to renew its authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before September 29, 2011.

ADDRESSES: Comments, protests, or motions to intervene should be addressed to: Christopher Lawrence, Office of Electricity Delivery and Energy Reliability, Mail Code: OE-20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to Christopher.Lawrence@hq.doe.gov, or by facsimile to 202-586-8008.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) 202-586-5260.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On July 23, 1998, DOE issued Order No. EA-184, authorizing MSCG to transmit electric energy from the United States to Mexico as a power marketer for a two-year term using existing international transmission facilities. That Order expired on July 23, 2000. DOE renewed the MSCG export authorization on June 28, 2006 in Order No. EA-184-A. That Order expired on June 28, 2011. On June 20, 2011 MSCG filed an application with DOE to renew

the export authority contained in Order No. EA-184-A for a five-year term.

The electric energy that MSCG proposes to export to Mexico would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by MSCG have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (385.214). Fifteen copies of each comment, protest, or motion to intervene should be filed with DOE on or before the date listed above.

Comments on the MSCG application to export electric energy to Mexico should be clearly marked with Docket No. EA-184-B. Additional copies (one each) are to be filed directly with Edward J. Zabrocki, Managing Director and Counsel, Morgan Stanley & Co. Inc., 2000 Westchester Avenue, Purchase, NY 10577 AND Daniel E. Frank and Jennifer Kubicek, Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, NW., Washington, DC 20004. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and a determination is made by DOE that the proposed action will not have an adverse impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at <http://energy.gov/node/11845>, or by e-mailing Odessa Hopkins at Odessa.hopkins@hq.doe.gov.

Issued in Washington, DC, on August 24, 2011.

Brian Mills,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2011-22116 Filed 8-29-11; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho National Laboratory. The Federal Advisory Committee Act (Pub. L. No. 92-463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, September 14, 2011 8 a.m.–5 p.m. Opportunities for public participation will be from 10:15 to 10:30 a.m. and from 2:15 to 2:30 p.m. These times are subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Sun Valley Inn, 1 Sun Valley Road, Sun Valley, Idaho 83402.

FOR FURTHER INFORMATION CONTACT: Robert L. Pence, Federal Coordinator, Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS-1203, Idaho Falls, Idaho 83415. Phone (208) 526-6518; Fax (208) 526-8789 or e-mail: pencerl@id.doe.gov or visit the Board's Internet home page at: <http://inlcab.energy.gov/>.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE-EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Topics (agenda topics may change up to the day of the meeting; please contact Robert L. Pence for the most current agenda):

- Recent Public Involvement and Outreach.
- Idaho EM Cleanup Status.
- Mission-Relevant Facility Transfers.
- New Advanced Mixed Waste Treatment Project (AMWTP) Contract.
- Idaho Cleanup Project (ICP) Contract Extension.
- EM Organizational Changes.
- American Recovery and Reinvestment Act (ARRA) Status.

Public Participation: The EM SSAB, Idaho National Laboratory, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Robert L. Pence at least

seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Robert L. Pence at the address or telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments. This notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

Minutes: Minutes will be available by writing or calling Robert L. Pence, Federal Coordinator, at the address and phone number listed above. Minutes will also be available at the following Web site: <http://inlcab.energy.gov/pages/meetings.php>.

Issued at Washington, DC on August 24, 2011.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2011-22114 Filed 8-29-11; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

National Petroleum Council

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the National Petroleum Council. The Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, September 15, 2011, 9 a.m. to 12 noon (E.D.T.)

ADDRESSES: St. Regis Hotel, 923 16th and K Streets, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Nancy Johnson, U.S. Department of Energy, Office of Oil and Natural Gas (FE-30), Washington, DC 20585; telephone (202) 586-5600 or facsimile (202) 586-6221.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: To provide advice, information, and recommendations to the Secretary of

Energy on matters relating to oil and natural gas, or the oil and natural gas industries.

Tentative Agenda:

- Call to Order and Introductory Remarks,
- Remarks by the Honorable Steven Chu, Secretary of Energy,
- Consideration of the Proposed Final Report of the NPC Committee on Resource Development,
- Progress Report of the NPC Committee on Future Transportation Fuels,
- Administrative Matters,
- Discussion of Any Other Business Properly Brought Before the National, Petroleum Council,
- Adjournment.

Public Participation: The meeting is open to the public. The Chair of the Council will conduct the meeting to facilitate the orderly conduct of business. Members of the public who wish to make oral statements pertaining to agenda items should contact Ms. Nancy Johnson at the address or telephone number listed above. Request for oral statements must be received at least three days prior to the meeting. Those not able to attend the meeting or having insufficient time to address the Council are invited to send a written statement to info@npc.org. Any member of the public who wishes to file a written statement to the Council will be permitted to do so, either before or after the meeting.

Additionally, the meeting will also be available via live video webcast. The link will be available at <http://www.npc.org>.

Transcripts: Transcripts of the meeting will be available by contacting Ms. Johnson at the address above, or info@npc.org.

Issued at Washington, DC, on August 23, 2011.

Carol A. Matthews,

Deputy Committee Management Officer.

[FR Doc. 2011-22120 Filed 8-29-11; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC-036]

Publication of the Petition for Waiver From LG Electronics, Inc. and Granting of the Interim Waiver From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from LG Electronics, Inc. (LG). The petition for waiver (hereafter "petition") requests a waiver from the U.S. Department of Energy (DOE) test procedure applicable to commercial package air-source and water-source central air conditioners and heat pumps. The petition is specific to the variable capacity Multi V III (commercial) multi-split heat pump models specified in LG's petition. Through this document, DOE: (1) Solicits comments, data, and information with respect to the LG petition; and (2) announces the grant of an interim waiver to LG from the existing DOE test procedure for the subject commercial multi-split air conditioners and heat pumps.

DATES: DOE will accept comments, data, and information with respect to the LG petition until, but no later than September 29, 2011.

ADDRESSES: You may submit comments, identified by case number "CAC-036," by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:*

AS Waiver_Requests@ee.doe.gov.

Include the case number [CAC-036] in the subject line of the message.

- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE-2/1000 Independence Avenue, SW., Washington, DC 20585-0121.

Telephone: (202) 586-2945. Please submit one signed original paper copy.

- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents

relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., Washington, DC 20024; (202) 586-2945, between 9 a.m. and 4 p.m., Monday through Friday, except on Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings and waivers regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE-2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 586-9611. E-mail: AS_Waiver_Requests@ee.doe.gov.

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC-71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0103. Telephone: (202) 586-7796. E-mail: mailto:Elizabeth.Kohl@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency, including part B of Title III, which establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles." (42 U.S.C. 6291-6309) part C of Title III provides for a similar energy efficiency program titled "Certain Industrial Equipment," which includes commercial air conditioning equipment, package boilers, water heaters, and other types of commercial equipment.¹ (42 U.S.C. 6311-6317)

Today's notice involves commercial equipment under Part C. Part C specifically includes definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316). With respect to test procedures, Part C authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly

burdensome to conduct. (42 U.S.C. 6314(a)(2)).

For commercial package air-conditioning and heating equipment, EPCA provides that "the test procedures shall be those generally accepted industry testing procedures or rating procedures developed or recognized by the Air-Conditioning and Refrigeration Institute [ARI] or by the American Society of Heating, Refrigerating and Air-Conditioning Engineers [ASHRAE], as referenced in ASHRAE/IES Standard 90.1 and in effect on June 30, 1992." (42 U.S.C. 6314(a)(4)(A)) Under 42 U.S.C. 6314(a)(4)(B), if the industry test procedure for commercial package air-conditioning and heating equipment is amended, EPCA directs the Secretary to amend the corresponding DOE test procedure unless the Secretary determines, by rule and based on clear and convincing evidence, that such a modified test procedure does not meet the statutory criteria set forth in 42 U.S.C. 6314(a)(2) and (3).

On December 8, 2006, DOE published a final rule adopting test procedures for commercial package air-conditioning and heating equipment, effective January 8, 2007. 71 FR 71340. Table 1 to Title 10 of the Code of Federal Regulations (10 CFR) 431.96 directs manufacturers of commercial package air conditioning and heating equipment to use the appropriate procedure when measuring energy efficiency of those products. For commercial package air-source equipment with capacities between 65,000 and 760,000 Btu/h, ARI Standard 340/360-2004 is the applicable test procedure.

DOE's regulations for covered products permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers remain in effect

pursuant to the provisions of 10 CFR 431.401(g).

The waiver process also permits parties submitting a petition for waiver to file an application for interim waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 431.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs first. It may be extended by DOE for an additional 180 days. 10 CFR 431.401(e)(4).

II. Petition for Waiver

On July 22, 2011, LG filed a petition for waiver from the test procedures at 10 CFR 431.96 applicable to commercial package air-source and water-source central air conditioners and heat pumps, as well as an application for interim waiver. LG's petition requested a waiver for the LG Multi V III multi-split heat pumps with capacities ranging from 69,000 Btu/h to 414,000 Btu/h. The applicable test procedure for these heat pumps is ARI 340/360-2004. Manufacturers are directed to use these test procedures pursuant to Table 1 of 10 CFR 431.96.

LG seeks a waiver from the applicable test procedures under 10 CFR 431.96 on the grounds that its Multi V III multi-split heat pumps contain design characteristics that prevent testing according to the current DOE test procedures. Specifically, LG asserts that the two primary factors that prevent testing of its Multi V III multi-split variable speed products are the same factors stated in the waivers that DOE granted to Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi) and other manufacturers for similar lines of commercial multi-split air-conditioning systems:

- Testing laboratories cannot test products with so many indoor units; and
- There are too many possible combinations of indoor and outdoor units to test. *See, e.g.*, 72 FR 17528 (April 9, 2007) (Mitsubishi); 76 FR 19069 (April 6, 2011) (Daikin); 76 FR 19078 (April 6, 2011) (Mitsubishi); 76 FR 31951 (June 2, 2011) (Carrier); 76 FR

¹ For editorial reasons, upon codification in the U.S. Code, Parts B and C were re-designated parts A and A-1, respectively.

50204 (August 12, 2011) (Fujitsu General Limited).

The Multi V III systems have operational characteristics similar to the commercial multi-split products manufactured by other manufacturers. As indicated above, DOE has already granted waivers for these products. The Multi V III system consists of multiple indoor units connected to an air-cooled outdoor unit. These multi-splits are used in zoned systems where an outdoor or water-source unit can be connected with up to 13–61 separate indoor units, which need not be the same models. According to LG, the various indoor and outdoor models can be connected in a multitude of configurations, with many thousands of possible combinations. Consequently, LG requested that DOE grant a waiver from the applicable test procedures for its Multi V III product designs until a suitable test method can be prescribed.

III. Application for and Grant of Interim Waiver

On July 22, 2011, LG also submitted an application for an interim waiver from the test procedures at 10 CFR 431.96 for its Multi V III equipment. DOE determined that LG's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship LG might experience absent a favorable determination on its application for an interim waiver. DOE understands, however, that if it did not issue an interim waiver, LG's products would not be tested and rated for energy consumption in the same manner as equivalent products for which DOE previously granted waivers. Furthermore, DOE has determined that it appears likely that LG's petition for waiver will be granted and that is desirable for public policy reasons to grant LG immediate relief pending a determination on the petition for waiver. DOE believes that it is likely LG's petition for waiver for the new Multi V III multi-split models will be granted because, as noted above, DOE has previously granted a number of waivers for similar product designs. The two principal reasons supporting the grant of the previous waivers also apply to LG's Multi V III products: (1) Test laboratories cannot test products with so many indoor units; and (2) it is impractical to test so many combinations of indoor units with each outdoor unit. In addition, DOE believes that similar products should be tested and rated for energy consumption on a comparable basis. For these same

reasons, DOE also determined that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

Therefore, *it is ordered that:*

The application for interim waiver filed by LG is hereby granted for LG's Multi V III multi-split heat pumps, subject to the specifications and conditions below.

1. LG shall not be required to test or rate its Multi V III commercial multi-split products on the basis of the existing test procedures under 10 CFR 431.96, which incorporates by reference ARI 340/360–2004.

2. LG shall be required to test and rate its Multi V III commercial multi-split products according to the alternate test procedure as set forth in section IV, "Alternate test procedure."

The interim waiver applies to the following basic model groups:

Multi V Series Air-Source Heat Pumps and Heat Recovery Units:

ARU*072*T3, ARU*096*T3, ARU*121*T3, ARU*144*T3, ARU*168*T3, ARU*192*T3, ARU*216*T3, ARU*240*T3, ARU*264*T3, ARU*288*T3, ARU*312*T3, ARU*336*T3, ARU*360*T3, ARU*384*T3, ARU*408*T3, ARU*432*T3, with normally rated cooling capacities of 69,000, 92,000, 114,000, 138,000, 160,000, 184,000, 206,000, 228,000, 250,000, 274,000, 296,000, 320,000, 342,000, 366,000, 390,000, and 414,000 Btu/h respectively.

Compatible indoor units for the above-listed air-source and water-source units:

Wall Mounted: ARNU073SEL2, ARNU093SEL2, ARNU123SEL2, ARNU153SEL2, ARNU183S5L2, and ARNU243S5L2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Art Cool Mirror: ARNU073SE*2, ARNU093SE*2, ARNU123SE*2, ARNU153SE*2, ARNU183S3*2, and ARNU243S3*2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

4 Way Cassette: ARNU053TR*2, ARNU073TEC2, ARNU093TEC2, ARNU093TN*2, ARNU123TEC2, ARNU123TN*2, ARNU153TEC2, ARNU153TN*2, ARNU183TEC2, ARNU183TM*2, ARNU243TPC2, ARNU243TM*2, ARNU283TPC2, ARNU363TNC2, ARNU423TMC2, and ARNU483TMC2, with nominally rated cooling capacities of 5,300, 7,500, 9,600, 9,600, 12,300, 12,300, 15,400, 15,400, 19,100, 19,100, 24,200, 24,200, 28,000, 36,200, 42,000, and 48,100 Btu/h respectively.

2 Way Cassette: ARNU183TLC2 and ARNU243TLC2, with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

1 Way Cassette: ARNU073TJC2, ARNU093TJC2, and ARNU123TJC2, with nominally rated capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Ceiling Concealed Duct—Low Static: ARNU073B1G2, RNU093B1G2, ARNU123B1G2, ARNU153B1G2, ARNU183B2G2, and ARNU243B2G2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—Built-in: ARNU073B3G2, ARNU093B3G2, ARNU123B3G2, ARNU153B3G2, ARNU183B4G2, and ARNU243B4G2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—High Static: ARNU073BHA2, ARNU093BHA2, ARNU123BHA2, ARNU153BGA2, ARNU183BHA2, ARNU183BGA2, ARNU243BHA2, ARNU243BGA2, ARNU283BGA2, ARNU363BGA2, ARNU423BGA2, ARNU483BRA2, URNU763B8A2, and URNU963B8A2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 15,400, 19,100, 19,100, 24,200, 24,200, 28,000, 36,200, 42,000, 48,100, 76,400, and 95,500 Btu/h respectively.

Ceiling & Floor: ARNU093VEA2 and ARNU123VEA2, with nominally rated capacities of 9,600 and 12,300 Btu/h respectively.

Ceiling Suspended: ARNU183VJA2 and ARNU243VJA2, with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

Floor Standing with Case: ARNU073CEA2, ARNU093CEA2, ARNU123CEA2, ARNU153CEA2, ARNU183CFA2, and ARNU243CFA2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Floor Standing without Case: ARNU073CEU2, ARNU093CEU2, ARNU123CEU2, ARNU153CEU2, ARNU183CFU2, and ARNU243CFU2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Vertical/Horizontal Air Handler: ARNU183NJA2, ARNU243NJA2, ARNU303NJA2, ARNU363NJA2, ARNU423NKA2, ARNU483NKA2, and ARNU543NKA2, with nominally rated capacities of 19,100, 24,200, 28,000, 36,200, 42,000, 48,100 and 54,000 Btu/h respectively.

This interim waiver is issued on the condition that the statements, representations, and documents provided by the petitioner are valid. DOE may revoke or modify this interim waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. LG may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of

commercial package air conditioners and heat pumps for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

IV. Alternate Test Procedure

In responses to two petitions for waiver from Mitsubishi, DOE specified an alternate test procedure to provide a basis from which Mitsubishi could test and make valid energy efficiency representations for its R410A CITY MULTI products, as well as for its R22 multi-split products. Alternate test procedures related to the Mitsubishi petitions were published in the **Federal Register** on April 9, 2007. See 72 FR 17528 and 72 FR 17533. For reasons similar to those published in these prior notices, DOE believes that an alternate test procedure is appropriate in this instance.

DOE understands that existing testing facilities have limited ability to test multiple indoor units simultaneously. This limitation makes it impractical for manufacturers to test the large number of possible combinations of indoor and outdoor units for some variable refrigerant flow zoned systems. We further note that after DOE granted a waiver for Mitsubishi's R22 multi-split products, ARI formed a committee to discuss testing issues and to develop a testing protocol for variable refrigerant flow systems. The committee has developed a test procedure which has been adopted by AHRI—"ANSI/AHRI 1230–2010: Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment" and incorporated into ASHRAE 90.1–2010. ANSI/AHRI 1230–2010 is consistent with the alternate test procedure established in the commercial multi-split waivers that DOE has granted to Mitsubishi and several other manufacturers. ANSI/AHRI 1230–2010 uses a definition of "tested combination" that is substantially the same as the definition in the alternate test procedure in those waivers. DOE prescribed ANSI/AHRI 1230–2010 in decision and orders granted to Carrier Corporation (76 FR 31951, June 2, 2011) and Fujitsu General Limited (76 FR 50204, August 12, 2011).

Therefore, as a condition for granting this interim waiver to LG, DOE requires the use of ANSI/AHRI–1230–2010 as the alternate test procedure for units with capacities at or below 300,000 Btu/hr and the alternate test procedure specified in the Mitsubishi waiver for larger capacity units. This alternate test

procedure will allow LG to test and make energy efficiency representations for its Multi V III products. As stated above, DOE has applied a similar alternate test procedure to other waivers for similar residential and commercial central air conditioners and heat pumps manufactured by other manufacturers. See, e.g., 72 FR 17528, April 9, 2007 (Mitsubishi); 76 FR 19069, April 6, 2011 (Daikin); 76 FR 19078, April 6, 2011 (Mitsubishi); 76 FR 31951, June 2, 2011 (Carrier); 76 FR 50204, August 12, 2011 (Fujitsu General Limited).

The alternate test procedure in the commercial multi-split waivers that DOE granted to Mitsubishi and the other manufacturers listed above is similar to ANSI/AHRI 1230–2010, except that, as stated previously, it covers equipment with cooling capacities greater than 300,000 Btu/hr while ANSI/AHRI 1230–2010 covers equipment with cooling capacities only equal to or less than 300,000 Btu/hr. In addition, the earlier alternate test procedure consisted of a definition of a "tested combination" and a prescription for representations. ANSI/AHRI 1230–2010 also includes a definition of "tested combination," and the two definitions are identical in all relevant respects. As described in the following paragraph, the prescription for representations in ANSI/AHRI is also similar to the prescription in the earlier alternate test procedure, but requires separate representations for ducted, non-ducted and mixed units.

The earlier alternate test procedure provides for efficiency rating of a non-tested combination in one of two ways: (1) At an energy efficiency level determined using a DOE-approved alternative rating method; or (2) at the efficiency level of the tested combination utilizing the same outdoor unit. ANSI/AHRI 1230–2010 requires an additional test and in this respect is similar to the residential test procedure set forth in 10 CFR part 430, subpart B, appendix M. Multi-split manufacturers must test two or more combinations of indoor units with each outdoor unit. The first system combination is tested using only non-ducted indoor units that meet the definition of a tested combination. The rating given to any untested multi-split system combination having the same outdoor unit and all non-ducted indoor units is set equal to the rating of the tested system having all non-ducted indoor units. The second system combination is tested using only ducted indoor units that meet the definition of a tested combination. The rating given to any untested multi-split system combination having the same outdoor unit and all ducted indoor units is set equal to the rating of the tested

system having all ducted indoor units. The rating given to any untested multi-split system combination having the same outdoor unit and a mix of non-ducted and ducted indoor units is set equal to the average of the ratings for the two required tested combinations.

Alternate Test Procedure

(A) LG is not required to test the products with cooling capacities of 300,000 Btu/h and below listed in its petition for waiver dated July 22, 2011, according to the test procedure for commercial package air conditioners and heat pumps prescribed by DOE at 10 CFR 431.96 (ARI Standard 340/360–2004 (incorporated by reference in 10 CFR 431.95(b)(2)–(3)), but instead shall use the alternate test procedure ANSI/AHRI 1230–2010.

(B) LG shall be required to test the equipment listed in its petition for waiver dated July 22, 2011, with cooling capacities above 300,000 Btu/h according to the test procedures for central air conditioners and heat pumps prescribed by DOE at 10 CFR 431.96, except that LG shall test a "tested combination" selected in accordance with the provisions of subparagraph (C). For every other system combination using the same outdoor unit as the tested combination, LG shall make representations concerning the Multi V III equipment covered in this interim waiver according to the provisions of subparagraph (D).

(C) Tested combination. The term tested combination means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this waiver, the tested combination shall have the following features:

(1) The basic model of a variable refrigerant flow system used as a tested combination shall consist of one outdoor unit, with one or more compressors, that is matched with between two and five indoor units. (For systems with nominal cooling capacities greater than 150,000 Btu/h, as many as eight indoor units may be used, to enable testing of non-ducted indoor unit combinations.) For multi-split systems, each of these indoor units shall be designed for individual operation.

(2) The indoor units shall—

(i) Represent the highest sales model family or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(ii) Together, have a nominal cooling capacity that is between 95% and 105% of the nominal cooling capacity of the outdoor unit;

(iii) Not, individually, have a nominal cooling capacity that is greater than 50% of the nominal cooling capacity of the outdoor unit;

(iv) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(v) Be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR part 430, subpart B, appendix M.

(D) *Representations.* In making representations about the energy efficiency of its Multi V III variable capacity multi-split heat pump products for compliance, marketing, or other purposes, LG must fairly disclose the results of testing under the DOE test procedure in a manner consistent with the provisions outlined below:

(1) For Multi V III combinations tested in accordance with this alternate test procedure, LG may make representations based on these test results.

(2) For Multi V III combinations that are not tested, LG may make representations of non-tested combinations at the same energy efficiency level as the tested combination. The outdoor unit must be the one used in the tested combination. The representations must be based on the test results for the tested combination. The representations may also be determined by an Alternative Rating Method approved by DOE.

V. Summary and Request for Comments

Through today's notice, DOE announces receipt of the LG petition for waiver from the test procedures applicable to the Multi V III commercial multi-split heat pump products specified in LG's petition. For the reasons articulated above, DOE also grants LG an interim waiver from those procedures. As part of this notice, DOE is publishing LG's petition for waiver in its entirety. The petition contains no confidential information. Furthermore, today's notice includes an alternate test procedure that LG is required to follow as a condition of its interim waiver.

DOE is interested in receiving comments on the issues addressed in this notice. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR 431.401(d). The contact information for the petitioner is: John I. Taylor, Vice President, Government Relations and Communications, LG Electronics USA, Inc., 1776 K Street, NW., Washington,

DC 20006. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on August 23, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

Englewood Cliffs, NJ 07632
July 22, 2011

The Honorable Dr. Henry Kelly
Acting Assistant Secretary and Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy
United States Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, DC 20585-0121

Re: Petition for Waiver and Application for Interim Waiver, LG Electronics Multi V III VRF Multi-Split Heat Recovery Systems and Heat Pump Systems

Dear Assistant Secretary Kelly:

LG Electronics, Inc. (LG) respectfully submits this Petition for Waiver and Application for Interim Waiver, pursuant to 10 C.F.R. § 431.401, for certain LG Multi V III variable refrigerant flow (VRF) multi-split air-source heat recovery systems, specifically the Multi V III heat recovery systems (3Ø 208/230 V 60 Hz, and 3Ø 460 V 60 Hz), and LG Multi V III VRF multi-split air-source heat pump systems, specifically the Multi V III heat pump systems (3Ø 208/230 V 60 Hz, and 3Ø 460 V 60 Hz), listed in Appendix A hereto. This request adds models to the waivers that DOE already has granted to LG for Multi V and Multi V II VRF multi-split systems. 76 Fed. Reg. 29733 (May 23, 2011) (interim waiver); 74 Fed. Reg. 66330 (Dec. 15, 2009); id. 20688 (May 5, 2009) (interim waiver).

Among other things, the applicable DOE test procedure does not provide a method for testing and rating a system that utilizes so many indoor units; the applicable test

procedure does not provide a method for rating systems where the type and capacity of the indoor unit can be mixed in the same system; and no testing laboratories can test products with so many indoor units. See, e.g., 75 Fed. Reg. 41845, 41848 (July 19, 2010) (existing testing facilities "have a limited ability to test multiple indoor units simultaneously," and "it is impractical to test some variable refrigerant flow zoned systems").

Waiver relief has been granted for many other comparable commercial multi-splits, including LG, Mitsubishi, Samsung, Fujitsu, Sanyo, Daikin, and Carrier. See 69 Fed. Reg. 52660 (Aug. 27, 2004) (Mitsubishi); 70 Fed. Reg. 9629 (Feb. 28, 2005) (Samsung); 71 Fed. Reg. 14858 (March 24, 2006) (Mitsubishi); 72 Fed. Reg. 17528 (April 9, 2007) (Mitsubishi); id. 71387 (Dec. 17, 2007) (Samsung); id. 71383 (Dec. 17, 2007) (Fujitsu); 73 Fed. Reg. 179 (Jan. 2, 2008) (Sanyo); id. 1207, 1213 (Jan. 7, 2008) (Daikin); id. 39680 (July 10, 2008) (Daikin); id. 75408 (Dec. 11, 2008) (Mitsubishi); 74 Fed. Reg. 15955 (April 8, 2009) (Daikin); id. 16373 (April 10, 2009) (Daikin); id. 20688 (May 5, 2009) (LG); id. 66330 (Dec. 15, 2009) (LG); id. 66324 (Dec. 15, 2009) (Daikin); id. 66311, 66315 (Dec. 15, 2009) (Mitsubishi); 75 Fed. Reg. 4795 (Jan. 29, 2010) (Daikin); id. 13114 (March 18, 2010) (Sanyo); id. 22581 (April 29, 2010) (Daikin); id. 25224 (May 7, 2010) (Daikin); id. 41845 (July 19, 2010) (Sanyo); 76 Fed. Reg. 19069 (April 6, 2011) (Daikin); id. 19078 (April 6, 2011) (Mitsubishi); id. 19759 (April 8, 2011) (Carrier); id. 29733 (May 23, 2011) (LG); id. 31946 (June 2, 2011) (Fujitsu); id. 31951 (June 2, 2011) (Carrier); id. 34685 (June 14, 2011) (Daikin); and id. 40714 (July 11, 2011) (Mitsubishi). As stated above, LG's current request simply adds additional models to the waiver relief already granted to LG.

LG is a manufacturer of digital appliances, as well as mobile communications, digital displays, and digital media products. Its appliances include air-conditioners, washing machines, clothes dryers, refrigerators, refrigerator-freezers, air cleaners, ovens, microwave ovens, dishwashers, and vacuum cleaners and are sold worldwide, including in the United States. LG's U.S. operations are LG Electronics USA, Inc., with headquarters at 1000 Sylvan Avenue, Englewood Cliffs, NJ 07632 (tel. 201-816-2000). Its worldwide headquarters are located at LG Twin Towers 20, Yoido-dong, Youngdungpo-gu Seoul, Korea 150-721 (tel. 011-82-2-3777-1114) URL: <http://www.LGE.com>. LG's principal brands include LG® and OEM brands, including GE® and Kenmore®. LG's appliances are produced in Korea and Mexico.

LG's Multi V VRF systems are beneficial products, each consisting of a single outdoor unit, using a scroll type inverter compressor with variable capacity, that can connect to multiple indoor units and that uses VRF and control systems. (In certain high capacity applications [152,900 Btu/h and above], a consumer can choose between a system using a single outdoor unit and a system using two or three outdoor units.) These multi-splits are intended to be used in zoned systems where an outdoor unit can be connected with up to

between 13 and 61 separate indoor units, which need not be the same models. The operating characteristics allow each indoor unit to have a different set temperature and a different mode of operation (i.e., on/off/fan). All of the indoor units are capable of operating independently, with their own temperature and fan speed setting. Based on those controls, the outdoor unit will then determine the cooling or heating capacity delivered into the zones. The system therefore offers great flexibility and convenience to the consumer, permitting precise space conditioning control throughout the building, and thus saving energy. The cooling capacities of the systems are between 69,000 and 414,000 Btu/h.

The variable speed, constant speed or dual compressors and the associated system controls can direct refrigerant flow throughout the system to precisely meet the various heating or cooling loads required in the conditioned areas. The compressor is capable of reducing its operating capacity to as little as 10 percent of its rated capacity. The outdoor fan motor also has a variable speed drive to properly match the outdoor coil to indoor loads. Zone diversity enables the system to have a total connected indoor unit capacity of up to 130 percent of the capacity of the outdoor.

As discussed above, up to between 13 and 61 indoor units can be matched with each related outdoor unit. Thus, for each outdoor unit there is a multitude of possible combinations of indoor units that can be matched in a system configuration. And since there are so many outdoor units and indoor units, there is an enormous total of possible combinations.

A waiver and interim waiver for the specified LG Multi V III VRF systems are warranted because test procedures under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291 et seq., namely 10 C.F.R. § 431.96, evaluate the basic models in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data, and/or the basic models contain one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. In such circumstances DOE "will grant" waiver relief. 10 C.F.R. §§ 431.401(e)(3), (f)(4). In that regard:

- The test procedure provides for testing of a pair of indoor and outdoor assemblies making up a typical split system, but does not specify how LG Multi V VRF systems, with so many combinations of indoor units for each outdoor unit, could be evaluated. The situation is further complicated by the fact that there are so many outdoor units. It is not practical to test each possible combination, and the test procedure provides no alternative rating method for generating efficiency ratings for systems with more than one indoor unit. Thus, the test procedure does not contemplate, and cannot practically be applied to, LG Multi V VRF systems. DOE has already recognized this by granting waiver relief to LG, and to other manufacturers for comparable systems.
- Testing laboratories cannot test products with so many indoor units. In that regard,

the testing of multi-splits when all indoor units are connected cannot be physically located in a single room.

- The test procedure provides for testing "matched assemblies," which does not apply to LG Multi V VRF systems. Indoor and outdoor coils in split systems are typically balanced; that is, the capacity of the outdoor coil is equivalent to the capacity of the indoor coil. The test procedure's application to "matched assemblies" contemplates such a balance between indoor and outdoor coil capacity. With the Multi V VRF systems, however, the sum of the capacity of the indoor units connected into the system can be as much as 130 percent of the capacity of the outdoor coil. Such unbalanced combinations of LG indoor and outdoor units are permitted by the zoning characteristics of the system, the use of electronic expansion valves to precisely control refrigerant flow to each indoor coil, and the system intelligence for overall system control. The test procedure designed for "matched assemblies" therefore does not contemplate or address testing for substantially unbalanced zoning systems such as the LG Multi V VRF systems.
- The indoor units are designed to operate at many different external static pressure values, which compounds the difficulty of testing LG Multi V VRF systems. A test facility could not maintain proper airflow at several different external static pressure values for the many indoor units that would be connected to the outdoor unit.

* * *

For all of these reasons, the existing test procedures evaluate the LG Multi V VRF systems in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data and/or the basic models contain one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. Therefore, DOE should grant a waiver for the LG Multi V VRF systems set forth in Appendix A. See 10 C.F.R. § 431.401(a)(1). The waiver should continue until a test procedure can be developed and adopted that will provide the U.S. market with a fair and accurate assessment of the LG Multi V VRF system energy consumption and efficiency levels. LG intends to work with DOE, stakeholders, and the Air-Conditioning, Heating and Refrigeration Institute (AHRI) to develop the appropriate test procedure.

There are no alternative test procedures known to LG that could evaluate these products in a representative manner (other than perhaps the procedures provided by DOE in its waiver decisions for comparable products).

That a waiver is warranted is borne out by the fact that DOE has granted waiver relief to LG, as well as to Mitsubishi, Samsung, Fujitsu, Sanyo, Daikin, and Carrier for comparable commercial multi-splits.

Manufacturers of all other basic models marketed in the United States and known to LG to incorporate similar design characteristics as found in the LG Multi V VRF systems include Mitsubishi Electric and

Electronics USA, Samsung Air Conditioning, Fujitsu General Limited, SANYO North America Corp., Daikin AC (Americas), Inc., and Carrier Corporation.

LG also requests immediate relief by grant of an interim waiver. Grant of an interim waiver is fully justified:

- The petition for waiver is likely to be granted, as evidenced not only by its merits, but also because DOE has already granted waiver relief to LG, Mitsubishi, Samsung, Fujitsu, Sanyo, Daikin, and Carrier for their commercial VRF multi-splits. In such instances, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.
- Without waiver relief, LG will be at a competitive disadvantage in the market and suffer economic hardship. LG would be placed in an untenable situation: the Multi V VRF systems involved here would be subject to a set of regulations that DOE already acknowledges should not apply to such a product, while at the same time other manufacturers are allowed to operate relieved from such regulations.
- Significant investment has already been made in LG Multi V VRF systems. Lack of relief would not allow LG to recoup this investment as it relates to the models involved here and would deny LG anticipated sales revenue. This does not take into account significant losses in goodwill and brand acceptance.
- The basic purpose of EPCA is to foster purchase of energy-efficient products, not hinder such purchases. LG Multi V VRF systems produce a benefit to consumers and are in the public interest. To encourage and foster the availability of these products is in the public interest. Standards programs should not be used as a means to block innovative, improved designs.² DOE's rules should accommodate and encourage—not act to block—such a product.
- Granting the interim waiver and waiver would also eliminate a non-tariff trade barrier.
- Grant of relief would also help enhance economic development and employment, including not only LG Electronics USA's operations in New Jersey, Georgia, Texas, California, Illinois and Alabama, but also at major national retailers and regional dealers that carry LG products. Furthermore, continued employment creation and ongoing investments in its marketing, sales and servicing activities will be fostered by approval of the interim waiver. Conversely, denial of the requested relief would harm the company and would be anticompetitive.

CONCLUSION

LG respectfully requests that DOE grant a waiver and interim waiver from existing test standards for LG Multi V III VRF multi-split systems set forth in Appendix A hereto until such time as a representative test procedure is developed and adopted for such products.

² See FTC Advisory Opinion No. 457, TRRP 1718.20 (1971 Transfer Binder); 49 Fed. Reg. 32213 (Aug. 13, 1984); 52 Fed. Reg. 49141, 49147–48 (Dec. 30, 1987).

We would be pleased to discuss this request with DOE and provide further information as needed.

We hereby certify that all manufacturers of domestically marketed units of the same product type have been notified by letter of this petition and application, copies of which letters are attached (Appendix B hereto).

Sincerely,



John I. Taylor
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APPENDIX A

MULTI V III SERIES AIR-SOURCE HEAT PUMPS AND HEAT RECOVERY UNITS

Rated cooling capacity Btu/h	Model name				Frame type
	Multi V III heat pump 3 phase 208/230 V 60 Hz	Multi V III heat recovery 3 phase 208/230 V 60 Hz	Multi V III heat pump 3 phase 460 V 60 Hz	Multi V III heat recovery 3 phase 460 V 60 Hz	
69000	ARUN072BT3 ...	ARUB072BT3 ...	ARUN072DT3 ...	ARUB072DT3 ...	Single
92000	ARUN096BT3 ...	ARUB096BT3 ...	ARUN096DT3 ...	ARUB096DT3 ...	
114000	ARUN121BT3 ...	ARUB121BT3 ...	ARUN121DT3 ...	ARUB121DT3 ...	Dual
138000	ARUN144BT3 ...	ARUB144BT3 ...	ARUN144DT3 ...	ARUB144DT3 ...	
160000	ARUN168BT3 ...	ARUB168BT3 ...	ARUN168DT3 ...	ARUB168DT3 ...	
184000	ARUN192BT3 ...	ARUB192BT3 ...	ARUN192DT3 ...	ARUB192DT3 ...	
206000	ARUN216BT3 ...	ARUB216BT3 ...	ARUN216DT3 ...	ARUB216DT3 ...	
228000	ARUN240BT3 ...	ARUB240BT3 ...	ARUN240DT3 ...	ARUB240DT3 ...	
250000	ARUN264BT3 ...	ARUB264BT3 ...	ARUN264DT3 ...	ARUB264DT3 ...	Triple
274000	ARUN288BT3 ...	ARUB288BT3 ...	ARUN288DT3 ...	ARUB288DT3 ...	
296000	ARUN312BT3 ...	ARUB312BT3 ...	ARUN312DT3 ...	ARUB312DT3 ...	
320000	ARUN336BT3 ...	ARUB336BT3 ...	ARUN336DT3 ...	ARUB336DT3 ...	
342000	ARUN360BT3 ...	ARUB360BT3 ...	ARUN360DT3 ...	ARUB360DT3 ...	
366000	ARUN384BT3 ...	ARUB384BT3 ...	ARUN384DT3 ...	ARUB384DT3 ...	
390000	ARUN408BT3 ...	ARUB408BT3 ...	ARUN408DT3 ...	ARUB408DT3 ...	
414000	ARUN432BT3 ...	ARUB432BT3 ...	ARUN432DT3 ...	ARUB432DT3 ...	

COMPATIBLE INDOOR UNITS FOR THE ABOVE-LISTED MODELS
[Shaded indoor units not previously listed in DOE waiver]

Rated cooling capacity	Indoor unit								
	Wall mounted	Art cool mirror	Vertical/horizontal air handler	4 way cassette		2 way cassette	1 way cassette	Ceiling concealed duct—low static	Ceiling concealed duct—built in
5300				ARNU073TEC2	ARNU053TR*2		ARNU073TJC2	ARNU073B1G2	ARNU073B3G2
7500	ARNU073SEL2	ARNU073SE*2		ARNU093TEC2	ARNU093TN*2		ARNU093TJC2	ARNU093B1G2	ARNU093B3G2
9600	ARNU093SEL2	ARNU093SE*2		ARNU123TEC2	ARNU123TN*2		ARNU123TJC2	ARNU123B1G2	ARNU123B3G2
12300	ARNU123SEL2	ARNU123SE*2		ARNU153TEC2	ARNU153TN*2			ARNU153B1G2	ARNU153B3G2
15400	ARNU153SEL2	ARNU153SE*2	ARNU183NJA2	ARNU183TEC2	ARNU183TM*2	ARNU183TLC2		ARNU183B2G2	ARNU183B4G2
19100	ARNU183S5L2	ARNU183S5*2	ARNU243NJA2	ARNU243TPC2	ARNU243TM*2	ARNU243TLC2		ARNU243B2G2	ARNU243B4G2
24200	ARNU243S5L2	ARNU243S5*2							
28000			ARNU303NJA2	ARNU283TPC2					
36200			ARNU363NJA2	ARNU363TNC2					
42000			ARNU423NKA2	ARNU423TMC2					
48100			ARNU483NKA2	ARNU483TMC2					
54000			ARNU543NKA2						
76400									
95500									

Rated cooling capacity	Indoor unit				
	Ceiling concealed duct—high static	Ceiling & floor	Ceiling suspended	Floor standing with case	Floor standing without case
7500	ARNU073BHA2			ARNU073CEA2	ARNU073CEU2
9600	ARNU093BHA2	ARNU093VEA2		ARNU093CEA2	ARNU093CEU2
12300	ARNU123BHA2	ARNU123VEA2		ARNU123CEA2	ARNU123CEU2
15400	ARNU153BHA2		ARNU183VJA2	ARNU153CEA2	ARNU153CEU2
19100	ARNU183BHA2	ARNU183BGA2	ARNU243VJA2	ARNU183CFA2	ARNU183CFU2
24200	ARNU243BHA2	ARNU243BGA2		ARNU243CFA2	ARNU243CFU2
28000	ARNU283BGA2				
36200	ARNU363BGA2				
42000	ARNU423BGA2				
48100	ARNU483BGA2				
54000					
76400	URNU763B8A2				
95500	URNU963B8A2				

[FR Doc. 2011-22112 Filed 8-29-11; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP11-2404-000.

Applicants: KO Transmission Company.

Description: KO Transmission Company submits tariff filing per 154.402: Annual Charge Adjustment Filing to be effective 10/1/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5059.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Docket Numbers: RP11-2405-000.

Applicants: Questar Overthrust Pipeline Company.

Description: Questar Overthrust Pipeline Company submits tariff filing per 154.204: Correction to Forms of Agreement to be effective 9/23/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5111.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Docket Numbers: RP11-2406-000.

Applicants: Questar Overthrust Pipeline Company.

Description: Questar Overthrust Pipeline Company submits tariff filing per 154.204: Inactive Meters/Facilities to be effective 9/21/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5112.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Docket Numbers: RP11-2407-000.

Applicants: Questar Southern Trails Pipeline Company.

Description: Questar Southern Trails Pipeline Company submits tariff filing per 154.204: Inactive Meters/Facilities to be effective 9/21/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5113.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Docket Numbers: RP11-2408-000.

Applicants: White River Hub, LLC.
Description: White River Hub, LLC submits tariff filing per 154.204: Correction to Forms of Agreement to be effective 9/23/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5114.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Docket Numbers: RP11-2409-000.

Applicants: White River Hub, LLC.

Description: White River Hub, LLC submits tariff filing per 154.204: Inactive Meters/Facilities to be effective 9/21/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5115.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Docket Numbers: RP11-2410-000.

Applicants: Gulf States Transmission LLC.

Description: Gulf States Transmission LLC submits tariff filing per 154.402: Gulf States Transmission LLC ACA Tariff Update to be effective 10/1/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5164.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 06, 2011.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: August 23, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011-22054 Filed 8-29-11; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11-119-000.

Applicants: Copper Mountain Solar 1, LLC.

Description: Copper Mountain Solar 1, LLC Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 08/22/2011.

Accession Number: 20110822-5079.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: EG11-120-000.

Applicants: Pinnacle Wind, LLC.

Description: Notice of Self-Certification as an Exempt Wholesale Generator of Pinnacle Wind, LLC.

Filed Date: 08/22/2011.

Accession Number: 20110822-5213.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11-4336-002.

Applicants: ISO New England Inc.

Description: ISO New England Inc. submits tariff filing per 35.17(b): Errata to Docket No. ER11-4336-001 to be effective 6/1/2015.

Filed Date: 08/22/2011.

Accession Number: 20110822-5084.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: ER11-4347-000.

Applicants: ITC Midwest LLC.

Description: ITC Midwest LLC submits tariff filing per 35.13(a)(2)(iii): Filing of Distribution-Transmission Agreement to be effective 10/22/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5086.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: ER11-4348-000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii): Non-Queued Interconnection Service Agreement—Original Service 2960 to be effective 7/21/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5116.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: ER11-4349-000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii): 2233 Osage Wind/GRDA Facilities Construction Agreement to be effective 7/21/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5144.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: ER11-4351-000.

Applicants: Pinnacle Wind, LLC.

Description: Pinnacle Wind, LLC submits tariff filing per 35.12: Application for Market-Based Rate Authority to be effective 10/3/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5166.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: ER11-4352-000.
Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits tariff filing per 35.13(a)(2)(iii): Service Agreement No. 312, LGIA of Perrin Ranch Wind, LLC to be effective 8/23/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5167.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

Docket Numbers: ER11-4353-000.
Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii): 2011-08-22 CAISO Regulation Energy Management Amendment to be effective 12/1/2011.

Filed Date: 08/22/2011.

Accession Number: 20110822-5222.

Comment Date: 5 p.m. Eastern Time on Monday, September 12, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: August 23, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011-22092 Filed 8-29-11; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-RCRA-2011-0178; FRL-9457-5]

EPA Seeking Input Materials Measurement; Municipal Solid Waste (MSW), Recycling, and Source Reduction Measurement in the U.S.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) issued a

notice in the **Federal Register** of August 2, 2011 soliciting stakeholder input regarding the efficacy and scope of the MSW Characterization Report called "Municipal Solid Waste in the United States" as part of a broader discussion about sustainable materials management. This information will be used to develop new measurement definitions and protocols for measurement of these materials, as well as the possible addition of construction and demolition (C&D) materials and non-hazardous industrial materials to the list of materials addressed in future efforts. This effort could lead to the creation of a new measurement report that the EPA will make publicly available. This document is extending the comment period from August 31, 2011 to September 30, 2011.

DATES: All written comments must be received on or before September 30, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-RCRA-2011-0178 by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments using the Docket ID No. EPA-HQ-RCRA-2011-0178.

- *E-mail:* rcra-docket@epa.gov.

- *Fax:* 202-566-9744.

- *Mail:* RCRA Docket (28221T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Hand Delivery:* EPA West Building Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays) and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-RCRA-2011-0178. 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. 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 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/dockets/>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the RCRA Docket is (202) 566-0270.

FOR FURTHER INFORMATION CONTACT: Hope Pillsbury, Mail Code (5306P), Office of Resource Conservation and Recovery, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-7258; pillsbury.hope@epa.gov.

SUPPLEMENTARY INFORMATION:

This document extends the public comment period established in the **Federal Register** of August 2, 2011 (76 FR 46290?) (FRL-9446-9). In that document, EPA sought comments regarding the efficacy and scope of the MSW Characterization Report called "Municipal Solid Waste in the United States" as part of a broader discussion about sustainable materials management. Several requests were received from potential commenters, to extend the comment period by 30 days. EPA is hereby extending the comment period, which was set to end on August 31, 2011, to September 30, 2011. EPA will consider all comments received by

September 30, 2011 to be timely and given full consideration.

To submit comments, please follow the detailed instructions as provided under the **ADDRESSES** section of this notice. If you have questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, municipal solid waste (MSW) characterization, MSW management, recycling, measurement, data, data collection, construction and demolition (C&D) recycling, source reduction, life cycle, life cycle systems approach, sustainable materials management.

Dated: August 18, 2011.

Suzanne Rudzinski,

Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response.

[FR Doc. 2011-22137 Filed 8-29-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9456-9]

Proposed Administrative Settlement Agreement and Order on Consent; In Re: Ely Copper Mine Superfund Site, Located in Vershire, VT

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), and Section 7003(d) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 9673(d), notice is hereby given of a proposed settlement for recovery of past and projected future response costs concerning the Ely Copper Mine Superfund Site in Vershire, Vermont with the following settling party: Ely Mine Forest, Inc. The proposed settlement requires the settling party to hold all of its remaining cash accounts for purposes of paying certain site-related expenses approved by EPA. In addition, the proposed settlement requires the settling party to: use best efforts to market and sell the site property, allow EPA to remove and use borrow material located on the site property, provide EPA and their contractors access to the site property, and prepare and record any documents necessary to implement institutional controls on the site property. The

proposed settlement includes a covenant not to sue the settling party pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a) and Section 7003 of RCRA, 42 U.S.C. 6973.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the US EPA Region 1 OSRR Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109. During the public comment period, commenters may request an opportunity for a public meeting in the affected area in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Comments should be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region I, 5 Post Office Square, Suite 100, Mailcode ORA18-1, Boston, MA 02109 and should refer to: In re: Ely Mine Forest, Inc., U.S. EPA Region 1 Docket No. CERCLA-01-2011-0012.

FOR FURTHER INFORMATION CONTACT: The proposed settlement and additional background information relating to the settlement are available for public inspection at the Vershire Town Hall, 6894 VT Rt. 113, Vershire, VT or at the US EPA Region 1 OSRR Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109. In addition, a copy of the proposed settlement agreement can be obtained from Ann Gardner, U.S. Environmental Protection Agency, Region I, 5 Post Office Square, Suite 100, Mailcode OES04-4, Boston, MA 02109-3912, or by e-mail at gardner.ann@epa.gov. Additional information on the Ely Copper Mine Superfund Site can be found through the US EPA Region I Web site at <http://www.epa.gov/region1/cleanup/index.html>.

Dated: May 17, 2011.

Stanley D. Chin,

Acting Director, Office of Site Remediation and Restoration, U.S. EPA, Region I.

[FR Doc. 2011-21991 Filed 8-29-11; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92-237; DA 11-1434]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission released a public notice announcing the meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and agenda.

DATES: Thursday, September 15, 2011, 9:30 a.m.

ADDRESSES: Requests to make an oral statement or provide written comments to the NANC should be sent to Deborah Blue, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 Twelfth Street, SW., Room 5-C162, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418-1466 or Deborah.Blue@fcc.gov. The fax number is: (202) 418-1413. The TTY number is: (202) 418-0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document in CC Docket No. 92-237, DA 11-1434 released August 22, 2011. The complete text in this document is available for public inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (800) 378-3160 or (202) 863-2893, facsimile (202) 863-2898, or via the Internet at <http://www.bcpweb.com>. It is available on the Commission's Web site at <http://www.fcc.gov>.

The North American Numbering Council (NANC) has scheduled a meeting to be held Thursday, September 15, 2011, from 9:30 a.m. until 5 p.m. The meeting will be held at the Federal Communications Commission, Portals II, 445 Twelfth Street, SW., Room TW-C305, Washington, DC. This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two

business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting.

People With Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Proposed Agenda: Thursday, September 15, 2011, 9:30 a.m.*

1. Announcements and Recent News.
2. Approval of Transcript Meeting of May 17, 2011.
3. Report of the North American Numbering Plan Administrator (NANPA).
4. Report of the National Thousands Block Pooling Administrator (PA).
5. Report of the Numbering Oversight Working Group (NOWG).
6. Report of the North American Numbering Plan Billing and Collection (NANP B&C) Agent.
7. Report of the Billing and Collection Working Group (B&C WG).
8. Report of the North American Portability Management LLC (NAPM LLC).
9. Report of the LNPA Selection Working Group (SWG).
10. Report of the Local Number Portability Administration (LNPA) Working Group.
11. Status of the Industry Numbering Committee (INC) activities.
12. Report of the Future of Numbering Working Group (FoN WG).
13. Summary of Action Items.
14. Public Comments and Participation (5 minutes per speaker).
15. Other Business.

Adjourn no later than 5 p.m.

* The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Ann Stevens,

Attorney, Wireline Competition Bureau.

[FR Doc. 2011-22195 Filed 8-29-11; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of 10006—First Integrity Bank, Staples, MN

Notice Is Hereby Given that the Federal Deposit Insurance Corporation ("FDIC") as Receiver for First Integrity Bank, Staples, MN ("the Receiver") intends to terminate its receivership for said institution. The FDIC was appointed Receiver of First Integrity Bank, Staples, MN on May 30, 2008. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 8.1, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Federal Deposit Insurance Corporation.

Dated: August 25, 2011.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011-22094 Filed 8-29-11; 8:45 am]

BILLING CODE 6714-01-P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

AGENCY: Federal Election Commission.

DATE AND TIME: *Thursday, September 1, 2011 at 10 a.m.*

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of the Minutes for the Meeting of August 4, 2011.

Draft Advisory Opinion 2011-15: Abdul Karim Hassan, *Esq.*

Draft Advisory Opinion 2011-17: Giffords for Congress.

Interpretive Rule on When Certain Independent Expenditures are "Publicly Disseminated" for Reporting Purposes.

Proposed Final Audit Report on the United Association Political Education Committee (A09-27).

Management and Administrative Matters.

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.

Signed:

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2011-22182 Filed 8-26-11; 11:15 am]

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 September 13, 2011.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. *Oaktree Capital Group Holdings GP, LLC; Oaktree Capital Group*

Holdings, L.P.; Oaktree Capital Group, LLC; Oaktree AIF Holdings, Inc.; Oaktree Holdings, LLC; Oaktree Holdings, Inc.; OCM Holdings I, LLC; Oaktree Capital Management, L.P.; Oaktree AIF Investments, L.P.; Oaktree Capital I, L.P.; Oaktree Fund GP I, L.P.; Oaktree Fund GP III, L.P.; Oaktree Principal Fund V GP, Ltd.; Oaktree Fund GP AIF, LLC; Oaktree Principal Fund V GP, L.P.; Oaktree Fund GP, LLC; Oaktree Principal Fund V, L.P.; Oaktree Principal Fund V (Parallel), L.P.; Oaktree Fund AIF Series, L.P.—Series I; Oaktree Principal Fund V (Delaware), L.P.; Oaktree FF Investment Fund AIF (Delaware), L.P., all of Los Angeles, California; to gain control of First BanCorp, and thereby indirectly gain control of FirstBank Puerto Rico, both in San Juan, Puerto Rico.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. *Paul K. Steen, Edina, Minnesota, and James R. Steen, Fargo, North Dakota*; to each retain voting shares of Clinton Bancshares, Inc., and thereby indirectly retain control of Clinton State Bank, both in Clinton, Minnesota.

Board of Governors of the Federal Reserve System, August 24, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011-22010 Filed 8-29-11; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 14, 2011.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice

President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *Luis Enrique Cobo and Ana A. Cobo, individually, and Terry Mark Jones and April Jones, individually*, all of Key West, Florida; to acquire additional voting shares of First State Bank of the Florida Keys Holding Company, and thereby indirectly acquire additional voting shares of First State Bank of the Florida Keys, both in Key West, Florida.

Board of Governors of the Federal Reserve System, August 25, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011-22124 Filed 8-29-11; 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 23, 2011.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. *Edon Bancorp, Inc.*, Edon, Ohio; to become a bank holding company by

acquiring 100 percent of the voting shares of the Edon State Bank Company of Edon, Edon, Ohio.

Board of Governors of the Federal Reserve System, August 25, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011-22123 Filed 8-29-11; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 13, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Union State Banc Holding Company*, through the acquisition of the assets of Republican Valley Title, LLC, both in Clay Center, Kansas; to engage in the sale of insurance in a town of less than 5,000, pursuant to section 225.28(b)(11)(iii)(A) of Regulation Y.

Board of Governors of the Federal Reserve System, August 24, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011-22011 Filed 8-29-11; 8:45 am]

BILLING CODE 6210-01-P

GENERAL SERVICES ADMINISTRATION

[Notice–2011–03; Docket No. 2011–0006;
Sequence 16]

The President's Management Advisory Board (PMAB); Notification of Upcoming Public Advisory Meeting

AGENCY: Office of Executive Councils,
U. S. General Services Administration
(GSA).

ACTION: Meeting Notice.

SUMMARY: The President's Management
Advisory Board (PMAB), a Federal
Advisory Committee established in
accordance with the Federal Advisory
Committee Act (FACA), 5 U.S.C., App.,
and Executive Order 13538, will hold a
public teleconference meeting on
September 23, 2011.

DATES: *Effective date:* August 30, 2011.

Meeting date: The teleconference
meeting will be held on Friday,
September 23, 2011, beginning at 10:30
a.m. eastern time, ending no later than
12 p.m.

FOR FURTHER INFORMATION CONTACT: Mr.
Stephen Brockelman, Designated
Federal Officer, President's Management
Advisory Board, Office of Executive
Councils, General Services
Administration, 1776 G Street NW.,
Washington, DC 20006, at
stephen.brockelman@gsa.gov.

SUPPLEMENTARY INFORMATION:

Background: The PMAB was
established to provide independent
advice and recommendations to the
President and the President's
Management Council on a wide range of
issues related to the development of
effective strategies for the
implementation of best business
practices to improve Federal
Government management and
operation, with a particular focus on
productivity and the application of
technology.

Agenda: The main purpose of this
meeting is for the full PMAB to discuss
and vote on initial recommendations
presented by PMAB's Information
Technology (IT) and Senior Executive
Service (SES) subcommittees. The Board
is examining recommendations and
leading business practices that have the
potential to improve government
performance in the areas of IT portfolio
and project management, IT vendor
performance management, SES
leadership development, and SES
performance appraisal systems. The
meeting minutes will be available after
the meeting on the PMAB Web site.
[http://www.whitehouse.gov/
administration/advisory-boards/pmab](http://www.whitehouse.gov/administration/advisory-boards/pmab).

Meeting Access: The teleconference
meeting is open to the public; interested
members of the public may listen to the
PMAB's discussion using 1 (888) 323–
9795 and passcode 7672250. Members
of the public will not have the
opportunity to ask questions or
otherwise participate in the
teleconference. However, members of
the public wishing to comment on the
discussion or topics outlined in the
Agenda should follow the steps detailed
in Procedures for Providing Public
Comments below.

*Availability of Materials for the
Meeting:* Please see the PMAB Web site
([http://www.whitehouse.gov/
administration/advisory-boards/pmab](http://www.whitehouse.gov/administration/advisory-boards/pmab))
for any available materials.

*Procedures for Providing Public
Comments:* In general, public statements
will be posted on the White House Web
site ([http://www.whitehouse.gov/
administration/advisory-boards/pmab](http://www.whitehouse.gov/administration/advisory-boards/pmab)).
Non-electronic documents will be made
available for public inspection and
copying in PMAB offices at GSA, 1776
G Street NW., Washington, DC 20006,
on official business days between the
hours of 10 a.m. and 5 p.m. eastern
time. You can make an appointment to
inspect statements by telephoning (202)
501–1398. All statements, including
attachments and other supporting
materials received, are part of the public
record and subject to public disclosure.
Any statements submitted in connection
with the PMAB meeting will be made
available to the public under the
provisions of the Federal Advisory
Committee Act.

The public is invited to submit
written statements for this meeting to
the Advisory Committee prior to the
meeting no later than 5 p.m. on
September 22, 2011, preferably earlier,
by either of the following methods:

Electronic Statements: Submit written
statements to Stephen Brockelman,
Designated Federal Officer at
stephen.brockelman@gsa.gov; or

Paper Statements: Send paper
statements in triplicate to Stephen
Brockelman at President's Management
Advisory Board, Office of Executive
Councils, General Services
Administration, 1776 G Street, NW.,
Washington, DC 20006.

Dated: August 22, 2011.

Robert Flaak,

*Director, Office of Committee and Regulatory
Management, General Services
Administration.*

[FR Doc. 2011–22149 Filed 8–29–11; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New; 30–
Day Notice]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement
of section 3506(c)(2)(A) of the
Paperwork Reduction Act of 1995, the
Office of the Secretary (OS), Department
of Health and Human Services, is
publishing the following summary of a
proposed information collection request
for public comment. Interested persons
are invited to send comments regarding
this burden estimate or any other aspect
of this collection of information,
including any of the following subjects:
(1) The necessity and utility of the
proposed information collection for the
proper performance of the agency's
functions; (2) the accuracy of the
estimated burden; (3) ways to enhance
the quality, utility, and clarity of the
information to be collected; and (4) the
use of automated collection techniques
or other forms of information
technology to minimize the information
collection burden.

To obtain copies of the supporting
statement and any related forms for the
proposed paperwork collections
referenced above, e-mail your request,
including your address, phone number,
OMB number, and OS document
identifier, to
Sherrille.funncoleman@hhs.gov, or call
the Reports Clearance Office on (202)
690–6162. Written comments and
recommendations for the proposed
information collections must be directed
to the OS Paperwork Clearance Officer
at the above email address within 60-
days.

Proposed Project: The Office of
Adolescent Health (OAH) Teen
Pregnancy Prevention Performance
Measure Collection—OMB No. OS–
0990–NEW—Office of Adolescent
Health and the Administration for
Children Youth and Families.

Abstract: The Office of Adolescent
Health (OAH) and the Administration
for Children, Youth and Families
(ACYF), under the U.S. Department of
Health and Human Services (HHS), are
funding a total of 107 grantees to
conduct teen pregnancy prevention
programs. Grantees are funded to either
replicate evidence-based teen pregnancy
prevention programs (75 OAH grantees)
or to implement research and
demonstration programs to test new and
innovative approaches to teen

pregnancy prevention (19 OAH grantees and 13 ACYF grantees). Grants are funded for 5 years at levels ranging from \$400,000 to \$4 million per year. Interventions for these different programs vary widely in terms of duration (from 1 day to 4 years), setting (schools, clinics, or community based

settings), populations served (middle school students, high school students, parents of teens) and content (e.g., youth development programs or sex education programs). Funding requirements for the grantees included the collection and reporting of data for performance measurement. The performance measure

collection is important to OAH and ACYF because it will provide the agency with data both to effectively monitor these programs, and to comply with accountability and Federal performance requirements for the 1993 Government Performance and Results Act (Pub. L. 103–62).

ESTIMATED ANNUALIZED BURDEN TABLE

Forms (if necessary)	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Perceived impact questions	Youth participating in programs	100,000	1	5/60	8,333
Reporting form for reach	Grantee program staff	107	2	4	856
Tier 1 A/B performance measure reporting form.	Grantee program staff—Tier 1 A/B ..	59	1	19	1121
Tier 1 C/D and Tier 2/PREIS performance measure reporting form.	Grantee program staff—Tier 1 C/D and Tier 2/PREIS.	48	1	21	1008
Total .....	.....	.....	.....	.....	11,318

Mary Forbes,
Office of the Secretary, Paperwork Reduction Act Clearance Officer.
[FR Doc. 2011–22168 Filed 8–29–11; 8:45 am]
BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New; 30-day notice]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.
In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency’s functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections

referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to Sherette.funncoleman@hhs.gov, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: Outcome Evaluation of Teenage Pregnancy Prevention: Integrating Services, Programs, and Strategies through Community-wide Initiatives—OMB No. 0990–NEW–Office of Adolescent Pregnancy Programs.

The Office of Adolescent Health and the Centers for Disease Control and Prevention (CDC) are working collaboratively to address the high pregnancy rate of women between the ages of 15–19 by demonstrating the effectiveness of innovative, multi-component, community-wide initiatives in preventing teen pregnancy and reducing rates of teen births in communities with the highest rates, with a focus on reaching African American and Latino youth aged 15–19. Components of these efforts include (1) Implementing evidence-based or evidence-informed prevention programs; (2) linking teens to quality health services; (3) educating stakeholders (community leaders, parents and other constituents) about relevant evidence-based or evidence-informed strategies to reduce teen pregnancy and data on needs and resources in target communities; and (4)

supporting the sustainability of the community-wide teen pregnancy prevention effort.

The main objective for the proposed Outcome Evaluation of Teenage Pregnancy Prevention: Integrating Services, Programs, and Strategies through Community-wide Initiatives is to measure risk behaviors, pregnancies, and use of contraceptives and family planning services among youth. The data collection instrument for the proposed study is a modified version of a recently approved survey (OMB No. 0970–0360 Expiration date 7/31/2013). Clearance is being requested to expand the utilization of a modified version of the previously-approved instrument.

The Outcome Evaluation of Teenage Pregnancy Prevention: Integrating Services, Programs, and Strategies through Community-wide Initiatives will focus on the combined change of two proportions: (1) The proportion of youth who have not engaged in sexual intercourse during the past 12 months and (2) the proportion of youth who have engaged in sexual intercourse but have used contraception consistently during the past 12 months. To determine if the change in this proportion of interest in the intervention community is significantly different from the control community is one of the most important parameters to be estimated. Power analysis determined that 1,200 surveys per community will be sufficient to detect this difference. The precise number of youth surveyed will depend on the response rates, and will be between 1,200 and 1,500 per community.

TABLE—ESTIMATED ANNUALIZED BURDEN

Instrument	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Evaluation of Adolescent Pregnancy Prevention Approaches Household Survey.	Youth aged 15–19	9,000	1	45/60	6,750

Mary Forbes,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2011–22166 Filed 8–29–11; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Delegation of Authorities

Notice is hereby given that I have delegated to the Administrator, Centers for Medicare & Medicaid Services (CMS), or his or her successor, the authorities vested in the Secretary for the following provisions of Titles I, II, and X of the Affordable Care Act, including Title XXVII of the Public Health Service Act insofar as such parts pertain to CMS' mission, as described in section F.00 of CMS' Statement of Organization, Functions, and Delegations of Authority, last published at 55 FR 9363 (March 13, 1990).

Title I—Quality, Affordable Health Care for All Americans

Subtitle B—Immediate Actions to Preserve and Expand Coverage

Section 1101—The authorities pursuant to section 1101 [42 U.S.C. 18001], as amended, to establish a temporary high risk health insurance pool program to provide health insurance coverage for eligible individuals during the period beginning on the date on which such program is established and ending on January 1, 2014.

Section 1102—The authorities pursuant to section 1102 [42 U.S.C. 18002], as amended, to establish a temporary reinsurance program to provide reimbursement to participating employment-based plans for a portion of the cost of providing health insurance coverage to early retirees (and to the eligible spouses, surviving spouses, and dependents of such retirees) during the period beginning on the date on which such program is established and ending on January 1, 2014. The authority to accept and review appeals of adverse reimbursement determinations under the reinsurance program is, however, delegated to the Chair of the Departmental Appeals Board, Office of

the Secretary, who will designate one or more Board Members to decide each appeal. The Board's decision on an appeal will be final and binding unless reopened and revised pursuant to 45 CFR 149.610.

Section 1103—The authorities pursuant to section 1103 [42 U.S.C. 18003], as amended, to establish a mechanism, including an Internet Web site, through which a resident of any State may identify affordable health insurance coverage options in that State.

Subtitle C—Quality Health Insurance Coverage for All Americans

Part II—Other Provisions

Section 1251—The authorities pursuant to section 1251 [42 USC 18011], as amended, to preserve the right of individuals and groups to maintain existing health insurance coverage.

Section 1252—The authorities pursuant to section 1252 [42 USC 18012], as amended, to uniformly apply rate reforms to all health insurance issuers and group health plans.

Subtitle D—Available Coverage Choices for All Americans

Part I—Establishment of Qualified Health Plans

Section 1301—The authorities pursuant to section 1301 [42 U.S.C. 18021], as amended, pertaining to defining qualified health plans.

Section 1302—The authorities pursuant to section 1302 [42 U.S.C. 18022], as amended, pertaining to essential health benefits requirements, including a certification from the Chief Actuary of the Centers for Medicare & Medicaid Services that such essential health benefits meet the limitation described in Section 1302(b)(2) [42 U.S.C. 18022(b)(2)].

Section 1303—The authorities pursuant to section 1303 [42 U.S.C. 18023], as amended, pertaining to State opt-out of abortion coverage, special rules relating to coverage of abortion services, applying State and Federal laws regarding abortion, and applying emergency services.

Section 1304—The authorities pursuant to section 1304 [42 U.S.C. 18024], as amended, pertaining to

definitions related to quality, affordable health care for all Americans.

Part II—Consumer Choices and Insurance Competition Through Health Benefit Exchanges

Section 1311—The authorities pursuant to section 1311 [42 USC 18031], as amended, pertaining to affordable choices of health benefit plans, in particular, the American Health Benefit Exchanges (AHBE). CMS will coordinate with the Department of Labor under section 1311(e)(3)(B) [42 USC 18031(e)(3)(B)].

Section 1312—The authorities pursuant to section 1312 [42 USC 18032], as amended, pertaining to consumer choice, payment of premiums by qualified individuals, single risk pool, enrollment through agents or brokers, and qualified individuals and employers (access limited to citizens and lawful residents).

Section 1313(a)—The authorities pursuant to section 1313(a) [42 USC 18033(a)], as amended, pertaining to financial integrity involving accounting for expenditures, investigations, audits, pattern of abuse, protections against fraud and abuse, and applying the False Claims Act. CMS will coordinate with the Office of the Inspector General to investigate the affairs of an AHBE, to examine the properties and records of an AHBE, and to require periodic reports in relation to activities undertaken by an AHBE under section 1313(a)(2) [42 USC 18033(a)(2)].

Part III—State Flexibility Relating to Exchanges

Section 1321—The authorities pursuant to section 1321 [42 U.S.C. 18041], as amended, pertaining to the State's flexibility in operation and enforcement of AHBE and related requirements. CMS will consult with the National Association of Insurance Commissioners under section 1321(a)(2) [42 U.S.C. 18041(a)(2)].

Sections 1322(a)–(b)(1) and (2), (c)–(g) and (h)(1)—The authorities pursuant to sections 1322(a)–(b)(1) and (2), (c)–(g) [42 USC 18042] and (h)(1) [26 U.S.C. 501(c)(29)], as amended, to establish the Consumer Operated and Oriented Plan Program to assist establishment and operation of non-profit, member-run

health insurance issuers. CMS will coordinate with the Department of the Treasury to establish criteria and procedures for tax exemption under section 501(c)(29) of the Internal Revenue Code of 1986 [26 U.S.C. 501(c)(29)] for qualified nonprofit health insurance issuers.

Section 1323—The authorities pursuant to section 1323 [42 U.S.C. 18043], as amended, to fund territories that elect to establish an AHBE.

Section 1324—The authorities pursuant to section 1324 [42 U.S.C. 18044], as amended, pertaining to health insurance coverage offered by a private health insurance issuer, which would not be subject to the Federal or State laws described in section 1324(b) [42 U.S.C. 18044(b)] if a qualified health plan offered under the Consumer Operated and Oriented Plan program under section 1322 [42 U.S.C. 18042] or a multi-State qualified health plan under section 1334 [42 USC 18054] were not subject to such laws.

Part IV—State Flexibility to Establish Alternative Programs

Section 1331—The authorities pursuant to section 1331 [42 USC 18051], as amended, to establish basic health programs for low-income individuals not eligible for Medicaid, and allowing States the flexibility to establish alternative programs by entering into contracts to offer one or more standard health plans providing at least the essential health benefits described in section 1302(b) [42 U.S.C. 18022(b)] to eligible individuals in lieu of offering such individuals coverage through an Exchange. The Chief Actuary in the Office of the Actuary, CMS, will certify whether the methodology used to make determinations pursuant to section 1331(d)(3) (A)(iii) [42 U.S.C. 18051(d)(3)(A)(iii)], and such determinations, meet the requirements of section 1331(d)(3)(A)(ii) [42 U.S.C. 18051(d)(3)(A)(ii)] in consultation with the Office of Tax Analysis of the Department of the Treasury.

Section 1332—The authorities pursuant to section 1332 [42 U.S.C. 18052], as amended, pertaining to waivers for State innovations with respect to health insurance coverage within the State for plan years beginning on or after January 1, 2017. CMS will coordinate with the Department of the Treasury to publish regulations pursuant to section 1332(a)(4)(B) [42 U.S.C. 18052(a)(4)(B)].

Section 1333—The authorities pursuant to section 1333 [42 U.S.C. 18053], as amended, pertaining to offering plans in more than one State. CMS will coordinate with the National

Association of Insurance Commissioners to publish regulations pursuant to section 1333(a)(1) [42 U.S.C. 18053(a)(1)].

Part V—Reinsurance and Risk Adjustment

Section 1341—The authorities pursuant to section 1341 [42 U.S.C. 18061], as amended, pertaining to the transitional reinsurance program for individual and small group markets in each State. CMS will coordinate with the National Association of Insurance Commissioners to publish regulations pursuant to section 1321(a) [42 U.S.C. 18041].

Section 1342—The authorities pursuant to section 1342 [42 U.S.C. 18062], as amended, to establish and administer a program of risk corridors under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the health plan to the health plan's aggregate premiums based on the program for regional participating provider organizations under part D of Title XVIII of the Social Security Act.

Section 1343(b)—The authorities pursuant to section 1343(b) [42 U.S.C. 18063(b)], as amended, to establish criteria and methods used in carrying out risk adjustment activities pursuant to section 1343 [42 USC 18063] with respect to health insurance plans and coverage.

Subtitle E—Affordable Coverage Choices for All Americans

Part I—Premium Tax Credits and Cost-Sharing Reductions

Subpart A—Premium Tax Credits and Cost-Sharing Reductions

Section 1401(a)—The authorities pursuant to section 1401(a) [26 USC 36B], as amended, pertaining to refundable credit for coverage under a qualified health plan. CMS will consult with the Department of the Treasury pursuant to the Internal Revenue Code of 1986 section 36B(e)(3) [26 U.S.C. 36B(e)(3)] to prescribe rules setting forth the methods by which calculations of family size and household income are made, and carry out the activities set out pursuant to 26 U.S.C. 36B [26 U.S.C. 36B], such as determinations of premiums.

Section 1402—The authorities pursuant to section 1402 [42 U.S.C. 18071], as amended, pertaining to reduced cost-sharing for individuals enrolling in qualified health plans. CMS will consult with the Department of the Treasury pursuant to section 1402(e)(3) [42 U.S.C. 18071(e)(3)].

Section 1411—The authorities pursuant to section 1411 [42 U.S.C. 18081], as amended, to determine eligibility for exchange participation, premium tax credits and reduced cost-sharing, and individual responsibility exemptions. CMS will consult with: (1) The Department of Homeland Security pursuant to section 1411(b)(2)(B) [42 U.S.C. 18081(b)(2)(B)]; 2) the Departments of the Treasury, and Homeland Security, and the Social Security Administration pursuant to sections 1411(c)(4)(A) [42 U.S.C. 18081(c)(4)(A)] and 1411(f)(1) [42 U.S.C. 18081(f)(1)]; and 3) the Department of the Treasury pursuant to section 1411(i)(1) [42 U.S.C. 18081(i)(1)].

Section 1412—The authorities pursuant to section 1412 [42 U.S.C. 18082], as amended, pertaining to advance determinations made pursuant to section 1411 [42 U.S.C. 18081] with respect to the income eligibility of individuals enrolling in a qualified health plan in the individual market through the AHBE for the premium tax credit allowable pursuant to section 1401(a) [26 U.S.C. 36B] and the cost-sharing reductions under section 1402 [42 U.S.C. 18071]. CMS will consult with the Department of the Treasury.

Section 1413—The authorities pursuant to section 1413 [42 U.S.C. 18083], as amended, to streamline procedures for enrollment through an AHBE and State Medicaid, CHIP, and health subsidy programs.

Section 1414(a)(1)—The authorities pursuant to section 6103(l)(21) of the Internal Revenue Code of 1986 [26 U.S.C. 6103(l)(21)], as amended, pertaining to disclosure of taxpayer return information and Social Security numbers.

Section 1414(a)(2)—The authorities pursuant to section 205(c)(2)(C)(x) of the Social Security Act [42 U.S.C. 405(c)(2)(C)(x)], as amended, to collect and use the names and Social Security account numbers of individuals as required to administer the provisions of the Social Security Act and amendments made by the Affordable Care Act.

Section 1415—The authorities pursuant to section 1415 [42 U.S.C. 18084], as amended, pertaining to premium tax credit and cost-sharing reduction payments disregarded for Federal and federally-assisted programs.

Subtitle F—Shared Responsibility for Health Care

Part I—Individual Responsibility

Sections 1501(a) and (b)—The authorities pursuant to section 1501(a) [42 U.S.C. 18091(a)], as amended, and

pursuant to section 1501(b) [26 U.S.C. 5000A], as amended, to maintain minimal essential coverage for health care, except for the last paragraph of 26 U.S.C. 5000A(e)(4).

Part II—Employer Responsibilities

Section 1511—The authorities pursuant to 29 USC 218A, as amended, to automatically enroll employees of large employers that have more than 200 full-time employees, and that offer employees enrollment in 1 or more health benefits plans (subject to any waiting period authorized by law) and to continue the enrollment of current employees in a health benefits plan offered through the employer.

Section 1512—The authorities pursuant to 29 U.S.C. 218B, as amended, to provide notice to employees of coverage options.

Section 1513(a)—The authorities pursuant to section 1513(a) [26 U.S.C. 4980H], as amended, pertaining to shared responsibility for employers regarding health coverage. CMS will consult with the Department of Labor pursuant to 26 U.S.C. 4980H(c)(4)(B) to determine the hours of service of an employee necessary to qualify under 26 U.S.C. 4980H(c)(4) as a “full-time employee” for purposes of coverage under the Affordable Care Act.

Section 1514(a)—The authorities pursuant to section 6056 [26 U.S.C. 6056] of the Internal Revenue Code of 1986, as amended, to review the accuracy of health insurance information provided by large employers who are required to report on health insurance coverage.

Subtitle G—Miscellaneous Provisions

Section 1558—The authority pursuant to section 1558 [29 U.S.C. 218C], as amended, to prohibit employers from discharging or in any manner discriminating against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has: (1) Received a credit pursuant to section 36B of the Internal Revenue Code of 1986 or a subsidy pursuant to section 1402 of the Affordable Care Act; (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title); (3) testified or is about to testify in a proceeding concerning such violation;

(4) assisted or participated, or is about to assist or participate, in such a proceeding; or (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of Title 29 of the United States Code (or amendment), or any order, rule, regulation, standard, or ban pursuant to Title 29 of the United States Code (or amendment).

Title II—Role of Public Programs

Subtitle C—Medicaid and CHIP Enrollment Simplification

Section 2201—The authority pursuant to section 2201 [42 U.S.C. 1396w–3, section 1943 of the Social Security Act], as amended, pertaining to enrollment simplification and coordination with State Health Insurance Exchanges.

Subtitle K—Protections for American Indians and Alaska Natives

Sections 2901(a) and (b)—The authorities pursuant to section 2901(a) and (b) [25 U.S.C. 1623(a) and (b)], as amended, pertaining to special rules relating to Indians. CMS will coordinate with the Indian Health Service pursuant to section 2901(b) [25 U.S.C. 1623(b)].

Title X—Strengthening Quality, Affordable Health Care for All Americans

Section 10108(a)–(e)—The authorities under section 10108(a)–(e) [42 USC 18101(a)–(e)], as amended, pertaining to an offering employer providing free choice vouchers to each qualified employee through an employer-sponsored health insurance plan.

Title XXVII of the Public Health Service Act, as amended, including the authority to conduct studies and demonstration projects, as directed by Congress, relating to Title XXVII of the Public Health Service Act. The delegation includes, but does not limit the authority to, directing performance, entering into contracts or cooperative agreements, making grants, approving payments for contracts, cooperative agreements, and grants, and approving authorized waivers of compliance with certain requirements of Title XXVII of the Public Health Service Act when such authorities are for the purpose of conducting studies and demonstration projects.

This delegation of authorities excludes the authorities to issue regulations, to submit reports to Congress, and the following authorities, as amended by the indicated sections of the Affordable Care Act:

(1) *Section 1302(b)(2)(A) and (B)*—The authority to conduct a survey of

employer-sponsored coverage pursuant to section 1302(b)(2)(A) [42 U.S.C. 18022(b)(2)(A)] to determine the benefits typically covered by employers, including multi-employer plans and the authority to submit a report pursuant to section 1302(b)(2)(B) [42 U.S.C. 18022(b)(2)(B)] to the appropriate committees of Congress.

(2) *Section 1311(e)(3)(D)*—The authority to update and harmonize rules concerning the accurate and timely disclosure to participants by group health plans of plan disclosure, plan terms and conditions, and periodic financial disclosure with the standards established pursuant to section 1311(e)(3)(D) [42 U.S.C. 18031(e)(3)(A)].

(3) *Sections 1322(b)(4)*—The authority to appoint 15 members to the Consumer Operated and Oriented Plan Advisory Board pursuant to section 1322(b)(4) [42 U.S.C. 18042(b)(4)].

(4) *Section 1332*—The authorities with respect to health insurance coverage within the State for plan years beginning on or after January 1, 2014, pursuant to section 1332(a)(2)(D) [42 U.S.C. 18052(a)(2)(D)] including sections 36B [26 U.S.C. 36B], 4980H [26 U.S.C. 4980H], and 5000A [26 U.S.C. 5000A] of the Internal Revenue Code of 1986, pertaining to reports to Congress pursuant to section 1332(a)(4)(C) [42 U.S.C. 18052(a)(4)(C)], and to notify the appropriate committees of Congress pursuant to section 1332(d)(2)(B) [42 U.S.C. 18052(d)(2)(B)].

(5) *Section 1411(i)(2)*—The authority under section 1411(i)(2) [42 U.S.C. 18081(i)(2)] of the Affordable Care Act to issue a report of the results of the study conducted under section 1411(i)(1) [42 U.S.C. 18081(i)(1)], including any recommendations for legislative changes to the Committees on Finance and Health, Education, Labor, and Pensions of the Senate, and the Committees of Education and Labor and Ways and Means of the House of Representatives.

(6) *Section 1412(c)(2)*—The authority under section 1412(c)(2) [42 U.S.C. 18082(c)(2)] to make advance payments under section 1412 [42 U.S.C. 18082] of any premium tax credit allowed under section 36B of the Internal Revenue Code of 1986 [26 U.S.C. 36B] to the issuer of a qualified health plan on a monthly basis.

(7) *Section 1414(a)(1)*—The authority to prescribe regulations to disclose return information indicating whether the taxpayer is eligible for a tax credit or reduction (and the amount thereof) pursuant to 26 U.S.C. 6103(l)(21)(A)(v).

(8) *Section 1501(b)*—The authority to prescribe rules for the collection of the penalty imposed in cases where

continuous periods include months in more than one taxable year pursuant to the last paragraph of 26 U.S.C. 5000A(e)(4).

This delegation of authorities supersedes the authorities delegated under Title XXVII of the Public Health Service Act that were published in the **Federal Register** notice on June 23, 1998 (63 FR 34190).

This delegation of authorities is effective immediately.

These authorities may be re-delegated. These authorities shall be exercised under the Department's policy on regulations and the existing delegation of authority to approve and issue regulations.

I hereby affirm and ratify any actions taken by the Administrator, CMS, or his or her subordinates, which involved the exercise of the authorities under Titles I, II, and X of the Affordable Care Act, including Title XXVII of the Public Health Service Act delegated herein prior to the effective date of this delegation of authorities.

Authority: 44 U.S.C. 3101.

Dated: August 2, 2011.

Kathleen Sebelius,
Secretary.

[FR Doc. 2011-22042 Filed 8-29-11; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR-270]

Availability of Final Toxicological Profile for RDX

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR),

Department of Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of one toxicological profile, prepared by ATSDR for the Department of Defense, on Royal Demolition eXplosive (RDX), chemical name hexahydro-1,3,5-trinitro-1,3,5-triazine, also known as cyclonite.

FOR FURTHER INFORMATION CONTACT: Ms. Delores Grant, Division of Toxicology and Environmental Medicine, Agency for Toxic Substances and Disease Registry, Mailstop F-62, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone (770) 488-3351.

SUPPLEMENTARY INFORMATION: The Superfund Amendments and Reauthorization Act (SARA) of 1986 (Pub. L. 99-499) amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). Section 211 of SARA also amended Title 10 of the U.S. Code, creating the Defense Environmental Restoration Program. Section 2704 of Title 10 of the U.S. Code directs the Secretary of Defense to notify the Secretary of Health and Human Services (HHS) of not less than 25 of the most commonly found unregulated hazardous substances at defense facilities. The Secretary of HHS is to prepare toxicological profiles of these substances. Each profile is to include an examination, summary and interpretation of available toxicological information and epidemiologic evaluations. This information is used to ascertain the level of significant human exposure for the substance and the associated health effects. The toxicological profile includes a determination of whether adequate information on the health effects of each

substance is available or in the process of development. When adequate information is not available, ATSDR, in cooperation with the National Toxicology Program (NTP), may plan a program of research designed to determine these health effects.

Notice of the availability of the draft profile for public review and comment was published in the **Federal Register** on August 26, 2010, (75 FR 52535), with notice of a 90-day public comment period starting from the actual release date. Following the close of the comment period, chemical-specific comments were addressed, and, where appropriate, changes were incorporated into each profile. The public comments and other data submitted in response to the **Federal Register** notice bears the docket control number ATSDR-266. This material is available for public inspection at the Agency for Toxic Substances and Disease Registry, 4700 Buford Highway, Building 106, Second Floor, Chamblee, Georgia 30341 between 8 a.m. and 4:30 p.m., Monday through Friday, except legal holidays.

Availability

This notice announces the availability of one updated final toxicological profile, RDX, prepared by ATSDR for the Department of Defense. Electronic access to this document is available at the ATSDR Web site: <http://www.atsdr.cdc.gov/toxprofiles/index.asp>.

A printed copy of this toxicological profile is available through the U.S. Department of Commerce, National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, telephone 1-800-553-6847. There is a charge for this profile as determined by NTIS.

Hazardous substance	NTIS Order No.	CAS Number
RDX	PB2011-xxx	121-82-4

Dated: August 24, 2011.

Ken Rose,
Director, Office of Policy, Planning and Evaluation, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

[FR Doc. 2011-22080 Filed 8-29-11; 8:45 am]

BILLING CODE 4163-70-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: ORR State Plan for Grants to States for Refugee Resettlement.

OMB No. 0970-0351.

Description: A State Plan is required by 8 U.S.C. 1522 of the Immigration and Nationality Act (the Act) [Title IV, Sec.

412 of the Act] for each State agency requesting Federal funding for refugee resettlement under 8 U.S.C. 524 [Title IV, Sec. 414 of the Act], including Refugee Cash and Medical Assistance, Refugee Social Services, and Targeted Assistance program funding. The State Plan is a comprehensive narrative description of the nature and scope of a States programs and provides assurances that the programs will be administered in conformity with the specific requirements stipulated in 45 CFR 400.4-400.9. The State Plan must

include all applicable State procedures, designations, and certifications for each requirement as well as supporting documentation. A State may use a pre-print format prepared by the Office of Refugee Resettlement (ORR) of the Administration for Children and Families (ACF) or a different format, on the condition that the format used meets

all of the State plan requirements under Title IV of the Act and ORR regulations at 45 CFR part 400.

There is no schedule for submission of this State Plan, as all States are currently operating under an approved plan and are in compliance with regulations at 45 CFR 400.4 400.9. Per 45 CFR 400.4(b), States need only certify

that the approved plan is current and continues in effect, no later than 30 days after the beginning of the Federal fiscal year. Consistent with regulations, if States wish to revise or amend the plan, a revised plan or plan amendment must be submitted to ORR as described at 45 CFR 400.7 400.9.

Respondents:

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Title IV State Plan	50	1	15	750

Estimated Total Annual Burden Hours: 750.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: infocollection@acf.hhs.gov. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011-22078 Filed 8-29-11; 8:45 am]

BILLING CODE 4184-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2011-P-0460]

Determination That TALWIN COMPOUND (Aspirin; Pentazocine Hydrochloride) Tablets, 325 Milligrams; Equivalent to 12.5 Milligram Base, Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that TALWIN COMPOUND (aspirin; pentazocine hydrochloride (HCl)) tablets, 325 milligrams (mg); equivalent to (EQ) 12.5 mg base, were not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for aspirin; pentazocine HCl tablets, 325 mg; EQ 12.5 mg base, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Nam Kim, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6320, Silver Spring, MD 20993-0002, 301-796-3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and

dosage form as the "listed drug," which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products with Therapeutic Equivalence Evaluations," which is known generally as the "Orange Book." Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, are the subject of NDA 016891, held by Sanofi-aventis U.S., and initially approved on November 12, 1975. TALWIN COMPOUND tablets are indicated for the relief of moderate pain.

TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, are currently listed in the

“Discontinued Drug Product List” section of the Orange Book.

Lachman Consultant Services, Inc., submitted a citizen petition dated June 7, 2011 (Docket No. FDA-2011-P-0460), under 21 CFR 10.30, requesting that the Agency determine whether TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, have been voluntarily withdrawn or withheld from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, were not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, were withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, in the “Discontinued Drug Product List” section of the Orange Book. The “Discontinued Drug Product List” delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to TALWIN COMPOUND (aspirin; pentazocine HCl) tablets, 325 mg; EQ 12.5 mg base, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: August 25, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011-22145 Filed 8-29-11; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA-2011-P-0182 and FDA-2011-P-0209]

Determination That OPANA ER (Oxymorphone Hydrochloride) Extended-Release Tablets, 7.5 Milligrams and 15 Milligrams, Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that OPANA ER (oxymorphone hydrochloride (HCl)) extended-release tablets, 7.5 milligrams (mg) and 15 mg, were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to these drug products, and it will allow FDA to continue to approve ANDAs for oxymorphone HCl extended-release tablets, 7.5 mg and 15 mg, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Nam Kim, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6320, Silver Spring, MD 20993-0002, 301-796-3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the “listed drug,” which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs.

FDA publishes this list as part of the “Approved Drug Products With Therapeutic Equivalence Evaluations,” which is known generally as the “Orange Book.” Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug’s NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under § 314.161(a) (21 CFR 314.161(a)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved; (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved; and (3) when a person petitions for such a determination under §§ 10.25(a) and 10.30 (21 CFR 10.25(a) and 10.30). Section 314.161(d) provides that if FDA determines that a listed drug was withdrawn from sale for reasons of safety or effectiveness, the Agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, are the subject of NDA 021610, held by Endo Pharmaceuticals, and initially approved on June 22, 2006. OPANA ER is indicated for the relief of moderate to severe pain in patients requiring continuous, around-the-clock opioid treatment for an extended period of time.

OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, are currently listed in the “Discontinued Drug Product List” section of the Orange Book. There are approved ANDAs for oxymorphone HCl extended-release tablets, 7.5 mg and 15 mg; these ANDAs are listed in the Orange Book. The other strengths of OPANA ER—both lower and higher strengths than 7.5 mg and 15 mg—continue to be marketed.

Watson Laboratories, Inc., submitted a citizen petition dated March 21, 2011 (Docket No. FDA-2011-P-0182), under § 10.30, requesting that the Agency determine whether OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, were voluntarily withdrawn from sale for reasons of safety or effectiveness. In addition, K&L Gates submitted a citizen petition dated March 25, 2011 (Docket No. FDA-2011-P-0209), under § 10.30, requesting that the Agency determine that OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15

mg, were not discontinued from sale for reasons of safety or effectiveness.

After considering the citizen petitions and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, were not withdrawn for reasons of safety or effectiveness. The petitioners have identified no data or other information suggesting that OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, were withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. In addition, we have considered that the 7.5 mg and 15 mg strengths are bracketed by other strengths that are still being marketed. We have found no information that would indicate that OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, were withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. FDA will not begin procedures to withdraw approval of ANDAs that refer to these drug products. Additional ANDAs that refer to OPANA ER (oxymorphone HCl) extended-release tablets, 7.5 mg and 15 mg, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: August 25, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011-22143 Filed 8-29-11; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2011-D-0595]

Draft Guidance for Industry on Tablet Scoring: Nomenclature, Labeling, and Data for Evaluation; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Tablet Scoring: Nomenclature, Labeling, and Data for Evaluation." This draft guidance provides recommendations to sponsors of new drug applications (NDAs) and abbreviated new drug applications (ANDAs) regarding what criteria should be met to facilitate the evaluation and labeling of tablets that have been scored. (A scoring feature facilitates tablet splitting, which is the practice of breaking or cutting a higher-strength tablet into smaller portions.) Specifically, this draft guidance recommends guidelines to follow, data to provide, and criteria to meet and detail in an application to approve a scored tablet; and nomenclature and labeling for approved scored tablets.

This guidance does not address specific finished-product release testing, where additional requirements may be appropriate for scored tablets.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by November 28, 2011.

ADDRESSES: Submit written requests for single copies of the draft 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 draft guidance document.

Submit electronic comments on the draft guidance to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Russell Wesdyk, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 4182, Silver Spring, MD 20993-0002, 301-796-2400.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Tablet Scoring: Nomenclature, Labeling, and Data for Evaluation." This draft guidance provides recommendations to sponsors of NDAs and ANDAs regarding what criteria should be met to facilitate the evaluation and labeling of tablets that have been scored. (A scoring feature facilitates tablet splitting, which is the practice of breaking or cutting a higher-strength tablet into smaller portions.) Specifically, this draft guidance recommends:

- Guidelines to follow, data to provide, and criteria to meet and detail in an application to approve a scored tablet.

- Nomenclature and labeling for approved scored tablets.

The Agency has previously considered tablet scoring as an issue when determining whether a generic drug product is the same as the reference listed drug (RLD). One characteristic of a tablet dosage form is that it may be manufactured with a score or scores. This characteristic is useful because the score can be used to facilitate the splitting of the tablet into fractions when less than a full tablet is desired for a dose. Although there are no standards or regulatory requirements that specifically address scoring of tablets, the Agency recognizes the need for consistent scoring between a generic product and its RLD.

Consistent scoring ensures that the patient is able to adjust the dose, by splitting the tablet, in the same manner as the RLD. This enables the patient to switch between products made by different manufacturers without encountering problems related to the dose. In addition, consistent scoring ensures that neither the generic product nor the RLD has an advantage in the marketplace because one is scored and one is not.

CDER's Drug Safety Oversight Board considered the practice of tablet splitting at its October 2009 and November 2010 meetings. During those meetings, they discussed how insurance companies and doctors are increasingly recommending that patients split tablets, either to adjust the patients' dose or as a cost-saving measure.

Because of this, the Agency conducted internal research on tablet splitting and concluded that in some cases, there are possible safety issues, especially when tablets are not scored or evaluated for splitting. The Agency's concerns with splitting a tablet included variations in the tablet content, weight, disintegration, or dissolution, which can affect how much drug is present in a split tablet and available for absorption. In addition, there may be stability issues with splitting tablets.

Tablet splitting also is addressed in pharmacopeial standards. The European Pharmacopeia currently applies accuracy of subdivision standards for scored tablets—and has at various times also included standards for content uniformity, weight variation, and loss of mass—while the United States Pharmacopeia published a Stimuli article in 2009 proposing criteria for loss of mass and accuracy of subdivision for split tablets.¹

As an outgrowth of these discussions and developments, FDA is providing recommendations for application content regarding the scientific basis for functional scores on solid oral dosage form products to ensure the quality of both NDA and ANDA scored tablet products. To accomplish this, the Agency has developed consistent and meaningful criteria by which scored tablets can be evaluated and labeled. The criteria are as follows: (1) Provide a harmonized approach to chemistry, manufacturing, and controls reviews of scored tablets; (2) ensure consistency in nomenclature (e.g., score versus bisect) and labeling; and (3) provide information through product labeling or other means to healthcare providers.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on tablet scoring: nomenclature, labeling, and data for evaluation. 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. The Paperwork Reduction Act of 1995

This draft 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 201.57, 314.50, and 314.70 have been approved under OMB control numbers 0910–0572 (for section 201.57) and 0910–0001 (for part 314).

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 25, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–22146 Filed 8–29–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0594]

Fee for Using a Priority Review Voucher in Fiscal Year 2012

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the fee rates for using a tropical disease priority review voucher for fiscal year (FY) 2012. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Food and Drug Administration Amendments Act of 2007 (FDAAA), authorizes FDA to determine and collect priority review user fees for certain applications for approval of drug or biological products when those applications use a priority review voucher awarded by the Secretary of Health and Human Services. These vouchers are awarded to the sponsors of certain tropical disease

product applications, submitted after September 27, 2007, upon FDA approval of such applications. The amount of the fee to be submitted to FDA with applications using a priority review voucher is determined each FY based on the average cost incurred by FDA in the review of a human drug application subject to priority review in the previous FY. This notice establishes the priority review fee rate for FY 2012.

FOR FURTHER INFORMATION CONTACT:

David Miller, Office of Financial Management (HFA–100), Food and Drug Administration, 1350 Picard Dr., Rockville, MD 20850, 301–796–7103.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1102 (under title XI) of FDAAA (Pub. L. 110–85) added new section 524 to the FD&C Act (21 U.S.C. 360n). In section 524, Congress encouraged development of new drug and biological products for prevention and treatment of certain tropical diseases by offering additional incentives for obtaining FDA approval of such products. Under section 524, the sponsor of an eligible human drug application submitted after September 27, 2007, for a qualified tropical disease (as defined in section 524(a)(3)), shall receive a priority review voucher upon approval of the tropical disease product application. The recipient of a priority review voucher may either use the voucher with a future submission to FDA under section 505(b)(1) of the FD&C Act (21 U.S.C. 355(b)(1)) or section 351 of the Public Health Service Act (21 U.S.C. 262), or transfer (including by sale) the voucher to another party that may then use it. A priority review is a review conducted with a Prescription Drug User Fee Act (PDUFA) goal date of 6 months.

The applicant that uses a priority review voucher is entitled to a priority review but must pay FDA a priority review user fee in addition to any other fee required by PDUFA. FDA has published a draft guidance on its Web site about how this priority review voucher program will operate (available at: <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm080599.pdf>).

This notice establishes the priority review fee rate for FY 2012 of \$5,280,000 and outlines FDA's process for implementing the collection of the priority review user fees. This rate is effective on October 1, 2011, and will remain in effect through September 30, 2012, for applications submitted with a priority review voucher. The payment of

¹ Geoff Green et al., November–December 2009, 35(6), “Pharmacopeial Standards for the Subdivision Characteristics of Scored Tablets,” *Pharmacopeial Forum*.

this priority review user fee is required in addition to the payment of any other fee that would normally apply to such an application under PDUFA before FDA will consider the application complete and acceptable for filing.

II. Priority Review User Fee for FY 2012

Under section 524(c)(2) of the FD&C Act, the amount of the priority review user fee is to be determined each FY based on the average cost incurred by FDA in the review of a human drug application subject to priority review in the previous FY.

A priority review is a review conducted with a PDUFA goal date of 6 months. Normally, an application for a Center for Drug Evaluation and Research (CDER) product will qualify for a priority review if FDA determines that the product, if approved, would provide safe and effective therapy where no satisfactory alternative therapy exists or would be a significant improvement compared to marketed products, including non-drug products and/or therapies, in the treatment, diagnosis, or prevention of a disease. A Center for Biologics Evaluation and Research (CBER) product will qualify for a priority review if FDA determines that the product, if approved, would be a significant improvement in the safety or effectiveness of the treatment, diagnosis, or prevention of a serious or life-threatening disease. FDA has committed to a goal to review and act on 90 percent of the applications that have been granted priority review status no later than 6 months after receipt. An application that does not receive a priority designation will receive a standard review. Under the goals identified in the letters referenced in section 101(c) of FDAAA, FDA commits to a goal to review and act on 90 percent of standard applications within 10 months of the date of receipt. A priority review involves a more intensive level of effort and a higher level of resources than a standard review.

Section 524 of the FD&C Act specifies that the fee amount should be based on the average cost incurred by the Agency for a priority review in the previous FY. Because FDA has never tracked the cost of reviewing applications that get priority review as a separate cost subset, FDA estimated this cost based on other data that the Agency has tracked and kept. FDA started by using data that the Agency estimates and publishes on its Web site each year—standard costs for review. FDA does not publish a standard cost for “the review of a human drug application subject to priority review in the previous fiscal

year.” However, we expect all such applications would contain clinical data. The standard cost application categories with clinical data that FDA does publish each year are: (1) New drug applications (NDAs) for a new molecular entity (NME) with clinical data, and (2) biologic license applications (BLAs).

The worksheets for standard costs for FY 2010, the latest year for which standard cost data are available, show a standard cost of \$4,316,567 for an NDA with clinical data and \$6,081,461 for a BLA. Based on these standard costs, the total cost to review the 33 applications in these two categories in FY 2010 (9 BLAs and 24 NDAs with clinical data) was \$158,331,000, rounded to the nearest thousand dollars. (**Note:** No investigational new drug (IND) review costs are included in this amount; they will be calculated separately and added in the next paragraph.) Records acquired from CDER and CBER by the Office of Policy and Planning (OPP), Economics Staff, indicate that a total of 13 of these applications (8 NDAs [excluding the President’s Emergency Plan for Aids Relief NDAs] and 5 BLAs) received priority review, which would mean that the remaining 20 received standard reviews. Because a priority review compresses a review that ordinarily takes 10 months into 6 months, OPP estimates that a multiplier of 1.67 (10 months divided by 6 months) should be applied to non-priority review costs in estimating the effort and cost of a priority review as compared to a standard review. This multiplier is consistent with published research on this subject. In the article “Developing Drugs for Developing Countries,” published in *Health Affairs*, Volume 25, Number 2, in 2006, the analysis by David B. Ridley, Henry G. Grabowski, and Jeffrey L. Moe supports a priority review multiplier in the range of 1.48 to 2.35. The multiplier derived by FDA falls well below the mid-point of this range. Using FY 2010 figures, the costs of a priority and standard review are estimated using the following formula: $(13 \alpha * 1.67) + (20 \alpha) = \$158,331,000$ where “ α ” is the cost of a standard review and “ α times 1.67” is the cost of a priority review. Using this formula, the cost of a standard review for NMEs is calculated to be \$3,796,000 (rounded to the nearest thousand dollars) and the cost of a priority review for NMEs is 1.67 times that amount, or \$6,339,000 (rounded to the nearest thousand dollars).

Next, the cost of the IND review phase for these applications is calculated. The standard lifetime cost of reviewing a

drug IND in FY 2010 was \$362,102. The standard lifetime cost of a biologic IND review in FY 2010 was \$791,916. Because there were 8 priority NDAs and 5 priority BLAs received in FY 2010, the following formula below estimates the average cost of the IND review phase of an application:

$$(8 \text{ NDA} * \$362,102) + (5 \text{ BLAs} * \$791,916) = \$6,856,396$$

This is the full cost of the IND review associated with the 13 priority review applications received in FY 2010. Dividing \$6,856,000 (rounded to the nearest thousand dollars) by 13 (the total number of priority review applications received in FY 2010), yields an average IND review phase cost of \$527,000 (rounded to the nearest thousand dollars) per priority review application.

Adding the cost of the NDA/BLA priority review calculated above, \$6,339,000, to the cost of the IND review phase of \$527,000, results in an estimated average cost for priority review for an application received in FY 2010 of \$6,866,000.

Section 524 of the FD&C Act specifies that the fee amount should be based on the average cost incurred by the Agency for a priority review in the previous FY. FDA is setting fees for FY 2012, and the previous FY is FY 2011. However, the FY 2011 submission cohort has not been closed out yet, and the cost data for FY 2011 are not complete. The latest year for which FDA has data is FY 2010. Accordingly FDA will adjust the FY 2010 cost figure above by the average amount by which FDA’s average salary and benefit costs increased in the 5 years prior to FY 2011, to adjust the FY 2010 amount for cost increases in FY 2011. That figure, also published in the **Federal Register** of August 1, 2011 (76 FR 45831), setting PDUFA fees for FY 2012, is 3.72 percent. Increasing the FY 2010 average priority review cost figure of \$6,866,000 by 3.72 percent results in an estimated cost of \$7,121,000 (rounded to the nearest thousand dollars).

FDA will deduct from this amount the PDUFA fee that must also be paid (in addition to the priority review fee) when an NDA or BLA with clinical data is submitted in FY 2012. That amount, also published in the **Federal Register** of August 1, 2011, is \$1,841,500. The difference, rounded to the nearest thousand dollars, is \$5,280,000. This is the priority review user fee amount for FY 2012 that must be submitted with a priority review voucher in FY 2012, in addition to any PDUFA fee that is required for such an application.

III. Priority Review Fee Schedule for FY 2012

The fee rate for FY 2012 is set out in table 1 of this document:

TABLE 1—PRIORITY REVIEW SCHEDULE FOR FY 2012

Fee category	Fee rate for FY 2012
Applications Submitted With a Priority Review Voucher in Addition to the Normal PDUFA Fee	\$5,280,000

IV. Implementation of Priority Review Fee

Under section 524(c)(4)(A) of the FD&C Act, the priority review user fee is due upon submission of the application for which the priority review voucher is used. Section 524(c)(4)(B) specifies that the application will be considered incomplete if the priority review user fee and all other applicable user fees are not paid in accordance with FDA payment procedures. FDA may not grant a waiver, exemption, reduction, or refund of any fees due and payable under this section of the FD&C Act, and FDA may not collect priority review voucher fees prior to a relevant appropriation for fees for that FY. Beginning with FDA's appropriation for FY 2009, the annual appropriation language states specifically that "priority review user fees authorized by 21 U.S.C. 360n (section 524 of the FD&C Act) may be credited to this account, to remain available until expended." (Pub. L. 111-8, Section 5, Division A, Title VI).

The priority review fee established in the new fee schedule must be paid for any application that is received after September 30, 2011, and submitted with a priority review voucher. This fee must be paid in addition to any other fee due under PDUFA. Payment must be made in U.S. currency by check, bank draft, or U.S. postal money order payable to the order of the Food and Drug Administration. The user fee identification (ID) number should be included on the check, followed by the words "Priority Review." Payments can be mailed to: Food and Drug Administration, P.O. Box 979107, St. Louis, MO 63197-9000.

If checks are sent by a courier that requests a street address, the courier can deliver the checks to: U.S. Bank, Attention: Government Lockbox 979107, 1005 Convention Plaza, St. Louis, MO 63101. (Note: This U.S. Bank address is for courier delivery only.) The FDA post

office box number (P.O. Box 979107) must be written on the check. The tax identification number of the Food and Drug Administration is 53-0196965.

Wire transfer payments may also be used. Please reference your unique user fee ID number when completing your transfer. The originating financial institution may charge a wire transfer fee. Please ask your financial institution about the fee and include it with your payment to ensure that your fee is fully paid. The account information is as follows: New York Federal Reserve Bank, U.S. Dept. of Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, Acct. No.: 75060099, Routing No.: 021030004, Swift: FRNYUS33, Beneficiary: FDA, 1350 Piccard Dr., Rockville, MD 20850.

Dated: August 24, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011-22062 Filed 8-29-11; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2011-N-0607]

FDA's Public Database of Products With Orphan-Drug Designation: Replacing Non-Informative Code Names With Descriptive Identifiers

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA), Office of Orphan Products Development, is announcing that it has replaced non-informative code names with descriptive identifiers on its public database of products that have received orphan-drug designation. The Orphan Drug Act mandates that FDA provide notice to the public respecting the designation of a drug as an orphan-drug. FDA typically provides public notice by publishing a drug's generic or trade name upon orphan designation. Where a designated drug does not have a generic or trade name, publishing a non-informative code name does not meet the statutory disclosure requirement because the public would not be able to identify the drug that has received orphan designation.

FOR FURTHER INFORMATION CONTACT: Jeffrey Fritsch, Office of Orphan Products Development, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5276, Silver Spring,

MD 20993, 301-796-8660, e-mail: OPDAR@FDA.HHS.GOV.

SUPPLEMENTARY INFORMATION: FDA publishes the generic name and/or trade name of a drug on its Web site at <http://www.fda.gov/orphan> after it designates a drug as an orphan drug. It has come to our attention that a small subset of drugs that have received orphan designation were published on our public database with non-informative code names. After careful consideration of this matter, we have concluded that the Orphan Drug Act mandates that FDA identify to the public products that have received orphan-drug designation. If a drug has no generic or trade name, publishing a non-informative code name for that drug does not meet the statutory notice requirement because the public would not be able to identify the drug that has received orphan designation.

In addition to issuing this notice, FDA has mailed letters to affected sponsors at their last known address and has posted notification on its Web site at <http://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/HowtoapplyforOrphanProductDesignation/ucm267378.htm>. We informed sponsors that, on our Web site, we have replaced all non-informative code names with descriptive identifiers. We asked that these sponsors notify us within 20 days of the date of the letter if they believe that their product's current identifier did not accurately identify their product to the public.

Despite reasonable efforts, we were unable to notify a small proportion of affected sponsors. It appears that some sponsors may have gone out of business or may have transferred ownership of, or beneficial interest in, orphan-drug designation without informing FDA. (We remind sponsors of their obligations to notify us of any change in ownership of orphan-drug designation, under 21 CFR 316.27, and to submit brief progress reports to us on an annual basis, under 21 CFR 316.30.)

Through this document, FDA seeks to inform sponsors whom the Agency has not otherwise been able to notify that, under the Orphan Drug Act's notice requirements, all non-informative codes in our public orphan drug designations database have been replaced with corresponding informative identifiers.

If you believe this notice applies to you, please visit our Web site at <http://www.fda.gov/orphan>. Under "Resources for You," click on the "Search for Orphan Drug Designations and Approvals" and enter your product. If you believe that your product's current identifier does not accurately identify your product to the public,

please promptly contact Jeffrey Fritsch (see **FOR FURTHER INFORMATION CONTACT**).

Dated: August 25, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–22144 Filed 8–29–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Refugee Resettlement

Award of an Urgent Single-Source Grant to Survivors of Torture International (SOTI) in San Diego, CA; Correction

AGENCY: Office of Refugee Resettlement, ACF, HHS.

ACTION: Notice; correction.

CFDA Number: 93.604.

SUMMARY: The Office of Refugee Resettlement, ACF, HHS published a document in the **Federal Register** of August 16, 2011 (76 FR 50744), concerning the issuance of an urgent single-source grant to Survivors of Torture, International (SOTI), San Diego, CA. The document contained incorrect information in citing the statutory authority for making this award.

Correction: In the **Federal Register** of August 16, 2011 (76 FR 50744), ORR omitted the primary authority for issuing this award. The notice should have included the following: Awards announced in this notice are authorized by the Torture Victims Relief Act (TVRA) of 1998, "Public Law 105–320 (22 U.S.C. 2152 note), reauthorized by Public Law 109–165 in January 2006. Section 5 (a) of the TVRA of 1998 provides for "Assistance for Treatment of Torture Victims. — The Secretary of Health and Human Services may provide grants to programs in the United States to cover the cost of the following services: (1) Services for the rehabilitation of victims of torture, including treatment of the physical and psychological effects of torture. (2) Social and legal services for victims of torture. (3) Research and training for health care providers outside of treatment centers, or programs for the purpose of enabling such providers to provide the services described in paragraph (1)." And by Section 412 (c)(1)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1522(c)(1)(A), as amended, and the Refugee Assistance Extension Act of 1986, Public Law 99–605, Nov 6, 1986, 100 Stat. 3449.

FOR FURTHER INFORMATION CONTACT: Ronald Munia, Director, Division of Community Resettlement, Office of Refugee Resettlement, 901 D Street, SW., Washington, DC 20047. Telephone: 202–401–4559. E-mail: Ronald.Munia@acf.hhs.gov.

Dated: August 24, 2011.

Eskinder Negash,

Director, Office of Refugee Resettlement.

[FR Doc. 2011–22196 Filed 8–29–11; 8:45 am]

BILLING CODE 4120–27–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Services Accountability Improvement System—(OMB No. 0930–0208)—Revision

This revised instrument will allow SAMHSA to collect information on two new strategic initiatives—*Trauma and Violence* and *Military Families*. The new items will be added to the Services Accountability Improvement System (SAIS), which is a real-time, performance management system that captures information on the substance abuse treatment and mental health services delivered in the United States. A wide range of client and program information is captured through SAIS for approximately 600 grantees. Substance abuse treatment facilities submit their data on a monthly and even a weekly basis to ensure that SAIS is an accurate, up-to-date reflection on the scope of services delivered and characteristics of the treatment population. Over 30 reports on grantee performance are readily available on the SAIS website. The reports inform staff on the grantees' ability to serve their target populations and meet their client and budget targets. SAIS data allow grantees information that can guide modifications to their service array.

With the addition of new questions regarding military families, experiences with trauma, and experiences with violence GFA, there is a proposed new

data collection instrument up for comment.

Approval of this information collection will allow SAMHSA to continue to meet Government Performance and Results Act of 1993 (GPRA) reporting requirements that quantify the effects and accomplishments of its discretionary grant programs which are consistent with OMB guidance.

CSAT has increased the number of questions in the instrument to satisfy reporting needs. The following paragraphs present a description of the changes made to the information collection. These questions will be contained in new sections in the GPRA tool. *Section H. Violence and Trauma*—CSAT proposes to add the following 6 items in a new section entitled "Violence and Trauma".

1. Have you ever experienced violence or trauma in any setting (including community or school violence; domestic violence; physical, psychological, or sexual maltreatment/assault within or outside of the family; natural disaster; terrorism; neglect; or traumatic grief)? No, (skip to next section)

2. Did any of these experiences feel so frightening, horrible, or upsetting that in the past and/or the present that you:

2a. Have had nightmares about it or thought about it when you did not want to?

2b. Tried hard not to think about it or went out of your way to avoid situations that remind you of it?

2c. Were constantly on guard, watchful, or easily startled?

2d. Felt numb and detached from others, activities, or your surroundings?

3. In the past 30 days, how often have you been hit, kicked, slapped, or otherwise physically hurt?

- *Experiences with Violence and Trauma*—One of SAMHSA's 10 Strategic Initiatives is trauma and violence. In order to capture this information, CSAT is adding six new questions to be asked of respondents. This information will help in SAMHSA's overall goal of reducing the behavioral health impacts of violence and trauma by encouraging substance abuse treatment programs to focus on trauma-informed services.

Section L. Military Family and Deployment—CSAT proposes to add the following 6 new items in a new section entitled "Military Family and Deployment".

1. Have you ever served in the Armed Forces, in the Reserves, or the National Guard [select all that apply]? No, (Skip to #2)

1b. Are you currently on active duty in the Armed Forces, in the Reserves, or the National Guard [select all that apply]?

1c. Have you ever been deployed to a combat zone?

2. Is anyone in your family or someone close to you on active duty in the Armed

Forces, in the Reserves, or the National Guard, or separated or retired from Armed Forces, Reserves, or the National Guard? No, (Skip to next section)

3. What is the relationship of that person (Service Member) to you?

3b. Has the Service Member experienced any of the following (check all that apply):

- Deployed in support of Combat Operations (e.g. Iraq or Afghanistan)
- Was physically injured during Combat Operations
- Developed combat stress symptoms/difficulties adjusting following deployment,

including PTSD, Depression, or suicidal thoughts

- Died or was killed

• *Veteran Family Status and Areas of Deployment*—SAMHSA is also interested in collecting data on active duty and veteran military members. Collection of these data will allow CSAT to identify the number of veterans served, deployment status and location, and family veteran status in conjunction with the types of services they may receive. Identifying a client's veteran status and deployment area allows

CSAT and the grantees to monitor these clients and explore whether special services or programs are needed to treat them for substance abuse and other related issues. Identification of veteran status and other military family issues will also allow coordination between SAMHSA and other Federal agencies in order to provide a full range of services to veterans. CSAT will also be able to monitor their outcomes and activities per the NOMS. The total annual burden estimate is shown below:

ESTIMATES OF ANNUALIZED HOUR BURDEN¹—CSAT GPRA CLIENT OUTCOME MEASURES FOR DISCRETIONARY PROGRAMS

Center/form/respondent type	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Added burden proportion ²
Clients:						
Adolescents	3,900	4	15,600	.5	7,800	.34
Adults:						
General (non ATR or SBIRT).	28,000	3	84,000	.5	42,000	.34
ATR	53,333	3	159,999	.5	80,000	.34
SBIRT ⁴ Screening Only	150,618	1	150,618	.13	19,580	0
SBIRT Brief Intervention	27,679	3	83,037	.20	16,607	0
SBIRT Brief Tx & Refer to Tx.	9,200	3	27,600	.5	13,800	.34
Client Subtotal	272,730	.....	520,854	.....	179,787	.....
Data Extract ⁵ and Upload:						
Adolescent Records	44 grants	44 × 4	176	.18	32	.....
Adult Records:						
General (non ATR or SBIRT).	528 grants	70 × 3	210	.18	38	.....
ATR Data Extract	53,333	3	160,000	.16	25,600	.....
ATR Upload ⁶	24 grants	3	160,000	1 hr. per 6,000 records	27	.....
SBIRT Screening Only Data Extract.	9 grants	21,517 × 1	21,517	.07	1,506	.....
SBIRT Brief Intervention Data Extract.	9 grants	3,954 × 3	11,862	.10	1,186	.....
SBIRT Brief Tx&Refer to Tx Data Extract.	9 grants	1,314 × 3	3,942	.18	710	.....
SBIRT Upload ⁷	7 grants	.....	171,639	1 hr. per 6,000 records	29	.....
Data Extract and Upload Subtotal.	53,856	.....	529,382	.....	29,134	.....
Total	326,586	.....	1,050,236	.....	208,921	.....

NOTES:

¹ This table represents the maximum additional burden if adult respondents, for the discretionary services programs including ATR, provide three sets of responses/data and if CSAT adolescent respondents, provide four sets of responses/data.

² Added burden proportion is an adjustment reflecting customary and usual business practices programs engage in (e.g., they already collect the data items).

³ Estimate based on 2010 hourly wage of \$19.97 for U.S. workforce eligible from the Bureau of Labor Statistics.

⁴ Screening, Brief Intervention, Treatment and Referral (SBIRT) grant program:

* 27,679 Brief Intervention (BI) respondents complete sections A & B of the GPRA instrument, all of these items are asked during a customary and usual intake process resulting in zero burden; and

* 9,200 Brief Treatment (BT) & Referral to Treatment (RT) respondents complete all sections of the GPRA instrument.

⁵ Data Extract by Grants: Grant burden for capturing customary and usual data.

⁶ Upload: all 24 ATR grants upload data.

⁷ Upload: 7 of the 9 SBIRT grants upload data; the other 2 grants conduct direct data entry.

Based on current funding and planned fiscal year 2010 notice of funding announcements (NOFA), the CSAT programs that will use these measures in fiscal years 2010 through

2012 include: the Access to Recovery 2 (ATR2), ATR3, Addictions Treatment for Homeless; Adult Criminal Justice Treatment; Assertive Adolescent Family Treatment; HIV/AIDS Outreach; Office

of Juvenile Justice and Delinquency Prevention—Brief Intervention and Referral to Treatment (OJJDP-BIRT); OJJDP-Juvenile Drug Court (OJJDP-JDC); Offender Re-entry Program; Pregnant

and Postpartum Women; Recovery Community Services Program—Services; Recovery Oriented Systems of Care; Screening and Brief Intervention and Referral to Treatment (SBIRT), Targeted Capacity Expansion (TCE); TCE/HIV; Treatment Drug Court; and the Youth Offender Reentry Program. SAMHSA uses the performance measures to report on the performance of its discretionary services grant programs. The performance measures information is used by individuals at three different levels: the SAMHSA administrator and staff, the Center administrators and government project officers, and grantees

SAMHSA and its Centers will use the data for annual reporting required by GPRA and for NOMs comparing baseline with discharge and follow-up data. GPRA requires that SAMHSA's report for each fiscal year include actual results of performance monitoring for the three preceding fiscal years. The additional information collected through this process will allow SAMHSA to report on the results of these performance outcomes as well as be consistent with the specific performance domains that SAMHSA is implementing as the NOMs, to assess the accountability and performance of its discretionary and formula grant programs.

Written comments and recommendations concerning the proposed information collection should be sent by September 29, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202-395-7285.

Rose Shannon,

Director, Division of Executive Correspondence.

[FR Doc. 2011-22095 Filed 8-29-11; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of

information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276-1243.

Project: National Outcome Measures (NOMs) for Substance Abuse Prevention—(OMB No. 0930-0230)—Revision

This revised instrument will allow SAMHSA to collect information on a new strategic initiative—*Military Families*. The new items will be added to the Center for Substance Abuse Prevention's (CSAP) National Outcome Measures for Substance Abuse Prevention (NOMs). Data are collected from SAMHSA/CSAP grants and contracts where community and participant outcomes are assessed. The analysis of these data helps determine whether progress is being made in achieving SAMHSA/CSAP's mission. The primary purpose of this system is to promote the use among SAMHSA/CSAP grantees and contractors of common National Outcome Measures recommended by SAMHSA/CSAP with significant input from panels of experts and state representatives.

With the addition of new questions regarding military families, there is a proposed new data collection instrument up for comment. Approval of this information collection will allow SAMHSA to continue to meet Government Performance and Results Act of 1993 (GPRA) reporting requirements that quantify the effects and accomplishments of its discretionary grant programs which are consistent with OMB guidance, and address goals and objectives outlined in the Office of National Drug Control Policy's Performance Measures of Effectiveness.

CSAP has increased the number of questions in the instrument to satisfy reporting needs. The following paragraphs present a description of the changes made to the information collection. These questions will be contained in new sections in the Services tool.

Military Family and Deployment—CSAP proposes to add the following 6 new items in the adult tool and 3 new items in the youth tool in a new section entitled "Military Family and Deployment."

Adult

1. Have you ever served in the Armed Forces, in the Reserves, or the National Guard [select all that apply]? No, (Skip to #2)

1b. Are you currently on active duty in the Armed Forces, in the Reserves, or the National Guard [select all that apply]?

1c. Have you ever been deployed to a combat zone?

2. Is anyone in your family or someone close to you on active duty in the Armed Forces, in the Reserves, or the National Guard, or separated or retired from Armed Forces, Reserves, or the National Guard? No, (Skip to next section)

3. What is the relationship of that person (Service Member) to you?

3b. Has the Service Member experienced any of the following (check all that apply):

- Deployed in support of Combat Operations (e.g. Iraq or Afghanistan)
- Was physically Injured during combat Operations
- Developed combat stress symptoms/difficulties adjusting following deployment, including PTSD, Depression, or suicidal thoughts
- Died or was killed

Youth

1. Is anyone in your family or someone close to you on active duty in the Armed Forces, in the Reserves, or the National Guard, or separated or retired from Armed Forces, Reserves, or the National Guard? No, (Skip to next section)

2. What is the relationship of that person (Service Member) to you?

2b. Has the Service Member experienced any of the following (check all that apply):

- Deployed in support of Combat Operations (e.g. Iraq or Afghanistan)
- Was physically Injured during combat Operations
- Developed combat stress symptoms/difficulties adjusting following deployment, including PTSD, Depression, or suicidal thoughts
- Died or was killed

- *Veteran Family Status and Areas of Deployment*—SAMHSA is interested in collecting data on active duty and veteran military members. Collection of these data will allow CSAP to identify the number of veterans served, deployment status and location, and family veteran status in conjunction with the types of services they may receive. Identifying a participant's veteran status and deployment area allows CSAP and the grantees to monitor these participants and explore whether special services or programs are needed to treat them for substance abuse and other related issues. Identification of veteran status and other military family issues will also allow coordination between SAMHSA and

other Federal agencies in order to provide a full range of services to

veterans. CSAP will also be able to monitor their outcomes and activities

per the NOMS. The total annual burden estimate is shown below:

SAMHSA/CSAP program	Number of grantees	Number of respondents	Responses per respondent	Hours/response	Total hours
FY 11					
Science/Services:					
Fetal Alcohol	23	4,800	3	0.4	5,760
Capacity:					
HIV/Targeted Capacity	122	31,964	3	0.83	79,590
SPF SIG	51	.....	0	.....	.....
SPF SIG/Community Level * .....	.....	765	1	0.83	635
SPF SIG/Program Level * .....	.....	19,125	3	0.4	22,950
PFS	5	.....	0	.....	.....
PFS/Community Level * .....	.....	75	1	0.83	62
PFS/Program Level * .....	.....	1,875	3	0.4	2,250
PPC	N/A	N/A	N/A	N/A	N/A
FY 12					
Science/Services:					
Fetal Alcohol	23	4,800	3	0.4	5,760
Capacity:					
HIV/Targeted Capacity	122	31,964	3	0.83	79,590
SPF SIG	51	.....	0	.....	.....
SPF SIG/Community Level * .....	.....	765	1	0.83	635
SPF SIG/Program Level * .....	.....	19,125	3	0.4	22,950
PFS	10	.....	0	.....	.....
PFS/Community Level * .....	.....	150	1	0.83	125
PFS/Program Level * .....	.....	3,750	3	0.4	4,500
PPC	50	25,000	1	0.83	20,750
FY 13					
Science/Services:					
Fetal Alcohol	23	4,800	3	0.4	5,760
Capacity:					
HIV/Targeted Capacity	122	31,964	3	0.83	79,590
SPF SIG	35	.....	0	.....	.....
SPF SIG/Community Level * .....	.....	525	1	0.83	436
SPF SIG/Program Level * .....	.....	13,125	3	0.4	15,750
PFS	15	.....	0	.....	.....
PFS/Community Level * .....	.....	225	1	0.83	187
PFS/Program Level * .....	.....	5,625	3	0.4	6,750
PPC	50	25,000	1	0.83	20,750
Annual Average .....	.....	11,271	.....	.....	18,739

* The Strategic Prevention Framework State Incentive Grant (SPF SIG) and Partnerships for Success (PFS) have a three level evaluation: The Grantee, Community and Program Level. The Grantee level data will be pre-populated by SAMHSA. The use of the Community Level instrument is optional as they relate to targeted interventions implemented during the reporting period. At the program level, items will be selected in line with direct services implemented.

Written comments and recommendations concerning the proposed information collection should be sent by September 29, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to

submit comments by fax to: 202-395-7285.

Rose Shannon,

Director, Division of Executive Correspondence.

[FR Doc. 2011-22097 Filed 8-29-11; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276-1243.

Project: Transformation Accountability Reporting System—(OMB No. 0930-0285)—Revision

This revised instrument will allow SAMHSA to collect information on two new strategic initiatives—*Trauma and Violence* and *Military Families*. The new items will be added to the Transformation Accountability (TRAC) Reporting System is a real-time, performance management system that captures information on mental health services delivered in the United States. A wide range of client and program information is captured through TRAC for approximately 400 grantees.

With the addition of new questions regarding military families, experiences with trauma, and experiences with violence GFA, there is a proposed new data collection instrument up for comment. Approval of this information collection will allow SAMHSA to continue to meet Government Performance and Results Act of 1993 (GPRA) reporting requirements that quantify the effects and accomplishments of its discretionary grant programs which are consistent with OMB guidance.

CMHS has increased the number of questions in the instrument to satisfy reporting needs. The following paragraphs present a description of the changes made to the information collection. These questions will be contained in new sections in the Services tool.

Violence and Trauma—CMHS proposes to add the following 6 items in a new section entitled “Violence and Trauma”.

1. Have you ever experienced violence or trauma in any setting (including community or school violence; domestic violence; physical, psychological, or sexual maltreatment/assault within or outside of the family; natural disaster; terrorism; neglect; or traumatic grief)? No, (skip to next section)

2. Did any of these experiences feel so frightening, horrible, or upsetting that in the past and/or the present that you:

2a. Have had nightmares about it or thought about it when you did not want to?

2b. Tried hard not to think about it or went out of your way to avoid situations that remind you of it?

2c. Were constantly on guard, watchful, or easily startled?

2d. Felt numb and detached from others, activities, or your surroundings?

3. In the past 30 days, how often have you been hit, kicked, slapped, or otherwise physically hurt?

• *Experiences With Violence and Trauma*—One of SAMHSA’s 10 Strategic Initiatives is trauma and violence. In order to capture this information, CMHS is adding six new questions to be asked of respondents. This information will help in SAMHSA’s overall goal of reducing the behavioral health impacts of violence and trauma by encouraging substance abuse treatment programs to focus on trauma-informed services.

Military Family and Deployment—CMHS proposes to add the following 6 new items in a new section entitled “Military Family and Deployment”.

1. Have you ever served in the Armed Forces, in the Reserves, or the National Guard [select all that apply]? No, (Skip to #2)

1b. Are you currently on active duty in the Armed Forces, in the Reserves, or the National Guard [select all that apply]?

1c. Have you ever been deployed to a combat zone?

2. Is anyone in your family or someone close to you on active duty in the Armed Forces, in the Reserves, or the National Guard, or separated or retired from Armed Forces, Reserves, or the National Guard? No, (Skip to next section)

3. What is the relationship of that person (Service Member) to you?

3b. Has the Service Member experienced any of the following (check all that apply):

○ Deployed in support of Combat Operations (e.g. Iraq or Afghanistan)

○ Was physically Injured during combat Operations

○ Developed combat stress symptoms/ difficulties adjusting following deployment, including PTSD, Depression, or suicidal thoughts

○ Died or was killed

• *Veteran Family Status and Areas of Deployment*—SAMHSA is also interested in collecting data on active duty and veteran military members. Collection of these data will allow CMHS to identify the number of veterans served, deployment status and location, and family veteran status in conjunction with the types of services they may receive. Identifying a client’s veteran status and deployment area allows CMHS and the grantees to monitor these clients and explore whether special services or programs are needed to treat them for substance abuse and other related issues. Identification of veteran status and other military family issues will also allow coordination between SAMHSA and other Federal agencies in order to provide a full range of services to veterans. CMHS will also be able to monitor their outcomes and activities per the NOMS. The total annual burden estimate is shown below:

ESTIMATES OF ANNUALIZED HOUR BURDEN—CMHS CLIENT OUTCOME MEASURES FOR DISCRETIONARY PROGRAMS

Type of response	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Hourly wage cost	Total hour cost
Client-level baseline interview	15,681	1	15,681	0.48	7,527	¹ \$15	\$112,905
Client-level 6-month reassessment interview	10,646	1	10,646	0.367	3,907	15	58,605
Client-level discharge interview ²	4,508	1	4,508	0.367	1,655	15	24,825
Client-level baseline chart abstraction	2,352	1	2,352	0.1	235	15	3,525
Client-level reassessment chart abstraction ³	9,017	1	9,017	0.1	902	15	13,530
Client-level Subtotal ⁴	15,681	.....	15,681	.....	14,226	15	213,390
Infrastructure development, prevention, and mental health promotion quarterly record abstraction ...	942	4	3,768	4	15,072	⁵ 35	527,520

ESTIMATES OF ANNUALIZED HOUR BURDEN—CMHS CLIENT OUTCOME MEASURES FOR DISCRETIONARY PROGRAMS—
Continued

Type of response	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Hourly wage cost	Total hour cost
Total	16,623	.....	.....	.....	29,298	.....	740,910

¹ Based on minimum wage.

² Based on an estimate that it will be possible to conduct discharge interviews on 40 percent of those who leave the program.

³ Chart abstraction will be conducted on 100 percent of those discharged.

⁴ This is the maximum additional burden if all consumers complete the baseline and periodic reassessment interviews.

⁵ To be completed by grantee Project Directors, hence the higher hourly wage.

Written comments and recommendations concerning the proposed information collection should be sent by September 29, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202-395-7285.

Rose Shannon,

Director, Division of Executive Correspondence.

[FR Doc. 2011-22096 Filed 8-29-11; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS-2011-0045]

Privacy Act of 1974; Department of Homeland Security/Federal Emergency Management Agency—001 National Emergency Family Registry and Locator System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to update and reissue a current Department of Homeland Security system of records titled, "Department of Homeland Security/Federal Emergency Management Agency—001 National Emergency Family Registry and Locator System of Records." This system of records allows the Department of Homeland Security/Federal Emergency Management Agency to collect and maintain records on adults displaced from their homes or pre-disaster location after a Presidentially-declared emergency or disaster. This system of

records has been updated to include Law Enforcement Officials in categories of records, individuals, routine uses, and record source categories. This updated system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before September 29, 2011. This new system will be effective September 29, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS-2011-0045 by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 703-483-2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

- *Docket:* For access to the docket to read background documents or comments received go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Dr. Lesia Banks, (202-212-4491), Acting Privacy Officer, Federal Emergency Management Agency, 500 C Street, NW., Washington, DC 20475. For privacy issues please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) proposes to update and reissue a current DHS/FEMA system of records titled, "DHS/FEMA-001 National

Emergency Family Registry and Locator (NEFRLS) System of Records," 74 FR 48767, September 29, 2009.

The DHS/FEMA NEFRLS System of Records collects information from Law Enforcement Officials (LEOs) for the purpose of responding to a Missing Persons Report. The information collected from LEOs is to facilitate identity verification and their status as a member of law enforcement.

During Hurricane Katrina, displaced individuals experienced numerous difficulties in reuniting with family members after the disaster. As a result, Congress mandated in Section 689c of the Post-Katrina Emergency Management Reform Act (PKEMRA) of 2006, Public Law 109-295, that FEMA establish NEFRLS. FEMA has the discretionary authority to activate NEFRLS to help reunify families separated after an emergency or disaster declared by the President as defined in the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207.

The collection of a LEO's identifying information increased the amount of identifying information collected and maintained by the DHS/FEMA-001 NEFRLS System of Records. Information collected is stored on FEMA secured servers, and/or stored in locked cabinets with secured facility access controls.

Previously, the DHS/FEMA-001 NEFRLS System of Records only allowed two groups of individuals limited access. The groups were: (1) Registrants: displaced individuals registered in the system; and (2) searchers: individuals who are searching for family or household members who registered in the system. The DHS/FEMA-001 NEFRLS System of Records now allows FEMA NEFRLS Administrators to have limited access to records for the purpose of sharing registrants' information with LEOs pursuant to an official missing persons report. This increases the likelihood of reunifying family and friends displaced by a Presidentially-declared emergency or disaster.

The following categories are being updated: Categories of individuals is updated to clarify and specifically include LEOs; Categories of Records is updated to include LEO identifying information (such as Badge Number) and LEO verification indicators; Routine Uses is updated to clearly identify sharing with Federal, state, local, tribal, territorial, international, or foreign LEOs; and Records Source Categories is updated to include LEOs as a source.

This updated system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/FEMA-001 NEFRLS System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM OF RECORDS

DHS/FEMA-001

SYSTEM NAME:

DHS/FEMA-001 National Emergency Family Registry and Locator System (NEFRLS) System of Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at FEMA Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Registrants (adult individual(s)) who have been displaced by a Presidentially-declared disaster or emergency and who voluntarily register in NEFRLS; family or household members who are

travelling with the registrant or who lived in the pre-disaster residence immediately preceding the disaster; and searchers who are searching for missing family or household members.

Searchers are permitted to view personal information and/or messages of certain registrant(s) upon designation by the registrant(s).

Federal, state, local, tribal, territorial, international, or foreign Law Enforcement Officials (LEOs) that are searching for missing persons that may have been displaced by a Presidentially-declared disaster or emergency pursuant to an Official Missing Persons Report.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information about the individual registering in NEFRLS as a registrant consists of:

- Authenticated Individual's Full Name;
- Date of Birth;
- Gender;
- Current Phone;
- Alternate Phone;
- Current Address;
- Pre-Disaster Address;
- Name and Type of Current Location; (*i.e.* shelter, hotel, or family/friend's home);
 - Traveling with Pets (Yes or No);
 - Identity Authentication Approval or Nonapproval (the fact of the authentication is maintained, but the answers to the questions provided to the third party organization are not maintained by DHS/FEMA);
 - System Specific Username and Password; and
 - Personal Message (may consist of up to 300 characters intended for designated family or household members to read).

Information about the family/household members traveling with the registrant in NEFRLS consists of:

- Family/Household Members' Full Name;
- Gender;
- Current Phone;
- Alternate Phone;
- Current Address;
- Pre-Disaster address;
- Name and type of current location; (*i.e.*, shelter, hotel, or family/friend's home);
 - Traveling with Pets (Yes or No);
 - Personal Message: (may consist of up to 300 characters for listed, designated family, or household members to read.)

Information about the individual searching NEFRLS for a registrant or family/household member (searcher) consists of:

- Searching Individual's Full Name;
- Permanent Address;

- Phone;
- Alternate Phone;
- E-mail;
- Date of Birth;
- Identity Authentication Approval or Nonapproval (the fact of the authentication is maintained, but the answers to the questions provided to the third party organization are not maintained by DHS/FEMA); and
 - System Specific Username and Password.

Information about a LEO collected by a FEMA NEFRLS Administrator for verification and status:

- Law Enforcement Official's Title;
- First Name;
- Last Name;
- Gender;
- Badge number/Law Enforcement License ID Number;
- Agency Name;
- City;
- County/Parish;
- State;
- Zip Code;
- Contact Phone;
- Contact E-mail;
- Supervisor Name;
- Supervisor Contact Number;
- Supervisor Contact E-mail;
- Agency City;
- Agency County/Parish;
- Agency State; and
- Verification Data. The verification process below indicates that there is a confirmed box to be checked for successful verification.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 689c of the Post-Katrina Emergency Management Reform Act of 2006, Public Law 109-295 and the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121-5207.

PURPOSE(S):

The purpose of this system is to reunify families and household members following a Presidentially-declared disaster or emergency. To families using NEFRLS, the registrant, and searcher must acknowledge that the information in NEFRLS may be disclosed to searchers upon request, to Federal, state, local, tribal, territorial, international, or foreign agencies including LEO as well as voluntary agencies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be

disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including U.S. Attorney Offices, or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;
2. Any employee of DHS in his/her official capacity;
3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or
4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a

contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, state, local, tribal, territorial, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To appropriate authorized Federal, state, local, tribal, territorial, international, or foreign law enforcement officers charged with investigating the whereabouts or locating missing persons.

I. To the National Center for Missing and Exploited Children and voluntary organizations as defined in 44 CFR 206.2(a)(27) that have an established disaster assistance program to address the disaster-related unmet needs of disaster victims, are actively involved in the recovery efforts of the disaster, and either have a national membership, in good standing, with the National Voluntary Organizations Active in Disaster, or are participating in the disaster's Long-Term Recovery Committee for the express purpose of reunifying families.

J. To Federal, state, local, tribal, territorial, international, or foreign agencies that coordinate with FEMA under the National Response Framework (an integrated plan explaining how the Federal government will interact with and support state, local, tribal, territorial, and non-governmental entities during a Presidentially-declared disaster or emergency) for the purpose of assisting with the investigation on the whereabouts of or locating missing persons.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD-ROM.

RETRIEVABILITY:

Records may be retrieved by name, address, and phone number of the individual registering or searching in the National Emergency Family Registry and Locator System.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

In accordance with the FEMA Records Schedule (FRS) and NARA Disposition Authority number N1-311-09-1, records and reports related to and regarding registrations and searchers in NEFRS performed by a displaced person, Call Center Operator on behalf of a displaced person, or family and friends will be cut off 60 days after the last edit to the record and destroyed/ deleted three years after the cutoff. Additionally, in compliance with FRS and NARA Disposition Authority number N1-311-04-5, Item 3, records in this system associated with a domestic catastrophic event will have permanent value. A catastrophic event may be any natural or manmade incident, including terrorism, which results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions. A catastrophic event could result in sustained national impacts over a prolonged period of time; almost immediately exceeds resources normally available to state, local, tribal, territorial and private-sector authorities in the impacted area; and significantly interrupts governmental operations and emergency services to such an extent

that national security could be threatened.

SYSTEM MANAGER AND ADDRESS:

Deputy Director, Individual Assistance, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to FEMA's FOIA Officer, 500 C Street, SW., Attn: FOIA Coordinator, Washington, DC 20472.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, <http://www.dhs.gov> or 1-866-431-0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See "Notification procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification procedure" above.

RECORD SOURCE CATEGORIES:

Records are obtained from registrants of NEFRS and individuals searching NEFRS, LEOs, and the third party authentication service indicating an individual has been approved or not approved.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: July 25, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011-22167 Filed 8-29-11; 8:45 am]

BILLING CODE 9110-17-P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS-2011-0081]

Privacy Act of 1974; Department of Homeland Security ALL-034 Emergency Care Medical Records System of Records Notice

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new Department of Homeland Security system of records titled, "Department of Homeland Security/ALL-034 Emergency Care Medical Records System of Records Notice." This system of records will allow the Department of Homeland Security Office of Health Affairs to collect and maintain records on individuals who receive emergency care from Department Emergency Medical Services providers. Individuals in this system include anyone who experiences a medical emergency and is treated by an on-duty Departmental Emergency Medical Services medical care provider. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before September 29, 2011. This new system will be effective September 29, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS-2011-0081 by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 703-483-2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office,

Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

• *Docket:* For access to the docket to read background documents or comments received go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For questions please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) Office of Health Affairs (OHA) proposes to establish a new DHS system of records titled, "DHS/ALL-034 Emergency Care Medical Records."

The Assistant Secretary for Health Affairs and Chief Medical Officer (ASHA/CMO) exercises oversight over all medical and public health activities of DHS, with the exception of U.S. Coast Guard (USCG) medical and public health activities. Throughout its components, the DHS workforce includes approximately 3,500 Emergency Medical Service (EMS) healthcare providers rendering emergency medical care in the pre-hospital environment, primarily to DHS employees and, when necessary, to individuals encountered in the course of duty in need of emergency care. These DHS EMS healthcare providers are employed by the following DHS components: U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), the United States Secret Service (USSS), Transportation Security Administration (TSA), U.S. Citizenship and Immigration Services (USCIS), Federal Law Enforcement Training Center (FLETC), Federal Emergency Management Agency (FEMA), and Science & Technology Directorate (S&T).

OHA administers oversight of DHS EMS healthcare providers through its Medical Quality Management (MQM) program, to ensure DHS EMS providers deliver consistent, quality medical care. To support MQM, OHA operates the electronic Patient Care Record (ePCR), an electronic encounter-based database designed for EMS management. After administering emergency care, DHS

EMS medical care providers manually enter emergency medical care information into ePCR. ePCR captures all aspects of patient care, from the initial dispatch of a vehicle and personnel to a designated site, demographics, vital signs (initial assessment), treatment, and transfer of care and/or patient transport. The system captures patient data such as name, date of birth, and medical information. Concurrent with the publication of this notice, DHS is publishing a Privacy Impact Assessment (PIA) describing the ePCR system. This PIA will be available at the DHS Privacy Office Web site at <http://www.dhs.gov/privacy>. ePCR improves MQM at the Department by allowing OHA to track and trend data quality, including documentation review, clinical performance, and performance improvement initiatives. This system assists OHA in assessing overall quality of care provided while ensuring that a high standard of care is continually met.

This includes electronic data in ePCR operated by OHA as well as those same EMS encounter records when kept by the EMS provider, in paper form. Individuals covered by this system include members of the public who are treated by on-duty DHS Emergency Medical Services (EMS) healthcare provider. When patients are DHS or other federal employees, their records are considered part of the OPM/GOVT-10—Employee Medical File System Records, 71 FR 3560 (Jun. 19, 2006.) When patients are not Federal employees, such as members of the public, their records are considered part of this system.

OHA has primary responsibility within the Department for “ensuring internal and external coordination of all medical preparedness and response activities of the Department, including training, exercises, and equipment support.” See Section 516(c)(3) of the Post Katrina Emergency Management and Reform Act, Public Law 109–295, 6 U.S.C. 321e(c). In addition, the Secretary has delegated to OHA responsibility for providing oversight for all medical and health activities of the Department. See DHS Delegation to the Assistant Secretary of Health Affairs and Chief Medical Officer, No. 5001 (signed July 28, 2008). As per internal DHS directive, OHA ensures the MQM program is appropriately implemented within the department and that health care service standards are consistently applied across the department. This includes exercising oversight for development of quality assurance activities (quality improvement, risk management documentation, and

medical record management) within DHS. The responsibility of MQM necessitates a patient care reporting system to gather records of pre-hospital emergency medical care rendered by DHS employees, as part of their official DHS duties.

Due to the sensitive and private nature of patient medical records, ePCR has been evaluated to identify risks and corresponding mitigation strategies. Risks may include unauthorized disclosures, incorrect data entry, software viruses, unauthorized access to the system, sharing of data with private sector entities, and data security breaches. Mitigation activities involve privacy and security awareness training for all users, enforcement of role-based access to varied aspects of ePCR (e.g., end-users have access only to their component-specific patient data and any other patient encounter reports for which they have been identified as providing care).

Designated persons (Component Medical Director, Component EMS Coordinators, and ePCR Administrator) within the components will have full administrative review access to all records for quality assurance purposes. The OHA Medical Quality Management Branch and the OHA Medical First Responder Coordination Branch will have rights to run ad hoc reports and query data as it relates to quality assurance tracking and trending indicators (completeness of record, adherence to standards of care/protocols and training) on all component data. Audit logs are periodically reviewed for inconsistencies. Any inconsistencies are immediately addressed through the Component Medical Director, EMS coordinators, or Component Information Technology (IT) and Security Compliance Officer to correct or resolve any issues and concerns. The purpose of ePCR is to support OHA’s MQM program, and this purpose is supported by routine uses for sharing this data for notification of medical hazard, worker’s compensation claims, through formal legal channels, and other limited administrative purposes.

This newly established system will be included in DHS’s inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals’ records. The Privacy Act applies to information that is maintained in a “system of records.” A “system of records” is a group of any

records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals whose systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/OHA-002 Emergency Care Medical Records System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

III. Health Insurance Portability and Accountability Act

For this collection of health information, OHA and participating components are not subject to the provisions of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 regulation, “Standards for Privacy of Individually Identifiable Health Information” (Privacy Rule), 45 CFR parts 160 and 164. OHA does not meet the statutory definition of a covered entity under HIPAA, 42 U.S.C. 1320d-1. Because OHA and participating components are not a covered entity, the restrictions prescribed by the HIPAA Privacy Rule are not applicable.

SYSTEM OF RECORDS

Department of Homeland Security (DHS)/ Office of Health Affairs (OHA)—002 Emergency Care Medical Records (ECMR)

SYSTEM NAME:

DHS/OHA—002 Emergency Care Medical Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained in the electronic Patient Care Record (ePCR) system at the OHA Headquarters in Washington, DC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system include members of the public, including federal contractors, who are treated by an on-duty DHS Emergency Medical Services (EMS) healthcare provider. When patients are DHS or other federal employees, their records are considered part of the OPM/GOVT-

10—Employee Medical File System Records, 71 FR 35360 (Jun. 19, 2006.)

CATEGORIES OF RECORDS IN THE SYSTEM:

- Patient name.
- Patient case/identification number (not Social Security Number).
- Account of the illness or injury.
- Date of birth and age.
- Gender.
- Location.
- Address (residential or business, if/ as relevant).
- Type of injury.
- Current medications.
- Allergies.
- Past medical history.
- Assessment of injury.
- Chief complaint.
- Vital signs.
- Treatment provided and/or procedures.
- Transfer of care, refusal of care, and/or transportation mode and destination.
- Medication dispensed.
- Discharge instructions for follow-on care.
- If necessary, patient's guardian or legal representative.
- Patient's health insurance information, if any.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

OHA has primary responsibility within the Department for "ensuring internal and external coordination of all medical preparedness and response activities of the Department, including training, exercises, and equipment support." See Section 516(c)(3) of the Post Katrina Emergency Management and Reform Act, Pub. L. 109-295, 6 U.S.C. 321e(c). In addition, the Secretary has delegated to OHA responsibility for providing oversight for all medical and health activities of the Department. See DHS Delegation to the Assistant Secretary of Health Affairs and Chief Medical Officer, No. 5001 (signed July 28, 2008). As per internal DHS directive, OHA ensures the MQM program is appropriately implemented within the department and that health care service standards are consistently applied across the department. This includes exercising oversight for development of quality assurance activities (quality improvement, risk management documentation, and medical record management) within DHS. The responsibility of MQM necessitates a patient care reporting system to gather records of pre-hospital emergency medical care rendered by DHS employees, as part of their official DHS duties.

PURPOSE(S):

The purpose of this system is to support MQM oversight to ensure

consistent quality medical care and standardize the documentation of care rendered by DHS EMS medical care providers in diverse environments.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including U.S. Attorney Offices, or other federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;
2. Any employee of DHS in his/her official capacity;
3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or
4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or other federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by

DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To appropriate federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations for the purpose of protecting the vital interests of a data subject or other persons or to comply with laws governing reporting of communicable disease, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats; appropriate notice will be provided of any identified health threat or risk.

H. To hospitals, physicians, medical laboratories and testing facilities, and other medical service providers, for the purpose of diagnosing and treating medical conditions or arranging the care of patients who have been treated by DHS EMS providers.

I. To foreign governments for the purpose of coordinating and conducting the removal or return of aliens from the United States to other nations when disclosure of information about the alien's health is necessary or advisable to safeguard the public health, to facilitate transportation of the alien, to obtain travel documents for the alien, to ensure continuity of medical care for the alien, or is otherwise required by international agreement or law.

J. To immediate family members and attorneys or other agents acting on behalf of a patient to assist those individuals in determining the current medical condition and/or location of a patient to whom DHS has provided emergency medical care, provided they can present adequate verification of a familial or agency relationship with the patient.

K. To independent standardization and medical quality management

repositories, such as the National Emergency Medical Services Information System (NEMSIS), in de-identified, aggregate form only, to promote DHS compliance with emergency medical care industry standards and best practices.

L. To any person who is responsible for the care of the individual, to the extent necessary to assure payment of benefits to which the individual is entitled, when an individual to whom a record pertains is mentally incompetent or under other legal disability.

M. To the patient's health insurance company to facilitate any payment and billing negotiations between the patient, the insurance carrier and the agency.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD-ROM.

RETRIEVABILITY:

Records may be retrieved by any of the fields listed in the Categories of Records listed above.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Based on the most conservative industry standards advised to implement Medical Quality Management, OHA will propose a retention schedule of ten (10) years from the date of the EMS provider encounter. Records will be retained pending the final approval by the National Archives and Records Administration of this records schedule.

SYSTEM MANAGER AND ADDRESS:

Director, Workforce Health and Medical Support Division, Office of

Health Affairs, Department of Homeland Security, Washington, DC 20528.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters FOIA Officer, whose contact information can be found at <http://www.dhs.gov/foia> under "contacts." If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP-0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, <http://www.dhs.gov> or 1-866-431-0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations. Consistent with 6 CFR 5.22(f) *Release of Medical Records*, and pursuant to 5 U.S.C. 552a(f)(3), where requests are made for access to medical records, including

psychological records, the decision to release directly to the individual, or to withhold direct release, shall be made by a medical practitioner. Where the medical practitioner has ruled that direct release will cause harm to the individual who is requesting access, normal release through the individual's chosen medical practitioner will be recommended. Final review and decision on appeals of disapprovals of direct release will rest with the General Counsel.

RECORD ACCESS PROCEDURES:

See "Notification procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification procedure" above.

RECORD SOURCE CATEGORIES:

Records are obtained from DHS EMS medical care providers and their patients, either in the care and custody of the Department, at the DHS workplace, or in conjunction with a medical emergency where an on-duty DHS EMS is the medical care provider.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: August 23, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011-22169 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-9K-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2011-0821]

Merchant Mariner Medical Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of federal advisory committee meeting.

SUMMARY: The Merchant Mariner Medical Advisory Committee (MMMAC) will hold its inaugural meeting starting Monday, September 19, and ending Wednesday September 21, 2011. The meetings will be open to the public.

DATES: MMMAC will meet on Monday, September 19, Tuesday, September 20, and Wednesday, September 21, 2011 from 8:30 a.m. to 4:30 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held at the Calhoun Marine Engineers Beneficial Association (MEBA) Engineering School at 27050 Saint Michaels Road, Easton, MD 21601.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Anne Higgins, MEBA School Executive Assistant, 410-822-9600 Extension 338 as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the "Summary" section below. Comments must be submitted in writing to the Coast Guard on or before September 12, 2011 and must be identified by USCG-2011-0821 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments (preferred method to avoid delays in processing).

- *Fax:* 202-372-1918.

- *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

- *Hand delivery:* 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.

Instructions: All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided. You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Docket: For access to the docket to read background documents or comments related to this notice, go to <http://www.regulations.gov>.

Two public comment periods will be held during the meeting. The first public comment period will be held on Day 1 September 19, 2011 prior to the presentation of issues and task and the second comment period will be held on Day 3, September 21, 2011 from 10:00 to 11:00 a.m. Speakers are requested to limit their comments to 3 minutes. Please note that the public comment period may end before the time indicated, following the last call for comments. Additionally, public comment will be sought throughout the meeting as specific tasks and issues are discussed by the committee. Contact the individual listed below to register as a speaker.

FOR FURTHER INFORMATION CONTACT: Lieutenant Dylan McCall, the MMMAC

Alternate Designated Federal Officer (ADFO), at telephone 202-372-1128 or e-mail Dylan.k.mccall@uscg.mil. If you have questions about the MEBA facility, contact Anne Higgins, MEBA School Executive Assistant, at telephone 410-822-9600 Extension 338 or e-mail ahiggins@mebaschool.org. 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: Notice of this meeting is given under the *Federal Advisory Committee Act*, 5 U.S.C. App. (Pub. L. 92-463). The MMMAC is authorized by section 210 of the *Coast Guard Authorization Act of 2010* (Pub. L. 111-281) and the Committee's purpose is to advise the Secretary on matters related to medical certification determinations for issuance of merchant mariner credentials; medical standards and guidelines for the physical qualifications of operators of commercial vessels; medical examiner education; and medical research.

Agenda

Day 1

(1) Opening comments by Designated Federal Officer (DFO), Captain E. P. Christensen;

(2) Introduction and swearing in of the new members;

(3) Remarks from Coast Guard Leadership, Rear Admiral J. A. Watson;

(4) Staff Administration issues;

(5) Designation of the Chair and Vice-Chair;

(6) Public Comments/Presentations; and

(7) Presentation of Issues and Tasks (Order of Presentations TBD);

—Briefing the committee on the Coast Guard's Mariner Credentialing Program and mariner evaluation process.

—Report of maritime casualties with a nexus to mariner medical issues.

—Form CG-719K & CG-719K/E—Review of the forms used by physicians for documenting the medical/fitness exams of merchant mariners and discussion of recommendations for improvement.

—Review of the most common mariner medical conditions leading to the denial of a mariner's application and discussion of applicable standards or guidance.

—Revising the Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials, Navigation.

—and Vessel Inspection Circular No. 04-08 (NVIC 04-08).

—Discussion of the development of Designated Medical Examiners.

—Aging Mariners—Presentation to address the committee on the concerns with aging mariners. Discuss/Present how medical issues impact mariners as they age and the aged mariner is normally your more competent mariner.

(8) Acceptance of task statements by committee and establishment of work groups;

Day 2

Work groups meetings on tasks accepted by the committee.

Day 3

(1) Report of working groups;
(2) Public comments/presentations; and
(3) Closing remarks/plans for next meeting.

Dated: August 24, 2011.

J. A. Watson,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. 2011-22197 Filed 8-29-11; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4007-DR; Docket ID FEMA-2011-0001]

Wyoming; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Wyoming (FEMA-4007-DR), dated July 22, 2011, and related determinations.

DATES: *Effective Date:* July 22, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 22, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Wyoming resulting from severe storms, flooding, and landslides during the period of May 18 to July 8, 2011, is of sufficient severity and

magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Wyoming.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Mark H. Armstrong, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Wyoming have been designated as adversely affected by this major disaster:

Albany, Big Horn, Carbon, Crook, Fremont, Goshen, Johnson, Lincoln, Platte, Sheridan, Sublette, Teton, Uinta, Washakie, and Weston Counties and the Wind River Indian Reservation for Public Assistance.

All counties and Indian Tribes within the State of Wyoming are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011-22170 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4012-DR; Docket ID FEMA-2011-0001]

Missouri; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Missouri (FEMA-4012-DR), dated August 12, 2011, and related determinations.

DATES: *Effective Date:* August 12, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 12, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Missouri resulting from flooding during the period of June 1 to August 1, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Missouri.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Elizabeth Turner, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Missouri have been designated as adversely affected by this major disaster:

Andrew, Atchison, Buchanan, Holt, Lafayette, and Platte Counties for Individual Assistance.

All counties and the Independent City of St. Louis in the State of Missouri are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011-22175 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4011-DR; Docket ID FEMA-2011-0001]

Utah; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Utah (FEMA-4011-DR), dated August 8, 2011, and related determinations.

DATES: *Effective Date:* August 8, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 8, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of Utah resulting from flooding during the period of April 18 to July 16, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of Utah.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Mark H. Landry, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Utah have been designated as adversely affected by this major disaster:

Beaver, Box Elder, Cache, Daggett, Duchesne, Emery, Millard, Morgan, Piute, Salt Lake, Sanpete, Sevier, Summit, Tooele, Uintah, Utah, Wasatch, and Weber Counties and the Uintah and Ouray Indian Reservation for Public Assistance.

All counties and Indian Tribes within the State of Utah are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036,

Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–22179 Filed 8–29–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4010–DR; Docket ID FEMA–2011–0001]

Kansas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Kansas (FEMA–4010–DR), dated July 29, 2011, and related determinations.

DATES: *Effective Date:* July 29, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 29, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of Kansas resulting from severe storms, straight-line winds, tornadoes, and flooding during the period of May 19 to June 4, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of Kansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved

assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Bradley Harris, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Kansas have been designated as adversely affected by this major disaster:

Barton, Clay, Cloud, Hamilton, Jewell, Lincoln, Logan, Lyon, Marion, Mitchell, Morton, Osage, Osborne, Ottawa, Pottawatomie, Republic, Riley, Rooks, Rush, Russell, Sherman, Smith, Stafford, Stanton, and Washington Counties for Public Assistance.

All counties within the State of Kansas are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–22184 Filed 8–29–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4013–DR; Docket ID FEMA–2011–0001]

Nebraska; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Nebraska (FEMA–4013–DR), dated August 12, 2011, and related determinations.

DATES: *Effective Date:* August 12, 2011.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 12, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Nebraska resulting from flooding during the period of May 24 to August 1, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Nebraska.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas, and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael L. Parker, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Nebraska have been designated as adversely affected by this major disaster:

Boyd, Burt, Cass, Dakota, Dixon, Douglas, Knox, Sarpy, and Washington Counties for Individual Assistance.

Nemaha and Richardson Counties for emergency protective measures (Category B) under the Public Assistance program.

Burt, Cass, Dakota, Douglas, Garden, Knox, Lincoln, Otoe, Sarpy, Scotts Bluff, Thurston, and Washington Counties for Public Assistance.

All counties within the State of Nebraska are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011-22178 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4014-DR; Docket ID FEMA-2011-0001]

Nebraska; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Nebraska (FEMA-4014-DR), dated August 12, 2011, and related determinations.

DATES: *Effective Date:* August 12, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 12, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Nebraska resulting from severe storms, tornadoes, straight-line winds, and flooding during the period of June 19-21, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T.

Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Nebraska.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael L. Parker, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Nebraska have been designated as adversely affected by this major disaster:

Buffalo, Chase, Dodge, Furnas, Hamilton, Hayes, Phelps, Polk, Red Willow, and York Counties for Public Assistance.

All counties within the State of Nebraska are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011-22173 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2007-0008]

National Advisory Council**AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Committee management; notice of federal advisory committee meeting.**SUMMARY:** The National Advisory Council (NAC) will meet by teleconference on September 14, 2011 for the purpose of discussing the Presidential Policy Directive 8 on National Preparedness. The meeting will be open to the public.**DATES:** The teleconference will take place Wednesday, September 14, 2011, from 3 p.m. E.D.T. to 5 p.m. E.D.T. Please note that the meeting may close early if the National Advisory Council has completed its business. Written comments must be received by September 2, 2011.**ADDRESSES:** The meeting will be held by teleconference only. Members of the public who wish to obtain the listen-only call-in number, access code, and other information for the public teleconference may contact Patricia A. Kalla as listed in the **FOR FURTHER INFORMATION CONTACT** section by close of business on September 13, 2011. For information on services for individuals with disabilities or to request special assistance, contact Patricia A. Kalla as soon as possible.To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the **SUPPLEMENTARY INFORMATION** section. Comments must be submitted in writing no later than September 2, 2011 and must be identified by Docket ID FEMA-2007-0008 and may be submitted by one of the following methods:*Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.*E-mail:* FEMA-RULES@dhs.gov. Include Docket ID FEMA-2007-0008 in the subject line of the message.*Fax:* (703) 483-2999.*Mail:* FEMA, Office of Chief Counsel, 500 C Street, SW., Room 840, Washington, DC 20472-3100.*Instructions:* All submissions received must include the words "Federal Emergency Management Agency" and the Docket ID FEMA-2007-0008 for this action. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided.*www.regulations.gov*, including any personal information provided.*Docket:* For access to the docket to read documents or comments received by the National Advisory Council, go to <http://www.regulations.gov>.**FOR FURTHER INFORMATION CONTACT:** Patricia A. Kalla, Designated Federal Officer, FEMA, 500 C Street, SW., Room 832, Washington, DC 20472-3100, telephone 202-646-3746, fax 202-646-3930, and e-mail <mailto:FEMA-NAC@dhs.gov>. The NAC website is located at: <http://www.fema.gov/about/nac/>.**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92-463).

The National Advisory Council (NAC) was established to ensure effective and ongoing coordination of Federal preparedness, protection, response, recovery, and mitigation for natural disasters, acts of terrorism, and other man-made disasters. The NAC advises the Administrator of the Federal Emergency Management Agency on all aspects of emergency management. The NAC incorporates State, local and tribal government and private sector input in the development and revision of the national preparedness goal, the national preparedness system, the National Incident Management System, the National Response Plan and other related plans and strategies.

Agenda: The NAC plans to discuss the March 30, 2011 Presidential Policy Directive 8 (PPD-8) on National Preparedness. PPD-8 directs the Secretary of Homeland Security to develop a national preparedness goal that identifies the core capabilities necessary for preparedness and a national preparedness system to guide activities that will enable the Nation to achieve the goal. The NAC plans to finalize recommendations on the development of the preparedness goal and incorporation of these recommendations into the preparedness goal. The draft national preparedness goal has been posted to Docket ID FEMA-2007-0008.**W. Craig Fugate,***Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011-22039 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-48-P**DEPARTMENT OF HOMELAND SECURITY****U.S. Citizenship and Immigration Services****Agency Information Collection Activities: Form G-639, Revision of a Currently Approved Information Collection; Comment Request****ACTION:** 30-Day Notice of Information Collection Under Review: Form G-639, Freedom of Information/Privacy Act Request.

* * * * *

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on May 3, 2011, at 76 FR 24908, allowing for a 60-day public comment period. USCIS received a comment for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until September 29, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529-2020. Comments may also be submitted to DHS via facsimile to 202-272-0997 or via e-mail at uscisfrcomment@dhs.gov, and to the OMB USCIS Desk Officer via facsimile at 202-395-5806 or via e-mail at oira_submission@omb.eop.gov. When submitting comments by e-mail please make sure to add OMB Control Number 1615-0102 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Revision of a currently approved information collection.

(2) *Title of the Form/Collection:* Freedom of Information/Privacy Act Request.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G-639; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. Form G-639 is provided as a convenient means for persons to provide data necessary for identification of a particular record desired under FOIA/PA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100,000 responses at .25 hours (15 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 25,000 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: <http://www.regulations.gov>.

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529-2020; Telephone 202-272-8377.

Dated: August 24, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011-22063 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; Electronic Bonds Online (eBonds) Access; OMB Control No. 1653-0046.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until October 31, 2011.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time, should be directed to the Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Stop 5705 Washington, DC 20536-5705.

Comments are encouraged and will be accepted for sixty days until October 31, 2011. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Electronic Bonds Online (eBonds) Access.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* ICE Form I-352SA (Surety eBonds Access Application and Agreement); ICE Form I-352RA (eBonds Rules of Behavior Agreement); U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or Households, Business or other non-profit. The information taken in this collection is necessary for ICE to grant access to eBonds and to notify the public of the duties and responsibilities associated with accessing eBonds. The I-352SA and the I-352RA are the two instruments used to collect the information associated with this collection. The I-352SA is to be completed by a Surety that currently holds a Certificate of Authority to act as a Surety on Federal bonds and details the requirements for accessing eBonds as well as the documentation, in addition to the I-352SA and I-352RA, which the Surety must submit prior to being granted access to eBonds. The I-352RA provides notification that eBonds is a Federal government computer system and as such users must abide by certain conduct guidelines to access eBonds and the consequences if such guidelines are not followed.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 50 annual burden hours.

Comments and/or questions; requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., STOP 5705, Washington, DC 20536-5705.

John Ramsay,

Forms Program Manager, Office of Asset Administration, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2011-22106 Filed 8-29-11; 8:45 am]

BILLING CODE 9111-28-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5538-D-01]

Consolidated Delegation of Authority to the President of the Government National Mortgage Association

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of Delegation of Authority.

SUMMARY: This notice is issued to consolidate the authorities delegated to the President of the Government National Mortgage Association (GNMA) from the Secretary; and to provide context and clarity for the President of GNMA's redelegation of authority being published by separate notice in today's **Federal Register**.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Gregory A. Keith, Senior Vice President, Government National Mortgage Association, Department of Housing and Urban Development, Chief Risk Officer, Potomac Center South, 550 12th Street, SW., 3rd Floor, Washington, DC 20024, telephone number 202-475-4918 (this is not a toll-free number). This number may be accessed through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: GNMA is a wholly owned Government Corporation within the U.S. Department of Housing and Urban Development. GNMA's organic statute vests all the powers and duties of GNMA in the Secretary of HUD. (12 U.S.C. 1723.)

In GNMA's bylaws, the Secretary has delegated all of the powers and duties of GNMA that were vested in the Secretary to GNMA. In various **Federal Register** notices, the Secretary has delegated authority over GNMA to the GNMA President. Specifically, the Secretary has delegated: (1) All of the Secretary's authority with respect to managing GNMA and GNMA's programs pursuant to Title III of the National Housing Act (12 U.S.C. 1723 and 68 FR 41840); (2) authority to waive regulations issued by the U.S. Department of Housing and Urban Development (73 FR 76674); (3) authority to impose suspensions and debarments, with the concurrence of the General Counsel or his or her designee (54 FR 4913 and 63 FR 57133); and (4) the power to affix HUD's seal and authenticate documents (68 FR 41840).

This notice does not supersede previous delegations of authority, but consolidates the functions that the Secretary has delegated to the President of GNMA, and relates to GNMA's

relegation of authority being published by separate notice in today's **Federal Register**. Further, while the Secretary has delegated its authority to the GNMA President, the Secretary retains authority under 12 U.S.C. 1723.

Section A. Consolidation of Authority Delegated

The Secretary hereby consolidates the following delegations to the President of GNMA:

1. All powers and duties of GNMA, which are by law vested in the Secretary, except as otherwise provided in the GNMA bylaws (12 U.S.C. 1723 and 24 CFR part 310, § 1.02);

2. All authority of the Secretary with respect to the management of GNMA and GNMA programs pursuant to Title III of the National Housing Act, 12 U.S.C. 1723 (68 FR 41840);

3. The power to waive HUD regulations; Section 7(q), Department of Housing and Urban Development (42 U.S.C. 3535(q) and 73 FR 76674);

4. The power to impose suspensions and debarments, with the concurrence of the General Counsel; Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d); 54 FR 4913 and 63 FR 57133); and

5. Authority to authenticate documents and affix the seal of HUD to documents (68 FR 41840).

Section B. Authority To Redelegate

The GNMA President may redelegate the authorities delegated by the Secretary, with the exception of the authority to waive HUD regulations. The GNMA President's authority to waive HUD regulations cannot be redelegated by the GNMA President. This authority is reserved for the GNMA President pursuant to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)). If the President is absent from office, the person authorized to act in the President's absence may exercise the waiver authority of the President consistent with HUD's policies and procedures (73 FR 76674 and 66 FR 13944).

Dated: August 19, 2011.

Shaun Donovan,
Secretary.

[FR Doc. 2011-22174 Filed 8-29-11; 8:45 am]

BILLING CODE 4219-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5538-D-03]

Consolidated Redelegation of Authority for the Government National Mortgage Association

AGENCY: Government National Mortgage Association, HUD.

ACTION: Notice of Delegation of Authority.

SUMMARY: In this notice, the President of GNMA retains authority and redelegates authority granted to the Government National Mortgage Association (GNMA) to the Executive Vice President and other subordinate employees.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Gregory A. Keith, Senior Vice President, Chief Risk Officer, Government National Mortgage Association, Department of Housing and Urban Development, Potomac Center South, 550 12th Street, SW., 3rd Floor, Washington, DC 20024, telephone number 202-475-4918. (This is not a toll-free number). Persons with hearing- or speech-impairments may access this number though TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: By separate notice published in the **Federal Register**, the Secretary issued a consolidated delegation of authority to the President of GNMA. In that notice, the GNMA President was given authority to redelegate the authorities delegated to the President by the Secretary.¹

Part I of this notice contains concurrent redelegations from the GNMA President to the GNMA Executive Vice President and redelegations from the Executive Vice President to Senior Vice Presidents.² Part II of this notice contains redelegations from the Senior Vice Presidents to subordinate staff. Part III of this notice discusses the ability of GNMA Senior Vice Presidents to

¹ By regulations enacted in 2010 the Secretary adopted GNMA Bylaws, which were last published, in their entirety, in the Code of Federal Regulations in 1995. See 24 CFR § 310.1(2010); See also 24 CFR part 310 (1995). The GNMA Bylaws separately provide GNMA's President with other significant authority. *Id.* These delegations do not supersede or rescind the authority contained in the Bylaws.

² The GNMA Bylaws authorize GNMA Vice Presidents to sign all contracts, mortgages, pledges, other documents, instruments and other writings that call for GNMA's execution in the conducting of GNMA's business. See 24 CFR part 310 § 3.02. The authority redelegated to the Senior Vice Presidents by the Executive Vice President does not supersede or rescind the authority contained in the Bylaws.

redelegate the authority redelegated to them from the Executive Vice President and certain non-delegable duties of the Executive Vice President. Part IV of this notice discusses the delegations superseded by this redelegation.

I. Authority Redelegated

Section A. GNMA President Retains and Redelegates Concurrent Authority to the Executive Vice President

The President of GNMA hereby retains and redelegates to the GNMA Executive Vice President concurrent authority with the President. The Executive Vice President is authorized to perform all duties of the GNMA President in place of the President. The Executive Vice President is also authorized to perform the functions delegated by the Secretary to the GNMA President, except the authority to waive HUD regulations when the President is not absent from office, as that term is defined in 66 FR 13944; and 73 FR 76674.

Section B. GNMA Executive Vice President Retains and Redelegates Authority to the Senior Vice Presidents

The Executive Vice President of GNMA hereby retains and redelegates to the Senior Vice Presidents the authority to approve or deny staff requests for travel; and the authority to approve staff's request for the reimbursement of approved travel. Additionally, the Senior Vice Presidents are authorized to perform the below enumerated functions.

1. The Senior Vice President of the Office of Mortgage-Backed Securities is hereby delegated to handle matters related to the Mortgage-Backed Securities Program, which includes but is not limited to, the authority:
 - a. To approve new issuer applicants.
 - b. To notify an issuer of its high delinquency levels.
 - c. To approve streamlined commitment authority request.
 - d. To issue termination letters to issuers that have no GNMA portfolio and requested a voluntary termination from the GNMA program.
 - e. To issue a 30-day Notice of Intent to Default to GNMA issuers.
 - f. To execute cross default agreements provided by related issuers.
 - g. To accept a corporate guaranty and legal opinion when related issuers are precluded from executing a cross default agreement by their regulators.
 - h. To accept a corporate guaranty from issuers in instances where GNMA, in its discretion, deems that a corporate guaranty is necessary and has notified the issuer accordingly.

i. To extend the timeframe for issuers to resolve field review findings.

j. To approve exceptions to program pooling and pool administration requirements.

k. To approve document custodian exceptions.

l. To approve a request to extend the maturity date of a construction loan pool.

m. To approve and execute the Miscellaneous Disbursement Vouchers.

n. To approve an issuer's request to issue a Project Loan Certificate that contains two different interest rates applicable to different portions of the same underlying mortgage collateral.

o. To correct mortgage assignments, promissory notes or other documents which erroneously transfer the loans contained in a defaulted portfolio to GNMA.

p. To execute Limited Powers of Attorneys.

q. To collect claims, compromise claims and write-off debts.

r. To make determinations on litigation matters, legal fees, etc. for loans contained in defaulted issuer's portfolios.

2. The Senior Vice President of the Office of Capital Markets is hereby delegated to handle matters related to the Multiclass Securities Program.

3. The Senior Vice President of the Office of Finance is hereby delegated to handle finance matters related to GNMA, which includes but is not limited to, the authority:

a. To certify on HUD Forms 718/720 that funds are available for commitments of contracts.

b. To execute Secure Payment System-Financial Management Services 210CO designating individuals as certifying officers.

c. To certify vouchers for payments.

d. To sign checks drawn on the United States Treasury.

e. To designate, delegate and revoke authority of specifically designated staff members to use the U.S. Treasury's Secure Payment System.

f. To designate specific staff members to serve as data entry operators for purposes of creating and modifying Secure Payment System request and transmitting to the certifying officer for payments.

4. The Senior Vice President of Office of Program Operations is hereby delegated to handle matters related to GNMA Program Operations, which includes but is not limited to, the authority:

a. To approve any enhancements to GNMA's business applications used to administer the GNMA mortgage-backed securities program.

b. To approve a refund to the issuer for an overpayment of fees for commitment authority, pool transfers and guaranty fees.

c. To reassign mortgages not a part of a defaulted issuer's portfolio and were assigned to GNMA in error.

d. To authorize the early termination of a GNMA pool.

e. To authorize reimbursement to GNMA's Central Paying Agent for the funds that it forwarded to issuers to cover the interest that was forgiven under the Soldiers and Sailors Credit Relief Act.

f. To issue pool numbers.

5. The Senior Vice President/Chief Risk Officer is hereby delegated the following authority:

a. To approve a request for special servicing reviews to be conducted.

b. To approve an issuer's non-streamlined commitment authority request.

c. To determine the remedy for an issuer's failure to timely file its annual audited financial statement.

d. To approve an issuer's request to exceptions on Letters of Credit requirements.

e. To approve an issuer's request to transfer its issuer responsibilities.

f. To approve an issuer's request to extend its approvals to other programs.

g. To approve pledge of servicing requests and execute Acknowledgement Agreements.

II. Authority Redelegated to Other Positions Within GNMA

Section A

The Senior Vice President of the Office of Mortgage-Backed Securities hereby retains and redelegates the following duties to directors, assistant vice presidents and other staff members.

1. Directors

a. To extend the timeframe for issuers to resolve field review findings.

b. To notify an issuer of its high delinquency levels.

c. To approve streamlined commitment authority request.

d. To approve document custodian exception issues.

e. To approve a request to extend the maturity date of a construction loan pool.

f. To approve and execute Miscellaneous Disbursement Vouchers.

g. To approve exceptions to program pooling and pool administration requirements.

h. To correct mortgage assignments, promissory notes or other documents which erroneously transfer loans contained in a defaulted portfolio to GNMA.

2. Assistant Vice Presidents and Directors

- a. To collect claims, compromise claims and write-off debts.
 - b. To make determinations on litigation matters, legal fees, etc. for loans contained in defaulted issuers' portfolios.
 - c. To execute Limited Powers of Attorneys.
3. *Staff*. To approve an issuer's request to issue a Project Loan Certificate that contains two different interest rates applicable to different portions of the same underlying mortgage collateral.

Section B

The Senior Vice President of the Office of Capital Markets retains and redelegates the following duties to the directors and securities market specialists:

1. Directors

a. To sign all contracts and other documents, instruments and writings that call for execution by GNMA in order to affix the GNMA guaranty on a multiclass securities transaction, including the Sponsor Agreement in the form specified in the Multiclass Securities Guide.

b. To execute the Real Estate Mortgage Investment Conduit Guaranty Agreement in the form specified in the Multiclass Securities Guide.

2. Directors or Securities Market Specialists

To execute the Transaction Initiation Letter in the form specified by the Multiclass Securities Guide.

Section C

The Senior Vice President of the Office of Finance retains and redelegates the following authority to the directors and specifically designated staff members:

1. Directors

- a. To certify that funds are available for commitments of contracts on HUD Forms 718/720, Reservation of Funds—Procurement Funds Commitment.
- b. To certify vouchers for payment.

2. Specifically Designated Staff Members

- a. To sign checks drawn on the United States Treasury.
- b. To serve as data entry operators for purposes of creating and modifying Secure Payment System request and transmitting to the certifying officer for payments.

Section D

The Senior Vice President of Office of Program Operations retains and redelegates the following authority to directors and staff:

1. Directors

a. To reassign mortgages not a part of a defaulted issuer's portfolio and were assigned to GNMA in error.

b. To authorize the early termination of GNMA pools.

c. To authorize reimbursement to GNMA's Central Paying Agent for the funds that it forwarded to issuers to cover the interest that was forgiven under the Soldiers and Sailors Credit Relief Act.

2. Staff

To issue pool numbers.

III. Authority to Redelegate

Certain authority redelegated by the President of GNMA to the Executive Vice President in this notice is non-delegable. The non-delegable authorities include, but are not limited to, (1) Authority to issue All Participants Memoranda; (2) Authority to approve the reservation of funds request; (3) Authority to approve the request for contract services for all contract work; (4) Authority to issue a letter of involuntary extinguishment to a GNMA issuer; and (5) Authority to initiate and impose a civil money penalty.

Certain authority redelegated by the Executive Vice President to certain Senior Vice Presidents in this notice is non-delegable. Duties that are delegable have been redelegated by the Senior Vice Presidents in Part II Sections A–D above. Duties that are non-delegable are retained by the Senior Vice Presidents.

IV. Authority Superseded

This redelegation of authority supersedes all previous delegations of authority from the GNMA President to the Executive Vice President and from the Executive Vice President to the Senior Vice Presidents. This redelegation also supersedes all previous delegations from GNMA Senior Vice Presidents to subordinate staff.

The GNMA President, Executive Vice President and Senior Vice Presidents may revoke the authority authorized herein, in whole or part, at any time.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)); GNMA Bylaws, 24 CFR part 310.

Dated: August 19, 2011.

Theodore W. Tozer,

President, Government National Mortgage Association.

[FR Doc. 2011–22177 Filed 8–29–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5519–D–01]

Delegation Authority for the Office of Sustainable Housing and Communities

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: In this notice, the Secretary of HUD delegates concurrent authority to the Director and Deputy Director, Office of Sustainable Housing and Communities (OSHC), relating to improving regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Stephen A. Cerny, Attorney-Advisor, Office of Sustainable Housing and Communities, Department of Housing and Urban Development, 451 7th Street, SW., Room 10180, Washington, DC 20410, Telephone number, 202–402–5097. (This is not a toll-free number.) Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: OSHC provides grants to improve regional and local planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning to support market investments that support sustainable communities. OSHC is also charged with working within HUD to support program leadership and staff as they align their programs with the sustainability principles. OSHC represents HUD on the Sustainable Communities Partnership that is working with the United States Department of Transportation and the United States Environmental Protection Agency to align federal resources, reinforce local and regional development strategies to support economic growth, and reduce bureaucratic barriers so that communities can meet the demand for more sustainable communities. OSHC is also responsible for coordinating HUD's initiatives to expand energy efficiency

and renewable energy in affordable housing, through financing, technical assistance and industry partnerships. HUD's sustainable housing strategy utilizes market-based approaches and leverages the Department's existing authority to support private sector investment and consumer choice. There are no previous delegations of authority for OSHC.

Section A. Authority Delegated

The Secretary hereby delegates to the Director and Deputy Director, OSHC, concurrent authority and responsibility pursuant to the Consolidated Appropriations Act, 2010 (Pub. L. 111-117, 123 Stat. 3034, at 3084, approved, Dec. 16, 2009) relating to improving regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning. The Secretary may revoke the authority authorized herein, in whole or part, at any time.

Section B. Authority Excepted

The authority delegated in this document does not include the authority to sue or be sued or to issue or waive regulations.

Section C. Authority to Redelegate

The authority delegated in this document may be redelegated.

Section D. Authority Superseded

There are no previous delegations of authority.

Authority: Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Shaun Donovan,
Secretary.

[FR Doc. 2011-22192 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5517-D-01]

Delegation of Authority for the Office of Policy Development and Research

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: In this notice, the Secretary of HUD delegates authority to the Assistant Secretary for Policy Development and Research and supersedes any prior delegation of authority from the Secretary to the Assistant Secretary for Policy Development and Research.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Jean Lin Pao, General Deputy Assistant Secretary, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8228, Washington, DC 20410-6000, telephone number 202-708-1600. (This is not a toll-free number.) Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Section A. Authority Delegated

The Secretary hereby delegates to the Assistant Secretary for Policy Development and Research authority and responsibility over the Department's research agenda, including the authority to issue and waive regulations. In carrying out these responsibilities, the Assistant Secretary for Policy Development and Research shall, among other duties:

1. Undertake programs of research, study, testing, and demonstration relating to the mission and programs of the Department under Title V of the Housing and Urban Development Act of 1970 (12 U.S.C. 1701z-1).

2. Administer programs related to policy development and research as assigned by the Secretary, including the following programs:

a. The Community Development Work Study Program, under section 107(c) of Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5307(c));

b. The Community Outreach Partnership Center Program, within the Community Outreach Partnership Act of 1992 (42 U.S.C. 5307 note), and section 107 of the Housing Development Act of 1974 (42 U.S.C. 5307(b)(3));

c. The Historically Black Colleges and Universities Program, under section 107(b)(3) of the Housing and Community Development Act of 1974 (42 U.S.C. 5307(b)(3));

d. The Hispanic-Serving Institutions Assisting Communities Program, as provided for in annual HUD appropriations acts (e.g., Pub. L. 111-117, 123 Stat. 3034, approved December 16, 2009);

e. The Alaska Native/Native Hawaiian Institutions Assisting Communities program as provided for in annual HUD appropriations acts (e.g., Pub. L. 111-117, 123 Stat. 3034, approved December 16, 2009);

f. The Tribal Colleges and Universities program, as provided for in annual appropriations acts (e.g., Pub. L. 111-117, 123 Stat. 3034, approved December 16, 2009);

g. The Doctoral Dissertation Research Grant Program, as provided for in annual HUD appropriations acts (e.g., Pub. L. 111-117, 123 Stat. 3034, approved December 16, 2009); and

i. The Emergency Homeowners' Loan Program within the Emergency Homeowners' Relief Act, as amended (12 U.S.C. 2701 *et seq.*), in cooperation with HUD's Office of Housing and Office of the Chief Financial Officer.

3. Execute concurrent authority to carry out the duties and responsibilities authorized to the Secretary of HUD by Section 42(d)(5)(C) of the Internal Revenue Code.

Section B. Authority Excepted

The authority delegated in this document does not include the authority to sue or be sued.

Section C. Authority To Redelegate

The Assistant Secretary for Policy Development and Research is authorized to redelegate to employees of HUD any of the authority delegated under Section A, except for the authority to issue and waive regulations.

Section D. Authority Superseded

This delegation supersedes all previous delegations of authority from the Secretary to the Assistant Secretary for Policy Development and Research.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Shaun Donovan,
Secretary.

[FR Doc. 2011-22172 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5560-D-01]

Delegation of Authority for the Center for Faith-Based and Neighborhood Partnerships

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: Through this notice, the Secretary delegates to the Director, Center for Faith-Based and Neighborhood Partnerships, authority and responsibility for the direction of HUD's faith-based initiatives specifically relating to coordination with secular and faith-based nonprofit organizations seeking to partner with HUD, the provision of resources to those organizations, and the establishment of

relationships between HUD and outside partners, practitioners, and organizations from the nonprofit and faith communities to more effectively identify and meet the needs of some of the Nation's most vulnerable citizens.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT:

Paula A. Lincoln, Acting Director, Center for Faith-Based and Neighborhood Partnerships, Department of Housing and Urban Development, 451 7th Street, SW., Room 10184, Washington, DC 20410, telephone number 202-708-2404. (This is not a toll-free number.) Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Section A. Authority Delegated

The Secretary hereby delegates to the Director, Center for Faith-Based and Neighborhood Partnerships, the authority and responsibility for the direction of HUD's faith-based initiatives, specifically relating to coordination with secular and faith-based nonprofit organizations seeking to partner with HUD, the provision of resources to those organizations, and the establishment of relationships between HUD and outside partners, practitioners, and organizations from the nonprofit and faith communities to more effectively identify and meet the needs of some of the Nation's most vulnerable citizens.

Section B. Authority Excepted

The authority delegated in this document does not include the authority to sue or be sued or to issue or waive regulations.

Section C. Authority to Redelegate

The Secretary authorizes the Director, Center for Faith-Based and Neighborhood Partnerships, to redelegate the authority described in Section A.

Section D. Authority Superseded

This delegation supersedes all prior delegations of authority to the Center for Faith-based and Neighborhood Partnerships. The Secretary may revoke the authority authorized herein, in whole or part, at any time.

Authority: Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011-22187 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5539-D-01]

Delegation Authority for the Office of the Chief Financial Officer

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: In this notice, the Secretary of HUD, pursuant to the Chief Financial Officers Act of 1990 (CFO Act), which established the position of the Chief Financial Officer within HUD, is delegating authority to the Chief Financial Officer for certain responsibilities with respect to the financial management activities, systems, and operations of the Department.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT:

Laura Moore-Rush, Acting Deputy Director, Office of the Chief Financial Officer Management Staff, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 3120, Washington, DC 20410, telephone number 202-402-3638 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: The Secretary is delegating to the Chief Financial Officer those responsibilities enumerated in the CFO Act (31 U.S.C. 901 *et seq.*), and HUD's Fiscal Year (FY) 2003 Appropriations Act (Pub. L. 108-7, approved February 20, 2003), relating to the financial management activities related to the programs and operation of HUD.

Accordingly, the Secretary delegates as follows:

Section A. Authority Delegated

The Secretary hereby delegates the following responsibilities, functions, and duties to the Chief Financial Officer:

1. To serve as the principal advisor to the Secretary on financial management;
2. To supervise, coordinate, and establish policies to govern all financial management activities and operations of the Department consistent with the requirements of law and regulation; to

oversee the development, administration, and coordination of the financial and accounting functions of the Department; and to issue such policies and directives as may be necessary to carry out the duties of the Chief Financial Officer;

3. To develop and maintain a financial management system for the Department (including accounting and related transaction systems; internal control systems; financial reporting systems; and credit, cash and debt management systems). To coordinate systems for audit compliance with external organizations that have responsibilities for the use and management of funds and other resources for which the Department has responsibility;

4. To provide direction to ensure the Department's compliance with Office of Management and Budget (OMB), Government Accountability Office (GAO), Department of the Treasury (Treasury), and legislative accounting and financial management requirements; and to strengthen internal accounting and administrative controls to prevent waste, fraud, and abuse in Federal programs;

5. To assist in the financial execution of the Department's budget in relation to actual expenditures and to prepare timely performance reports for senior managers;

6. To develop, maintain, and revise an annual plan to bring the financial management systems of the Department into full compliance with established policies and standards and to oversee execution of the plan; and to estimate resource requirements for the Office of the Chief Financial Officer for inclusion in the Department's budget requests;

7. To coordinate with the Inspector General to ensure that all Department financial activities are regularly audited, and to ensure that adopted recommendations related to Department financial management issues are promptly implemented;

8. To be responsible for the financial management needs of the Department, to report to the Congress and to external agencies such as OMB, the Treasury and the GAO on financial management performance, Department financial statements, and other information requests required by law and regulation, and to develop and maintain a departmental financial management information system;

9. To provide policy direction and guidance to the designated Comptrollers of principal Department organizational components, including the Federal Housing Administration (FHA), and Government National Mortgage

Association (GNMA), as well as other departmental staff, with respect to financial management policies, standards, and responsibilities;

10. To process and sign Apportionments/Reapportionments Schedules and Advice of Allotments in accordance with applicable OMB Circulars;

11. Where not inconsistent with regulations pertaining to proceedings before administrative judges, to establish and maintain policies and procedures for claims collection and coordinate claims collection activities in the field offices and at Headquarters;

12. To appoint Disbursement and Certifying Officers to approve the disbursal of agency funds;

13. To serve as advisor to the Secretary and to other departmental officials in matters relating to budget formulation and execution, and to advise and assist program offices in their budgetary responsibilities and appraise the effectiveness of these activities; advise on budget and fiscal implications of policy and legislative proposals; and administer the issuance of staff ceilings and monitor staff usage in the Department;

14. To continue to ensure that HUD offices have an adequate system of funds control, including working with such offices to strengthen such controls to prevent or mitigate any potential Anti-deficiency Act (31 U.S.C. 1341 *et seq.*) violations; and

15. To implement and administer the Emergency Homeowners' Loan Program within the Emergency Homeowners' Relief Act, as amended (12 U.S.C. 2701 *et seq.*), in cooperation with HUD's Office of Policy Development and Research and HUD's Office of Housing.

The Secretary may revoke any discretionary authority authorized herein, in whole or part, at any time.

Section B. Authority Excepted

The authority delegated in this document does not include the authority to sue and be sued.

Section C. Authority To Redelegate

The Chief Financial Officer is authorized to retain or redelegate authorities delegated under Section A above to the Deputy Chief Financial Officer and/or the Assistant Chief Financial Officers in the Office of the Chief Financial Officer, with the exception of the authority to issue and waive regulations.

Section D. Authority Superseded

This delegation supersedes all prior delegations of authority from the Secretary to the Chief Financial Officer.

Authority: Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Shaun Donovan,
Secretary.

[FR Doc. 2011-22183 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5561-D-03]

Designation by the Chief Procurement Officer of Contracting Officers

AGENCY: Office of the Chief Procurement Officer, HUD.

ACTION: Notice of designation.

SUMMARY: In this notice, the Chief Procurement Officer (CPO) designates specified procurement positions as contracting officers.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Elie F. Stowe, Assistant Chief Procurement Officer for Policy and Systems, Office of the Chief Procurement Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 5276, Washington, DC 20410-3000, telephone number 202-708-0294 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: This notice includes the designation of the Deputy Chief Procurement Officer, the Assistant Chief Procurement Officer for Program Operations, the Assistant Chief Procurement Officer for Support Operations, and the Assistant Chief Procurement Officer for Field Operations as contracting officers.

Section A. Designation

The CPO hereby designates the Deputy Chief Procurement Officer, the Assistant Chief Procurement Officer for Program Operations, the Assistant Chief Procurement Officer for Support Operations, and the Assistant Chief Procurement Officer for Field Operations as contracting officers; any limitation(s) on the use of those appointments shall be set forth within individual Certificate(s) of Appointment.

Section B. No Authority To Further Redesignate

The authority conveyed in the designations in Section A does not include the authority to further

redesignate contracting officers by individuals holding the named positions. The CPO is the sole official authorized to appoint contracting officers within the Department.

Section C. Authority Superseded

This designation supersedes all previous designations from the CPO concerning specified procurement positions as contracting officers.

Authority: 41 U.S.C. 414; Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Jemine A. Bryon,
Chief Procurement Officer.

[FR Doc. 2011-22190 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5561-D-01]

Designation of Chief Acquisition Officer and Senior Procurement Executive and Delegation of Procurement Authority

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of designation of Chief Acquisition Officer and Senior Procurement Executive and delegation of procurement authority.

SUMMARY: In this notice, the Secretary of HUD designates the Deputy Secretary as the Chief Acquisition Officer, the Chief Procurement Officer as the Senior Procurement Executive, and delegates all procurement authority to the Chief Procurement Officer.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Elie F. Stowe, Assistant Chief Procurement Officer for Policy and Systems, Office of the Chief Procurement Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 5276, Washington, DC 20410-3000, telephone number 202-708-0294 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: This notice includes the Department's designations of the Chief Acquisition Officer and Senior Procurement Executive, and delegations of procurement authority to the Chief Procurement Officer. Previously, the delegations and redelegations were set forth in separate **Federal Register** notices. In addition, this notice revises the current delegations to clarify that

the Chief Procurement Officer may redelegate authority for simplified acquisitions using the Government Purchase Card. Under prior notices, the Chief Procurement Officer had redelegated to the Department's Commercial Credit Card Program Administrator authority for credit card purchases within the micro-purchase threshold established in Federal Acquisition Regulation (FAR) part 13 and authority to further redelegate such authority to credit card holders. This notice removes the Commercial Credit Card Program Administrator's authority to further redelegate this authority.

Accordingly, the Secretary hereby revokes, designates, and delegates as follows:

Section A. Designation of Chief Acquisition Officer

1. The Deputy Secretary is designated to serve as the Department's Chief Acquisition Officer. Functions of the Chief Acquisition Officer are outlined at 41 U.S.C. 414. If the Deputy Secretary position is vacant, the Senior Procurement Executive will perform all of the duties and functions of the Chief Acquisition Officer.

2. The authority of the Chief Acquisition Officer includes the authority to redelegate the duties and functions of the Chief Acquisition Officer.

Section B. Designation of Senior Procurement Executive

1. The Chief Procurement Officer is designated as the Department's Senior Procurement Executive.

2. The Senior Procurement Executive shall report directly to the Deputy Secretary without intervening authority for all procurement-related matters.

3. The authority of the Senior Procurement Executive includes the authority to redelegate the duties and functions of the Senior Procurement Executive.

Section C. Delegation of Authority to Chief Procurement Officer

1. The Chief Procurement Officer is delegated the authority to exercise all duties, responsibilities, and powers of the Secretary with respect to departmental procurement activities. The authority delegated to the Chief Procurement Officer includes the following duties, responsibilities, and powers:

a. Authority to enter into, administer, and/or terminate all procurement contracts (as well as interagency agreements entered into under the authority of the Economy Act), for property and services required by the

Department, and make related determinations and findings;

b. Authority to order the sanctions of debarment, suspension, and/or limited denial of participation pursuant to 48 CFR 2409.7001 and 2 CFR part 2424;

c. Responsibility for procurement program development, including:

(1) Implementation of procurement initiatives, best practices, and reforms;

(2) In coordination with the Office of Federal Procurement Policy, determination of specific areas where governmentwide performance standards should be established and applied, and development of governmentwide procurement policies, regulations, and standards;

(3) Establishment and maintenance of an evaluation program for all procurement activities within the Department;

(4) Development of programs to enhance the professionalism of the Department's procurement workforce, including the establishment of educational, training, and experience requirements for procurement personnel; and

(5) Development of all departmental procurement policy, regulations, and procedures.

2. The Chief Procurement Officer is authorized to issue rules and regulations as may be necessary to carry out the authority delegated under this Section C.

3. The Chief Procurement Officer may redelegate:

a. The procurement authority in C.1.a herein to qualified personnel within the Office of the Chief Procurement Officer.

b. Limited purchasing authority to other qualified departmental employees, as follows:

(1) Simplified acquisitions (FAR Part 13), including the Government Purchase Card purchases; and

(2) Issuance of delivery and task orders under contracts established by other Government sources in accordance with FAR Part 8, or under prepriced indefinite-delivery contracts established by the Department.

4. All redelegations of procurement authority shall be made by way of contracting officer Certificates of Appointment that clearly define the limits of the delegated authority.

Section D. No Authority to Redelegate

The authorities in Section C that may be redelegated from the Chief Procurement Officer do not include the authority to further redelegate.

Section E. Authority Superseded

This designation and delegation of authority supersedes all previous

designations concerning the Chief Acquisition Officer and Senior Procurement Executive, and supersedes all previous delegations of authority to the Chief Procurement Officer.

Authority: 41 U.S.C. 414; Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011-22186 Filed 8-29-11; 8:45 am]

BILLING CODE 4610-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5538-D-02]

Order of Succession for Government National Mortgage Association (GNMA)

AGENCY: Office of the President of the Government National Mortgage Association, HUD.

ACTION: Notice of Order of Succession.

SUMMARY: In this notice, the President of the Government National Mortgage Association (GNMA) designates the Order of Succession for GNMA. This Order of Succession supersedes all prior Orders of Succession for GNMA.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Gregory A. Keith, Senior Vice President, Chief Risk Officer, Government National Mortgage Association, Department of Housing and Urban Development, Potomac Center South, 550 12th Street, SW., 3rd Floor, Washington, DC 20024, telephone number 202-475-4918 (this is not a toll-free number). Persons with hearing- or speech-impaired may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The President of GNMA hereby issues this Order of Succession pursuant to the bylaws of GNMA, which authorize the President to designate the sequence in which other officers of GNMA shall act. The officers designated below shall perform the duties and exercise the power and authority of the President when the President is absent, or unable to act, or when there is a vacancy in the Office of the President of GNMA. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345-3349d) and the bylaws of the GNMA, 24 CFR part 310. Accordingly, the President of GNMA designates the following Order of Succession:

Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998 and the bylaws of GNMA, during any period when, by reason of absence, disability, or vacancy in office, the President of GNMA is not available to exercise the powers or perform the duties of the President, the following officials within the Office of GNMA are hereby designated to exercise the powers and perform the duties of the Office, including the authority to waive regulations:

- (1) Executive Vice President;
- (2) Senior Vice President, Office of Program Operations;
- (3) Senior Vice President, Office of Finance;
- (4) Senior Vice President, Office of Mortgage Backed Securities;
- (5) Senior Vice President, Office of Capital Markets;
- (6) Senior Vice President, Office of Enterprise Risk;
- (7) Vice President, Chief Information Officer; and
- (8) Vice President, Deputy Director, Office of Management Operations.

These officials shall perform the functions and duties of the Office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Section B. Authority Superseded

This Order of Succession supersedes all prior Orders of Succession for the President of GNMA.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)); Section 3.05, Bylaws of the Government National Mortgage Association, 24 CFR part 310.

Dated: August 19, 2011.

Theodore W. Tozer,
President, Government National Mortgage Association.

[FR Doc. 2011-22176 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5561-D-02]

Order of Succession for the Office of the Chief Procurement Officer

AGENCY: Office of the Chief Procurement Officer, HUD.

ACTION: Notice of Order of Succession.

SUMMARY: In this notice, the Chief Procurement Officer designates the

Order of Succession for the Office of the Chief Procurement Officer.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Elie F. Stowe, Assistant Chief Procurement Officer for Policy, Oversight, and Systems, Office of the Chief Procurement Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 5276, Washington, DC 20410-3000, telephone number 202-708-0294 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: The Chief Procurement Officer for the Department of Housing and Urban Development is issuing this Order of Succession of officials authorized to perform the functions and duties of the Office of the Chief Procurement Officer when, by reason of absence, disability, or vacancy in office, the Chief Procurement Officer is not available to exercise the powers or perform the duties of the office. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345-3349d). This publication supersedes all prior Orders of Succession for the Office of the Chief Procurement Officer.

The Chief Procurement Officer designates the following Order of Succession.

Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998, during any period when, by reason of absence, disability, or vacancy in office, the Chief Procurement Officer for the Department is unable to perform his or her functions and duties, the following officials within the Office of the Chief Procurement Officer, in the order of precedence shown, are hereby designated to exercise the powers and perform the duties of the office:

- (1) Deputy Chief Procurement Officer;
- (2) Assistant Chief Procurement Officer for Support Operations;
- (3) Assistant Chief Procurement Officer for Program Operations;
- (4) Assistant Chief Procurement Officer for Field Operations;
- (5) Assistant Chief Procurement Officer for Policy and Systems;
- (6) Director, Field Contracting Operations (Southern);
- (7) Director, Field Contracting Operations (Western); and
- (8) Director, Field Contracting Operations (Northern).

No official designated herein shall assume the functions and duties of the

Chief Procurement Officer unless all other officials preceding him or her in the order of succession are unable to act by reason of absence, disability, or vacancy in office. The designated official shall perform the functions and duties until such time that the Chief Procurement Officer or a higher-ranked official in the order of succession is able to resume them, or the duration of the temporary tenure of the acting Chief Procurement Officer permitted by 5 U.S.C. 3346 elapses.

Section B. Authority Superseded.

This Order of Succession supersedes all prior Orders of Succession for the Chief Procurement Officer.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: August 19, 2011.

Jemine A. Bryon,
Chief Procurement Officer.

[FR Doc. 2011-22188 Filed 8-29-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5518-D-01]

Order of Succession for the Office of Policy Development and Research

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice of order of succession.

SUMMARY: In this notice, the Assistant Secretary for Policy Development and Research designates the Order of Succession for the Office of the Assistant Secretary for Policy Development and Research. This Order of Succession supersedes all prior Orders of Succession for the Office of Policy Development and Research.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Jean Lin Pao, General Deputy Assistant Secretary, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8228, Washington, DC 20410-6000, telephone number 202-708-1812. (This is not a toll-free number.) Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Policy Development and Research is issuing this Order of Succession of officials authorized to perform the duties and

functions of the Office of the Assistant Secretary when, by reason of absence, disability, or vacancy in office, the Assistant Secretary is not available to exercise the powers or perform the duties of the office. This Order of Succession is subject to the provisions of the Vacancy Reform Act of 1998 (5 U.S.C. 3345–3349d). This publication supersedes all prior Orders of Succession for the Office of Policy Development and Research.

Accordingly, the Assistant Secretary for Policy Development and Research designates the following Order of Succession:

Section A. Order of Succession

Subject to the provision of the Vacancy Reform Act of 1998, during any period when, by reason of absence, disability, or vacancy in office, the Assistant Secretary for Policy Development and Research is not available to exercise the powers or perform the duties of the Office of the Assistant Secretary for Policy Development and Research, the following officials within the Office of Policy Development and Research are hereby designated to exercise the powers and perform the duties of the office, including the authority to waive regulations:

(1) Deputy Assistant Secretary for Policy Development;

(2) General Deputy Assistant Secretary;

(3) Deputy Assistant Secretary for Research, Evaluation, and Monitoring; and

(4) Deputy Assistant Secretary for Economic Affairs.

These officials shall perform the functions and duties of the office, in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his or hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Section B. Authority Superseded

This Order of Succession supersedes all prior Orders of Succession for the Office of Policy Development and Research.

Authority: Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: August 19, 2011.

Raphael W. Bostic,

Assistant Secretary for Policy Development and Research.

[FR Doc. 2011–22171 Filed 8–29–11; 8:45 am]

BILLING CODE 4219–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5539–D–02]

Order of Succession for the Office of the Chief Financial Officer

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of Order of Succession.

SUMMARY: In this notice, the Secretary designates the Order of Succession for the Office of the Chief Financial Officer. This Order of Succession supersedes all prior Orders of Succession for the Office of the Chief Financial Officer.

DATES: *Effective Date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT:

Laura Moore-Rush, Acting Deputy Director, Office of the Chief Financial Officer Management Staff, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 3120, Washington, DC 20410, telephone number 202–402–3638 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: The Secretary is issuing this Order of Succession of officials authorized to perform the functions and duties of the Office of the Chief Financial Officer when, by reason of absence, disability, or vacancy in office, the Chief Financial Officer is not available to exercise the powers or perform the duties of the office. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d). This publication supersedes all prior Orders of Succession for the Office of the Chief Financial Officer.

Accordingly, the Secretary designates the following Order of Succession:

Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998, during any period when, by reason of absence, disability, or vacancy in office, the Chief Financial Officer is not available to exercise the powers or perform the duties of the Chief Financial Officer, the following officials within the Office of the Chief Financial Officer are hereby designated to exercise the powers and perform the duties of the Office:

(1) Deputy Chief Financial Officer;

(2) Assistant Chief Financial Officer for Budget;

(3) Assistant Chief Financial Officer for Accounting;

(4) Assistant Chief Financial Officer for Systems; and

(5) Assistant Chief Financial Officer for Financial Management.

These officials shall perform the functions and duties of the office in the order specified herein and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Section B. Authority Superseded

This Order of Succession supersedes any prior Orders of Succession for the Chief Financial Officer.

Authority: Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: August 19, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011–22185 Filed 8–29–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK920000–L14100000–BJ0000]

Notice of Filing of Plats of Survey; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey.

SUMMARY: Notice of Filing of Plats of Survey; Alaska.

Survey Descriptions: The plat and field notes, representing the corrective dependent resurvey of the Second Guide Meridian East, along a portion of the west boundary of Township 7 North, Range 9 East, the corrective dependent resurvey of the south boundary of the Steese National Conservation Area (north unit) as defined by the 1987 survey of Townships 7 North, Ranges 8 and 9 East and the survey of Tract 37, Township 7 North, Range 9 East, accepted July 18, 2011, for Group No. 444, Alaska.

The plat of survey of U.S. Survey No. 13984, Alaska, in 17 sheets, representing the monumented centerline of the Pinnell Mountain Trail and 2 Lots with associated trail improvements thereon, is situated northerly of the Steese Highway, between Twelvemile Summit (Milepost 86) and Eagle Summit (Milepost 107), approximately 75 miles northeasterly of Fairbanks, within Township 7 North, Range 9 East and Townships 8 North, Ranges 9, 10 and 11 East, of the Fairbanks Meridian, Alaska, accepted

July 18, 2011, for U.S. Survey No. 13984, Alaska.

DATES: The plat of survey described above is scheduled to be officially filed in the Alaska State Office, Bureau of Land Management, Anchorage, Alaska, September 29, 2011.

ADDRESSES: Bureau of Land Management, Alaska State Office, 222 W. 7th Ave., Stop 13, Anchorage, AK 99513-7599.

FOR FURTHER INFORMATION CONTACT: Michael H. Schoder, Chief Cadastral Surveyor, Division of Cadastral Survey, BLM-Alaska State Office, 222 W. 7th Ave., Stop 13, Anchorage, AK 99513-7599; Tel: 907-271-5481; fax: 907-271-4549; e-mail: mschoder@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, seven 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 survey plat(s) and field notes will be available for inspection in the Public Information Center, Alaska State Office, Bureau of Land Management, 222 West 7th Avenue, Anchorage, Alaska 99513-7599; telephone (907) 271-5960. Copies may be obtained from this office for a minimum recovery fee.

If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed.

A person or party who wishes to protest against this survey must file a written response with the Alaska State Director, Bureau of Land Management, stating that they wish to protest.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

A statement of reasons for a protest may be filed with the notice of protest to the State Director; the statement of reasons must be filed with the State Director within thirty days after the protest is filed.

Authority: 43 U.S.C. 3; 53.

Dated: August 24, 2011.

Michael H. Schoder,

Chief Cadastral Surveyor, Alaska.

[FR Doc. 2011-22082 Filed 8-29-11; 8:45 am]

BILLING CODE 4310-JA-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZ956000.L1420000.BJ0000.241A]

Notice of Filing of Plats of Survey; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey; Arizona.

SUMMARY: The plat of survey as described below is officially filed in the Arizona State Office, Bureau of Land Management, Phoenix, Arizona.

SUPPLEMENTARY INFORMATION:

The Gila and Salt River Meridian, Arizona

The plat representing the dependent resurvey of portions of Mineral Survey No. 1510, in Townships 23 North, Range 17 and 18 West, accepted August 15, 2011, and officially filed August 17, 2011, for Group 1099, Arizona.

This plat was prepared at the request of the Bureau of Land Management.

A person or party who wishes to protest against any of these surveys must file a written protest with the Arizona State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

FOR FURTHER INFORMATION CONTACT:

These plats will be available for inspection in the Arizona State Office, Bureau of Land Management, One North Central Avenue, Suite 800, Phoenix, Arizona 85004-4427. 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.

Dated: August 23, 2011.

Danny A. West,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2011-22081 Filed 8-29-11; 8:45 am]

BILLING CODE 4310-32-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTB07900 09 L10100000.PH0000 LXAMANMS0000]

Notice of Public Meeting; Western Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Western Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held Sept. 15, 2011, beginning at 9 a.m. with a 30-minute public comment period and will adjourn at 3 p.m.

ADDRESSES: The meeting will be in the Bureau of Land Management Dillon Field Office (1005 Selway Drive) in Dillon, Montana.

SUPPLEMENTARY INFORMATION: This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public land management in Montana. During these meetings the council will participate in/discuss/act upon several topics, including reports from the Bureau of Land Management's Butte, Missoula and Dillon field offices.

All RAC meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

FOR FURTHER INFORMATION CONTACT:

David Abrams, Western Montana Resource Advisory Council Coordinator, Butte Field Office, 106 North Parkmont, Butte, Montana 59701, telephone 406-533-7617, e-mail david_abrams@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.

Scott Haight,
Field Manager.

[FR Doc. 2011-22084 Filed 8-29-11; 8:45 am]

BILLING CODE 4310-DN-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-NEW-BOHA-0728-870; 1727-SZS]

Boston Harbor Islands National Recreation Area Advisory Council; Notice of Public Meeting

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Annual Meeting.

SUMMARY: Notice is hereby given that a meeting of the Boston Harbor Islands National Recreation Area Advisory Council will be held on Wednesday, September 14, 2011, at 6 p.m. to 8 p.m. at Independence Wharf, 470 Atlantic Avenue, Community Room, Boston, MA.

The agenda will include: Summer season review; park update; and public comment. The meeting will be open to the public. Any person may file with the Superintendent a written statement concerning the matters to be discussed. Persons who wish to file a written statement at the meeting or who want further information concerning the meeting may contact Superintendent Bruce Jacobson at Boston Harbor Islands, 408 Atlantic Avenue, Suite 228, Boston, MA 02110, or (617) 223-8667. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

DATES: September 14, 2011, at 6 p.m.

ADDRESSES: Independence Wharf, 470 Atlantic Avenue, Community Room, Boston, MA.

FOR FURTHER INFORMATION CONTACT: Superintendent Bruce Jacobson, (617) 223-8667.

SUPPLEMENTARY INFORMATION: The Advisory Council was appointed by the Director of National Park Service pursuant to Public Law 104-333. The 28 members represent business, educational/cultural, community and environmental entities; municipalities

surrounding Boston Harbor; Boston Harbor advocates; and Native American interests. The purpose of the Council is to advise and make recommendations to the Boston Harbor Islands Partnership with respect to the development and implementation of a management plan and the operations of the Boston Harbor Islands NRA.

Dated: August 22, 2011.

Richard Armenia,
Acting Superintendent, Boston Harbor Islands NRA.

[FR Doc. 2011-21934 Filed 8-29-11; 8:45 am]

BILLING CODE 4310-8G-P

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Under the Clean Water Act

Notice is hereby given that on August 24, 2011; a proposed Consent Decree in *United States and the State of Ohio v. City of Euclid, Ohio*, Civil Action No. 1:11-CV-01783 was lodged with the United States District Court for the Northern District of Ohio.

In this action the United States and the State of Ohio seeks civil penalties and injunctive relief for violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, in connection with the City of Euclid's operation of its municipal wastewater and sewer system. The Complaint alleges that the City discharges combined sewer overflows ("CSOs") and sanitary sewer overflows ("SSOs") in violation of the Clean Water Act because, in the case of CSOs, the discharges of sewage violate limitations and conditions in the City's National Pollutant Discharge Elimination System (NPDES) permit, and, in the case of SSOs, the discharges of sewage are not authorized by the City's NPDES permit. The Complaint further alleges that the City bypasses treatment processes at its treatment plants, which also violate its NPDES permit.

Under the proposed Consent Decree, Euclid will be required to submit to the United States Environmental Protection Agency ("EPA") and the Ohio Environmental Protection Agency ("Ohio EPA") an acceptable long term control plan to reduce its CSOs and treatment plant bypasses, and an SSO elimination plan to eliminate its SSOs. Once EPA and Ohio EPA approve the plans, Euclid will be required to implement the plans. The SSO work must be completed no later than December 31, 2020, and the CSO and treatment plant work must be completed and placed into full operation no later than December 31, 2026. The City will

pay \$150,000 in civil penalties to be split evenly between the United States and the State of Ohio.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. City of Euclid, Ohio*, D.J. Ref. 90-5-1-1-08727.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Northern District of Ohio, 801 West Superior Avenue, Suite 400, Cleveland, OH 44113 (contact Assistant United States Attorney Steven J. Paffilas (216) 622-3698), and at U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604-3590 (contact Associate Regional Counsel Joe Williams (312) 886-6631). During the public comment period, the proposed Consent Decree, may also be examined on the following Department of Justice Web site, to http://www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$37.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address. In requesting a copy exclusive of exhibits, please enclose a check in the amount of \$10 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen M. Katz,
Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011-22068 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE

Notice of Lodging of First Addendum to Consent Decree Under the Emergency Planning and Community Right-To-Know Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Safe Drinking Water Act, and the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on August 25, 2011, a proposed First Addendum to Consent Decree in *United States, et. al. v. INVISTA, S.à r.l.*, Civil Action Number 1:2009-cv-00244, was lodged with the United States District Court for the District of Delaware.

The Consent Decree in this matter was entered on July 28, 2009. The Consent Decree resolves claims against *INVISTA S.à r.l.* (“*INVISTA*”) brought by the United States on behalf of the U.S. Environmental Protection Agency (“*EPA*”) under the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11001 to 11050; the Clean Water Act (CWA), 42 U.S.C. 1251 to 1387; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 to 6992k; the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 to 136y; Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 to 9675; the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f to 300j-26; and the Clean Air Act (CAA), 42 U.S.C. 7401 to 7671q (hereinafter “*Environmental Requirements*”). The Consent Decree also resolves the claims against *INVISTA* brought by the State of Delaware Department of Natural Resources and Environmental Control, the State of South Carolina Department of Health and Environmental Control, and the Chattanooga-Hamilton County Air Pollution Control Board.

The First Addendum to Consent Decree modifies deadlines for benzene waste NESHAP program enhancements at two *INVISTA* facilities in Orange and Victoria, Texas. The First Addendum extends the time for *INVISTA* to elect between two options for further benzene emission reductions and extends the time to implement the selected option. *INVISTA* will continue to comply with the benzene NESHAP throughout this period.

The Department of Justice will receive, for a period of 30 days from the date of this publication, comments

relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States et al. v. INVISTA, S.a.r.l.*, DOJ Ref. No. 90-5-2-1-08892.

The proposed First Addendum to Consent Decree may be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/ConsentDecrees.html>. A copy of the proposed Consent Decree may be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax number (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy of the Consent Decree from the Consent Decree Library, please enclose a check in the amount of \$2.00 (.25 cents per page reproduction costs), payable to the U.S. Treasury.

Robert D. Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011-22121 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09-33]

Richard A. Herbert, M.D.; Decision and Order

On June 15, 2010, Administrative Law Judge (ALJ) Mary Ellen Bittner issued the attached recommended decision. Thereafter, Respondent filed Exceptions to the ALJ’s decision.

Having reviewed the entire record including Respondent’s Exceptions, I have decided to adopt the ALJ’s rulings, findings of fact, conclusions of law, and recommended Order except as expressly set forth below.¹

In his Exceptions, Respondent raises several issues. First, Respondent argues that he “was irreparably harmed” because he was forced to represent himself “pro se” after the ALJ granted his previous attorney’s motion to

¹ Pursuant to 5 U.S.C. 552(a)(2), the ALJ’s recommended decision has been edited to eliminate the names of various persons who were either witnesses or were referred to in the proceeding. All citations to the ALJ’s decision are to the slip opinion attached to this Decision and Order.

withdraw but did not grant his motion for a continuance of the hearing to allow him to obtain new counsel.² Exc. at 6–7. Respondent argues that his previous attorney had requested that he “be given leave of 21 days to obtain new counsel,” and that “[t]he ALJ mistakenly assumed that the attorney and Respondent were not asking for a delay of the hearing” and did not grant a continuance in her October 13, 2009 order. *Id.* at 7. Respondent further asserts that the ALJ “unfairly denied a continuance” and that he “must be given a fair hearing with representation for a proper outcome in this matter.” *Id.* at 10.

The record establishes that on October 9, 2009, Respondent’s prior counsel filed a motion for leave to withdraw; in his motion, Respondent’s prior counsel “further requested that Respondent be given leave of twenty-one (21) days to secure new counsel.” ALJ Ex. 5. On October 13, 2009, the ALJ granted the motion to withdraw. *Id.* However, the ALJ found “it unnecessary to provide leave of twenty-one (21) days for Respondent to secure new counsel * * * as Respondent is free to retain counsel at any time.” *Id.* The ALJ further ordered that “the hearing in this matter, scheduled to begin on November 3, 2009, shall proceed as scheduled.” *Id.* A copy of this ruling was served on Respondent by Federal Express. *Id.* In addition, the following day, the ALJ’s law clerk wrote Respondent noting that it appeared that he was no longer represented by counsel and calling his attention to his “right to be represented by an attorney”; the letter also included verbatim the language of 21 CFR 1316.50, which addresses a party’s right to representation. ALJ Ex. 6. The letter further advised Respondent that he could contact the ALJ’s law clerk if he had any questions. *Id.*

At the hearing, Respondent argued that his prior counsel had sought a continuance of twenty-one days. Tr. 11. However, the ALJ noted that Respondent’s prior attorney “did not ask for a postponement of the hearing” and that he had simply requested that Respondent “be given leave of 21 days to secure new counsel.” *Id.* at 12–13. Respondent replied that his prior lawyer’s intent was “to get [him] time” because “we have blocked out four days” for the hearing, and no “major league attorney is going to have four days [open] on his calendar,” having been notified approximately three weeks before the hearing date. *Id.* at 13. The ALJ responded that she did not

² Respondent does not, however, contend that the ALJ erred in granting the motion to withdraw. See Resp. Exc. at 6–10.

know what Respondent's prior lawyer had "intended," but only "what he asked for." *Id.* Respondent then stated that he understood, and that ALJ "ha[d] made [her] ruling." *Id.* The ALJ then proceeded to conduct the hearing.

I conclude that the ALJ did not abuse her discretion in proceeding to conduct the hearing. Whatever the intent of Respondent's counsel was in asking for "leave * * * to secure new counsel," Respondent had at least three weeks between his prior attorney's moving to withdraw and the commencement of the hearing to find new counsel. While it may be the case that most capable attorneys would not have four days clear on their calendar on three weeks' notice, it is not as if Respondent had secured new counsel who, because his calendar was not clear, sought a continuance, which was denied. Indeed, it is notable that at the hearing, Respondent made no claim that he had actually contacted any attorney, let alone that an attorney had declined to represent him because the attorney had a scheduling conflict. I therefore reject Respondent's exception and conclude that he is not entitled to a new hearing.

Respondent takes further exception to the ALJ's conclusion that the OxyContin prescriptions he issued to E.M. lacked "a legitimate medical purpose" and that he "was at least reckless or negligent in ignoring the warning signs of diversion." *Exc.* at 10–16. Respondent raises a number of contentions regarding the weight the ALJ gave to the testimony of various witnesses and exhibits; Respondent also notes that after the Agency's hearing, the Illinois Department of Financial and Professional Regulation (IDFPR) held a hearing on the same allegations and "found that the State did not prove that any diversion occurred." *Id.* at 15.

Having reviewed each of these contentions, I concluded that a preponderance of the evidence supports the ALJ's conclusions that the OxyContin prescriptions which Respondent issued in the name of E.M. were issued outside of the "usual course of * * * professional practice" and lacked "a legitimate medical purpose" and therefore violated the CSA. 21 CFR 1306.04(a). The evidence shows that beginning in September 2003, Respondent prescribed 60 tablets of Oxycontin 80 mg. (BID, twice a day), to E.M., who was then 93 years old, on a monthly basis through May 2009, one month before her death. RX 16. Yet on various occasions throughout this period, E.M. was an in-patient in either a hospital or nursing home. *See* GX 42. Moreover, E.M. was under hospice care from June 9 through October 11, 2006;

December 8, 2006 through June 1, 2007; and from July 11, 2007 through the date of her death.

According to the testimony of a hospice nurse who treated E.M. for between eight months to a year, under the hospice agreement, E.M.'s family was required to disclose whether any other physicians were treating her. Tr. 35, 38. In addition, the testimony established that the hospice was required to know what medications E.M. was taking. *Id.* at 35. As the hospice nurse explained, a doctor would need to communicate with hospice what drugs he was prescribing so that contraindicated drugs were not prescribed by another doctor. *Id.* at 65.

Yet E.M.'s family, including her son I.S., who was a long-standing friend of Respondent and who also received the same monthly prescriptions for 60 tablets of OxyContin 80 mg (*see id.* at 686) and filled his mother's prescriptions (*id.* at 690), did not disclose to the hospice either that E.M. was being treated by Respondent or that she was taking OxyContin 80 mg. *Id.* at 66. According to the hospice nurse, the only controlled substance she was aware of being prescribed to E.M. was Valium. *Id.* at 35. Moreover, on those occasions when the hospice nurse determined that E.M. needed some medicine for her arm or knee pain, I.S. told the hospice nurse that Tylenol (acetaminophen, a non-controlled drug) worked for his mother and that his mother could not handle stronger medicine. *Id.* at 65.

The Government also called as a witness Dr. S.D., a specialist in internal medicine who was E.M.'s primary care physician for the last four years of her life, including when she was in hospice. *Id.* at 72, 76. According to Dr. S.D., E.M. had lower back pain, shoulder and knee pain, for which he prescribed Tylenol or Darvocet. *Id.* at 89–90. However, she did not require constant medication, and he never prescribed OxyContin 80 mg, which he considered to be "too strong for her." *Id.* at 91–92. While Dr. S.D. once prescribed Vicodin to E.M. upon her discharge from the hospital, GX 21, at 31; he did not prescribe Vicodin to her on a monthly basis. Tr. 143.

While Dr. S.D. talked with I.S.'s live-in girlfriend regarding E.M.'s condition, he further testified that he was never told that Respondent was prescribing OxyContin to her. *Id.* at 92, 95, 109, 141–42. Moreover, the hospice nurse never told him that E.M. was seeing another doctor and never listed OxyContin as one of her medications. *Id.* at 96, 102. Dr. S.D. further testified that if E.M. had, in fact, been taking two OxyContin 80 mg each day and had

stopped (as when she was in the hospital), she would have undergone "severe withdrawal," including such symptoms as abdominal pain, diarrhea, and vomiting. *Id.* at 105–06. Dr. S.D. also testified that when a patient is hospitalized, a family member is not allowed to give the patient medication. *Id.* at 107. There was, however, no evidence that E.M. underwent withdrawal during any of the various occasions when she was hospitalized. *Id.* at 106, 143–44.

Dr. S.D. further testified that because he was E.M.'s primary care physician, Respondent had "the legal responsibility to send [him] a consult that [Respondent was] treating her for pain and prescribing" OxyContin 80 mg to her. *Id.* at 140. Dr. S.D. testified that if doctors do not coordinate their prescribing to a patient, the patient could overdose. *Id.* at 144. Dr. S.D. then testified that it is outside of the normal course of medical practice for a physician, who is aware that a patient is being treated by another physician, to prescribe drugs and fail to consult with the other physician.³ *Id.*

As noted above, during the period in which Respondent issued the OxyContin prescriptions in E.M.'s name, E.M. was admitted as an in-patient to a hospital on approximately twenty occasions.⁴ *See* GX 42. Yet there is no evidence that she ever underwent withdrawal. Moreover, in the voluminous medical records entered into evidence, Respondent points to only a single instance (involving a January 18, 2006 emergency room visit for a potential stroke (CVA)), in which the medical records listed her medications as including OxyContin. GX 21, at 29. If E.M. was actually taking the OxyContin, this begs the question of why her family was so reluctant to disclose this information (as well as Respondent's) name to the hospitals where she was treated.

There is further evidence establishing that Respondent's prescriptions were unlawful. The evidence shows that on November 10, 2004, E.M. was discharged from the hospital to the

³ Respondent acknowledged that he was aware that E.M. was being treated by other doctors, and the chart he maintained on her shows that he was aware at various points that she was a patient in a rehab facility and a nursing home. RX 16, at 5–6. Yet he never notified either her physicians or these facilities that he was prescribing OxyContin to her. While Respondent maintained he did not notify E.M.'s physicians and the facilities regarding the OxyContin prescriptions because E.M.'s family did not want him to, Respondent offered no credible explanation for why he continued to prescribe to E.M. when he knew she was under the care of other physicians.

⁴ She was also taken to the Emergency Room approximately ten times.

Heritage Village Nursing Home, and that at 9:30 a.m., she was admitted to the latter. GX 11, at 1; GX 25, at 3; GX 27A, at 70. Yet Respondent noted in her chart that on the same day, he performed a physical exam at which he took her blood pressure, palpated her deformities and found that they were “not as painful,” and found that her “hand grip good,” RX 16, at 4; the same day, he also issued her a prescription for sixty OxyContin 80 mg. See GX 28, at 10. Respondent did not, however, offer any testimony explaining how he could have performed a physical exam on E.M. on this day.

Likewise, Respondent noted in E.M.’s chart that on November 17, 2006, her blood pressure was 138/94, she was “[d]oing surprisingly well today,” she “spoke my 1st name,” and was “oriented,” RX 16, at 5; he also issued a prescription in her name for sixty OxyContin 80 mg. See GX 14, at 5. However, between October 12 and December 8, 2006, E.M. was a patient in the Manor Care Nursing Home. GX 21, at 203; GX 27B, at 17, 956. Yet the record (including Respondent’s testimony) establishes that Respondent did not travel to the facilities E.M. was in. Tr. 547.

The ALJ found that there were “numerous inconsistencies between the testimonies of [I.S.] and Respondent” and that this led her “to believe that neither is a credible witness with regard to [E.M.’s] medication and treatment.” ALJ at 54. The ALJ further noted the extensive amount of time that E.M. was in either a hospital or nursing home/rehab facility (approximately 290 days during the course of Respondent’s prescribing to her) and found “it difficult to believe that [E.M.’s] family was able to administer [80 mgs of] OxyContin twice a day for such an expansive time without ever arousing the suspicion of the facility staff.”⁵ *Id.* I agree and find Respondent’s and I.S.’s testimony implausible. I also agree with the ALJ’s conclusion that the record

⁵ Among the implausible testimony I.S. gave was that he or a family member would take the OxyContin to his mother when she was institutionalized and give her the drug, which was prescribed to be taken twice a day. Tr. 685. I.S. also asserted that when he went to his mother’s various institutions, and told them that he had “supplements [and] medications that I give my mother at home, and I would like you to administer them, * * * they said we won’t do that * * * unless the doctor orders it. But if you want to come in yourself, or have somebody come in and give it to your mother, we haven’t got a problem with that, and that’s what I did.” *Id.* at 692–93. However, I.S. testified that he did not tell the facilities that he would be administering OxyContin. *Id.* Indeed, it seems strange that the facilities did not ask I.S. what medications he intended to bring into the facility, and as the ALJ found, this testimony is patently disingenuous.

supports the conclusion that the OxyContin prescriptions Respondent issued in the name of E.M. lacked a legitimate medical purpose and were issued outside of the usual course of professional practice and thus violated Federal law.⁶ 21 CFR 1306.04(a).

Respondent further points to an IDFPF Inspector’s Report of an interview he conducted with E.M. and her son on August 9, 2005. During this interview, E.M. identified two green tablets, which were reportedly OxyContin, and stated that they “were to combat pain.” RX 10. However, earlier in the interview the Inspector had asked E.M. if she had pain when she initially went to see Respondent and she answered “no.” *Id.* I.S. had objected that “the question was unfair as he felt she did not recall.” *Id.* Moreover, Respondent had previously diagnosed E.M. as having “senile dementia” nearly two years earlier, RX 16, at 1; and Dr. P. (Dr. S.D.’s partner) had diagnosed E.M. as having Alzheimer’s disease and dementia in June 2005, two months prior to the interview. Thus, there is ample reason to discount E.M.’s statement regarding the use of the OxyContin.

Respondent also argues that after the instant hearing, the IDFPF held a hearing on the “same underlying allegations,” at which much of the same evidence was presented; however, at the state hearing, Respondent was also able to procure the testimony of C.S. (I.S.’s wife). Exceptions at 15. Respondent argues that the State ALJ “found that the

⁶ Respondent argues that DEA Investigators “could have easily secured a blood test of [E.M.] to discern whether she was receiving OxyContin,” and that “[b]y the time Respondent realized the focus of the investigation centered around this patient and the severity of the charges against him, it was too late because the patient had passed away.” Exceptions at 12. Respondent further argues that “even though OxyContin was listed as a home medication and there was evidence that she was taking the medicine s[u]rreptitiously, Dr. [S.D.], her primary care physician, never ordered a blood test for opioid levels.” *Id.* at 13. As for DEA’s obligation to secure a blood test, this is beside the point. Moreover, in his testimony, Respondent acknowledged that “[i]n retrospect” he should have done a blood test on E.M. to see if she was actually taking the OxyContin. Tr. 835. However, he then attempted to shift the blame to Dr. S.D., asking “[w]hat is [his] excuse?” *Id.*

Respondent ignores that he was one who prescribed 60 tablets of OxyContin 80 mg to E.M.—which is the second strongest formulation available and which just happened to be the same prescription that he was giving her son—each month, and did this for a period of more than five and a half years and did so even when he knew she was being treated by other doctors. At a minimum, this evidence establishes that Respondent acted with deliberate ignorance as to the likelihood the drugs were being diverted. See *Jeri Hassman, M.D.*, 75 FR 8194, 8228 (2010) (citing *United States v. Katz*, 445 F.3d 1023, 1031 (8th Cir. 2006)).

State did not prove that any diversion occurred.” *Id.*

Respondent does not, however, argue that C.S. was unavailable to testify in the DEA proceeding and her testimony does not constitute newly discovered evidence. *Cf. ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 286 (1987). As for the state ALJ’s findings, DEA was not a party to that proceeding. Moreover, this Agency has long held that it “maintains a separate oversight responsibility [apart from that which exists in a state board] with respect to the handling of controlled substances and has a statutory obligation to make its independent determination as to whether the granting of [a registration] would be in the public interest.” *Mortimer B. Levin, D.O.*, 55 FR 8209, 8210 (1990). Accordingly, even if Respondent had submitted the state ALJ’s decision, the state ALJ’s finding would not be entitled to collateral estoppel effect in this proceeding.⁷ *Cf. United States v. Mendoza*, 464 U.S. 154 (1984). I therefore reject Respondent’s exception that the evidence in the record of this proceeding does not demonstrate that he engaged in the diversion of controlled substances and agree with the ALJ’s conclusion that he acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he issued OxyContin prescriptions in E.M.’s name. 21 CFR 1306.04(a). See also *George Mathew, M.D.*, 75 FR 66138, 66146 (2010) (under Federal law, where a physician issues a prescription in violation of 21 CFR 1306.04(a), the drug is deemed diverted).

Finally, Respondent argues that the proven allegations do not support the revocation of his registration. Resp. Exc. at 16. Contrary to Respondent’s understanding, DEA has held that proof of a single act of diversion is sufficient to support the revocation of a registration and the denial of an application. See *Dewey C. MacKay*, 75 FR 49956, 49977 (2010); *Alan H. Olefsky*, 57 FR 928, 928–29 (1992) (revoking registration based on physician’s act of presenting two fraudulent prescriptions to pharmacy for filling). The ALJ’s finding that Respondent issued prescriptions which lacked a legitimate medical purpose is sufficient by itself to support the revocation of Respondent’s registration, especially, where, as here, the ALJ

⁷ The Government also notes that in the IDFPF proceeding, the State’s burden of proof was “clear and convincing evidence,” but in this proceeding the “preponderance of the evidence” standard applies. Gov. Resp. to Resp. Motion for Rehearing and Exceptions, at 13 (citing Tit. 68, Ch. VII, Subchapter a, Admin. Rule, Part 1110.190).

found that “Respondent has repeatedly failed to accept responsibility for his misconduct.” ALJ at 44. *See also Jayam Krishna-Iyer*, 74 FR 459, 463 (2009) (quoting *Medicine Shoppe—Jonesborough*, 73 FR 364, 387 (2008) (DEA “has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.”)); *see also Hoxie v. DEA*, 419 F.3d 477, 483 (6th Cir. 2005) (“admitting fault” is “properly consider[ed]” by DEA to be an “important factor[.]” in the public interest determination).⁸

Moreover, the ALJ found that Respondent had committed additional acts which support the revocation of his registration, including that he materially falsified his 2006 renewal application when he failed to disclose the 1998 probation imposed on his state medical license by the Illinois Department of Professional Regulation. ALJ at 43. As the ALJ found, this was a material falsification because the underlying conduct which gave rise to the State’s order was Respondent’s prescribing of Dilaudid, a schedule II controlled substance, to four patients “under questionable circumstances, i.e., for pain related to old injuries or for pain in which surgery may have provided relief and that two (2) of the patients may have sold some of the Dilaudid back to Respondent.” GX 7. This falsification was material because under the public interest standard, DEA is required to assess an applicant’s experience in dispensing controlled substances and his record of compliance with state and federal laws related to

controlled substances. 21 U.S.C. 823(f) (2) & (4). Accordingly, Respondent’s failure to disclose the 1998 probation was capable of influencing the Agency’s decision as to whether to grant his application and was a material falsification.⁹ *See The Lawsons, Inc.*, 72 FR 74334, 74338–39 (2007) (other citations omitted). Under the CSA, material falsification provides a separate and independent ground for denying an application. 21 U.S.C. 824(a)(1).

Substantial evidence also supports the ALJ’s findings that Respondent committed other acts of misconduct. These included his: (1) Obtaining Marinol, a schedule III controlled substance, from a patient, who had been dispensed the drug by another doctor, in violation of 21 U.S.C. 844(a); and his (2) failing to document his receipt of the Marinol in violation of 21 U.S.C. 827(a)(3). ALJ at 48–49. In addition, Respondent prescribed controlled substances from a new location at which he did not hold a registration and did so even after he was told by DEA personnel to stop doing so. ALJ at 30–31, 52–53 (citing GXs 9, 33, and 34). As the ALJ noted, “Respondent’s act of continuing to handle controlled substances after numerous warnings shows a flagrant disregard for the requirements of the law governing the handling of controlled substances.” *Id.* at 53.

Finally, based on a 2003 state proceeding, the ALJ found that Respondent failed to properly supervise an unlicensed person who distributed phentermine, a schedule IV controlled substance, to patients of a weight loss clinic where Respondent worked and which was owned by the unlicensed person who was a personal friend. ALJ at 46. According to the record, this occurred when Respondent left his medical bag (which contained the drugs) at the clinic and the clinic owner distributed the phentermine to its patients. Notably, five years earlier—as part of the 1998 Consent Order, which resolved the allegations pertaining to his handling of Dilaudid—Respondent was required to take a course in controlled substance management. GX 7, at 3. Yet

⁹In his Exceptions, Respondent also contends that the Agency’s consideration of the 1998 Consent Order violates his right to due process because due process “requires protection from a never-ending time limit for the DEA to bring an action.” Exceptions at 3. Respondent, however, makes only a conclusory assertion of prejudice. *Cf. United States v. Brockman*, 183 F.3d 891, 895 (8th Cir. 1999). He likewise ignores that in making the public interest determination, Congress directed the Agency to consider his experience in dispensing controlled substances, an inquiry which necessarily entails review of prior incidents of misconduct.

Respondent then committed additional violations of the CSA.

The numerous acts of misconduct proved on this record, along with Respondent’s unwillingness to accept responsibility for much of it, and his demonstrated inability to take heed of the laws and regulations pertaining to controlled substances even after being required to undergo remedial instruction, make clear that his continued registration “would be inconsistent with the public interest.” 21 U.S.C. 823(f). I therefore reject Respondent’s exception that the evidence does not support the revocation of his registration. Accordingly, I will adopt the ALJ’s recommendation that his registration be revoked and that his applications to renew and modify his registration be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration, BH8738063, issued to Richard A. Herbert, M.D., be, and it hereby is, revoked. I further order that the applications of Richard A. Herbert, M.D., to renew and modify his registration be, and they hereby are, denied. This order is effective September 29, 2011.

Dated: August 12, 2011.

Michele M. Leonhart,
Administrator.

Bryan Bayly, Esq., for the Government.
Richard A. Herbert, M.D., Pro Se, for the Respondent.

Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

Mary Ellen Bittner, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to determine whether the Drug Enforcement Administration (DEA) should revoke a physician’s Certificate of Registration as a practitioner and deny any pending applications for renewal or modification of that registration. Without this registration the physician, Respondent Richard A. Herbert, M.D., of Riverside, Illinois, will be unable to lawfully handle controlled substances in the course of his practice.

On March 11, 2009, the Deputy Assistant Administrator, Office of Diversion Control, of the DEA issued an Order to Show Cause to Respondent, giving Respondent notice to show cause why the DEA should not revoke his

⁸In concluding that Respondent has not accepted responsibility for his misconduct, the ALJ noted that “despite my previous rulings to the contrary, Respondent continues to assert that most of the evidence and testimony admitted in the instant hearing is inadmissible and should not be considered” and that he “continues to assert that he was ‘not afforded a capable attorney’ although he was at any time free to procure the assistance of counsel [and] was notified of such.” ALJ at 44 (citing Resp. Closing Argument Br. at 10).

To make clear, that Respondent continues to object to the admission of certain evidence and argues that he was not afforded a capable attorney is of no relevance in determining whether he accepts responsibility for his misconduct. I thus reject the ALJ’s reliance on Respondent’s legal arguments as a basis for concluding that he does not accept responsibility. However, the record contains an ample evidentiary basis for concluding that Respondent does not accept responsibility for most of his misconduct, and his explanation of his prescribing to E.M. is utterly implausible. Thus, I conclude that Respondent has not rebutted the Government’s *prima facie* case. *See Hoxie*, 419 F.3d at 483 (upholding Agency’s reliance on registrant’s lack of candor in determining whether registration is consistent with the public interest).

DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(1) and (a)(4), and deny any pending applications for renewal or modification of such registration pursuant to 21 U.S.C. 823(f), on grounds that he materially falsified an application for renewal of his registration and that his continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 824(a)(4) and 823(f).

In substance, the Order to Show Cause alleges that Respondent holds a DEA Certificate of Registration that expired on October 31, 2006, and for which Respondent submitted a timely renewal application on September 26, 2006; that on that renewal application, Respondent was required to answer whether a state medical board had taken action against his state license; that on February 26, 1998, the Illinois then-Department of Professional Regulation had placed Respondent's medical license on probation for one year because Respondent issued unlawful prescriptions for Dilaudid, a brand name product containing the Schedule II narcotic controlled substance hydromorphone hydrochloride; that Respondent failed to disclose the 1998 probation on his September 2006 renewal application; that Respondent obtained dronabinol, a Schedule III hallucinogenic controlled substance, from a patient who had acquired it pursuant to a prescription from another physician but had no record of such receipt, and that on July 21, 2003, Respondent dispensed that dronabinol to another purported patient but had no record of such dispensing; that on August 15, 2003, the Illinois Department of Financial and Professional Regulation (IDFPR) placed Respondent's medical license on probation for three years because Respondent failed to supervise an unlicensed employee who illegally handled phentermine, a Schedule IV stimulant controlled substance; that Respondent disclosed the 2003 probation on his September 2006 renewal application; that on July 5, 2005, the Illinois Department of Professional Regulation served Respondent with an administrative subpoena seeking to obtain patient records and that Respondent did not fully comply with the subpoena in that he redacted patient identification information and all dates of treatment; that on July 28, 2007, the administrative subpoena was re-issued to Respondent; and that from February 2006 through August 2007, Respondent diverted OxyContin, a brand name product containing the Schedule II narcotic controlled substance oxycodone, to a

patient by giving the patient a prescription that Respondent wrote in the name of the patient's mother.

Respondent, through counsel, timely requested a hearing on the allegations in the Order to Show Cause. On October 9, 2009, Respondent's counsel requested leave to withdraw as counsel because of a conflict of representation; I granted counsel's request on October 13, 2009; and sent a copy of the memorandum granting that request to Respondent by Federal Express that same day. Following prehearing procedures, a hearing was held in Chicago, Illinois, from November 3 through November 6, 2009, with the Government represented by counsel and Respondent appearing *pro se*. Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law, and argument. All of the evidence and posthearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

Issue

Whether a preponderance of the evidence establishes that, pursuant to 21 U.S.C. 824(a)(1) and (a)(4), Respondent's registration with the Drug Enforcement Administration should be revoked and any pending applications for renewal or modification of that registration denied, because Respondent made material misstatements on an application for registration and because his continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f).

Findings of Fact

I. Background

Respondent is a physician licensed to practice medicine and to handle controlled substances in Illinois. He has held a DEA registration since April 13, 2004, with a registered address at Oakbrook Center Mall in Oak Brook, Illinois. [GX 1]

II. The Illinois Department of Financial and Professional Regulation

The Illinois Department of Financial and Professional Regulation (IDFPR) is a state agency that licenses physicians and investigates complaints regarding licensed physicians. Upon conclusion of an investigation, the information is forwarded to a medical coordinator, who is a physician, for review. That individual then determines whether to recommend the case to the Medical Disciplinary Board. [Tr. 151–152] D. M.,

a medical investigator and controlled substance inspector for the IDFPR, testified that the IDFPR was previously known as the Department of Professional Regulation but was merged with several stand-alone agencies to eventually become the IDFPR. [Tr. 155]

III. The Evidence Pertaining to Respondent

A. Respondent's Illinois Department of Professional Regulation 1998 Consent Order

Investigator D.M. testified that he and two representatives of the DEA were involved in a 1994 investigation of Respondent regarding the diversion of Dilaudid. [Tr. 154, 733] On February 26, 1998, Respondent entered into a Consent Order with the Illinois then-Department of Professional Regulation. The Consent Order stated that Respondent "may have prescribed Dilaudid to four (4) patients under questionable circumstances, i.e. for pain related to old injuries or for pain in which surgery may have provided relief and that two (2) of the patients may have sold some of the Dilaudid back to Respondent."¹⁰ Respondent did not admit or deny the allegations but, for the purposes of the Consent Order only, agreed not to contest the allegations. Respondent testified in the instant hearing that he does not agree that his actions were unlawful and that his position is that he acted lawfully. [Tr. 743, GX 2]

Under the terms of the Consent Order, Respondent's Illinois physician and surgeon and controlled substances licenses were both placed on probation for one year with several conditions, including completion of a course in controlled substances management and a requirement that Respondent make and submit controlled substance logs to the Department of Professional Regulation for a period of time. [GX 7]

B. Respondent's Illinois Department of Financial and Professional Regulation 2003 Consent Order

Investigator D.M. testified that another IDFPR investigation of Respondent began in 1999 and concerned the "aiding and abetting in the unlicensed practice of medicine."¹¹ According to Investigator D.M., an A.D. had "dispensed"¹² to patients in Chicago phentermine that Respondent

¹⁰ GX 7.

¹¹ Tr. 157.

¹² Agent D.M. testified that his use of the term "dispense" referred to "providing the actual pills." Tr. 159.

had ordered and received at his Oakbrook office.

At the hearing in the instant case, Respondent testified that he had a “deal for pay” with his friend Mr. D., who owned a weight loss clinic in Chicago. Pursuant to this agreement, Respondent used his DEA registration to purchase phentermine at his registered Oakbrook location and then took the phentermine to Mr. D.’s clinic in a locked bag that Respondent would sometimes leave at the clinic; Respondent saw patients and created records at the clinic and sold the phentermine to Mr. D. who in turn sold the phentermine to the patients at a higher cost. Respondent testified that one day he left his bag filled with his stock of phentermine at the clinic although he was not there, and when patients came in Mr. D. provided them with phentermine from the bag and instructed them to come back in a few days to see Respondent.¹³ Respondent testified that once he was notified that some of those patients were state investigators, he immediately resigned from the clinic and offered to cooperate.

Respondent testified that at a state hearing regarding the matter, he admitted that he had guilt because he technically aided in Mr. D.’s “practice of medicine by not securing my controlled substances”¹⁴ but that he “didn’t actually aid and abet.”¹⁵ On August 15, 2003, Respondent entered into a Consent Order with the IDFPR with regard to Mr. D.’s provision of phentermine from the Chicago clinic. The Consent Order stated that Respondent failed to supervise an unlicensed employee and Respondent admitted that the allegations were true. As a result of the Consent Order, Respondent’s Illinois physician and surgeon and controlled substances licenses were placed on probation for a period of three years with several conditions, including completion of continuing medical education in the area of prescribing and dispensing controlled substances and allowing the IDFPR to inspect Respondent’s controlled substance log book and inventory record book upon request. [GX 8]

C. Respondent’s Activity During the 2003–2006 Probation Period

The IDFPR filed a complaint against Respondent on April 5, 2007, alleging that he violated the terms of his probation as set forth in the 2003 Consent Order by failing to make available for inspection his controlled

substance log and inventory records; receiving dronabinol, a Schedule III controlled substance, from a purported patient and re-dispensing it to another purported patient, and failing to keep any records of the receipt and dispensing of the dronabinol; providing incomplete records in response to an IDFPR subpoena issued by the IDFPR; aiding and abetting the unlicensed practice of medicine relating to a June 2005 incident; and issuing prescriptions for OxyContin to patients without examining them and failing to keep and maintain records of those patients and the controlled substances.

1. The IDFPR Inspection of Respondent’s Controlled Substances Log

Investigator D.M. testified that in April 2005 he interviewed Respondent regarding his controlled substances logs and that Respondent stated that he did not have any logs for the years 2003, 2004, or 2005 because he had not ordered any controlled substance medications and therefore had no occasion to dispense¹⁶ them or maintain a log of them. [Tr. 194] Investigator D.M. further testified that when he again met with Respondent in May 2005, Respondent iterated that he did not have a log because he had not dispensed any controlled substances in 2003, 2004, or 2005. Investigator D.M., however, was aware from the transcript of a Chicago Police Board hearing held on August 10 and October 13, 2004, that Respondent had testified in that proceeding about dispensing dronabinol to a patient on July 21, 2003; this incident is further discussed below. [Tr. 165] Respondent testified in the instant hearing that “my assumption when D.M. was in there was that I knew that I had not ordered anything for years, and not recalling these three patients, I simply filled out a handwritten log and zero.”¹⁷

Respondent further stated that at the time he knew that he had not ordered anything from drug wholesalers for many years and therefore had not dispensed anything, and that he did not recall that he had made a controlled substances log for 2003, which included three entries and had been stored in his sample cabinet; later that evening he

realized his error and notified his attorney, who in turn notified Investigator D.M. and produced the log that included three entries for 2003. [Tr. 622, RX 2]

2. Respondent’s Dispensing of Dronabinol

D.S. was a Chicago police officer who tested positive for tetrahydrocannabinol¹⁸ (THC) after a random drug test performed by the Chicago Police Department on July 24, 2003. [Tr. 163] At Officer D.S.’s subsequent police board hearing on August 10, 2004, Respondent testified that he treated Officer D.S. on July 21, 2003, at Respondent’s office and gave him eight 10-milligram gelatin capsules of Marinol¹⁹ to control nausea and vomiting; that he did not write a prescription for Marinol for Officer D.S. but gave him “samples” of the drug that he had in his office;²⁰ [GX 5 at 98] that it is his practice to ask patients to give him their unused medications, so that he can “recycle” them “as much as I possibly can”;²¹ [GX 6 at 146] and that when he receives medications from patients, he puts the medication in a bottle, labels it, and stores it, but does not keep a record of which patient provided the medication. [GX 6 at 145]

In a continuation of the police board hearing on October 13, 2004, Respondent testified that the Marinol he gave to Officer D.S. was not a manufacturing sample but came from another of Respondent’s patients, although Respondent had no record of who that patient was; [GX 6 at 144] when asked at the police board hearing which patient provided the Marinol, Respondent replied that “[i]t could be anyone of a number of patients”;²² and that the Marinol “probably came from either a leukemia or lymphoma treatment patient * * * the *other possibility is this could have come from an AIDS patient.*”²³ In response to a question regarding the frequency with which he had prescribed or given Marinol to patients, Respondent said: “I have a number of patients that use chemotherapeutic agents for lymphomas and malignancies, leukemias. I also have a large number of AIDS patients

¹⁶ Investigator D.M. stated that in this instance, “dispensing” means providing or prescribing. Tr. 194. *But see supra* note 3. The Illinois Compiled Statutes defines “dispense” as “the interpretation, evaluation, and implementation of a prescription drug order, including the preparation and delivery of a drug or device to a patient or patient’s agent in a suitable container appropriately labeled for subsequent administration to or use by a patient in accordance with applicable State and federal laws and regulations.” 225 ILCS 85/3.

¹⁷ Tr. 622.

¹⁸ THC is a Schedule I controlled substance.

¹⁹ Marinol is a brand name product containing dronabinol, a Schedule III controlled substance, the active ingredient of which is a synthetic form of tetrahydrocannabinol, which naturally occurs in the Schedule I controlled substance marijuana.

²⁰ *See* GX 5 at 98.

²¹ GX 6 at 146.

²² GX 6 at 144–145.

²³ *Id.*

¹³ Tr. 587.

¹⁴ Tr. 589.

¹⁵ Tr. 589.

that I use Marinol for.”²⁴ Respondent then testified, however, that he had prescribed or given samples of Marinol only a few times in the last several years and that he had the Marinol in his office because it might have come from a patient who obtained it pursuant to a prescription from another doctor.

In the instant hearing, the Government entered into evidence Respondent’s medical record for Officer D.S., which indicates that Respondent “sampled” Marinol 10 mg to Officer D.S. [GX 4] Respondent testified that he both received and dispensed the Marinol in a plastic pill case without a label but that he recognized the pills as Marinol and used a picture in the Physician’s Desk Reference (PDR) to verify what the pill was. Respondent further testified that he remembered the patient from whom he had received the Marinol because he had never received Marinol from a patient before. [Tr. 767] Respondent entered into evidence an affidavit dated May 2, 2008, and signed by a J.W.; Respondent testified that Mr. J.W. was a former patient of his who had AIDS.²⁵ Mr. J.W.’s affidavit states that he was HIV positive; that Respondent was one of several physicians who treated him; and that he took Marinol to stimulate his appetite but because he did not like the way it made him feel and he could not control its effects, he stopped taking the Marinol and gave the remaining pills to Respondent. The affidavit does not identify Mr. J.W.’s source for the Marinol but states that the cost is high and that Mr. J.W. did not want to dispose of the pills by flushing them down the toilet or putting them in the garbage. [RX 17]

Respondent testified that as of the date of the hearing he understood that he was not authorized to acquire Marinol from a patient, although he had not thought about it before, and that he was not authorized to provide that Marinol to Officer D.S.. Respondent further testified that he did not tell Officer D.S. that he had acquired the Marinol from another patient rather than as a manufacturing drug sample. [Tr. 765] Respondent further testified that he did not keep any record of receipt of the Marinol because at the time he thought that he was only required to maintain records of drugs that he purchased.

3. Respondent’s Response to the IDFPR Subpoenas

Investigator D.M. testified that the IDFPR Medical Disciplinary Board issued to Respondent a Subpoena *Duces Tecum* dated June 15, 2005, pursuant to the Illinois Medical Practice Act of 1997. [GX 10] The subpoena commanded Respondent to surrender certain documents and records concerning his treatment of ten individuals, identified on the subpoena by name and date of birth. The documents were to be surrendered on or before June 30, 2005, to one of two identified individuals for inspection by the medical disciplinary board.

Investigator D.M. prepared and attached to the subpoena an affidavit advising that, according to a profile received from the Illinois Department of Human Services, [GX 28] Respondent issued multiple prescriptions of OxyContin 80 mg to the ten individuals whose records were requested, and that some of those individuals also were identified as having received Dilaudid from Respondent in the 1994 investigation. The affidavit states that Respondent issued the prescriptions in question between January 1, 2004, and April 2005, and, specifically, that during this period Respondent issued 124 prescriptions for Schedule II controlled substances, 123 of which were for 60 dosage units each of OxyContin 80 mg.

Investigator D.M. testified that in response to the subpoena, Respondent’s attorney provided records from which the names of the individuals and the dates of treatment were redacted. [GX 3] Further, Investigator D.M. stated that the documents provided indicated that one patient had her records sent to a family doctor who agreed to continue OxyContin and that Respondent did not have copies of those records, and that after Respondent advised another patient that the Medical Disciplinary Board had asked to review the patient’s records, the patient strongly objected to such a review and took the records, and Respondent did not have copies of them. [Tr. 170]

Investigator D.M. further testified that on June 20, 2007, the Medical Disciplinary Board issued a second subpoena to Respondent, again requesting the medical records for the ten previously identified individuals and requiring that no information other than the patient identity be removed. [Tr. 171] Investigator D.M. testified that he did not know whether Respondent had provided that information, [Tr. 311] but that he had seen documents in the possession of an IDFPR attorney that

appeared to include the dates of treatment and other information that had been previously redacted. [Tr. 175] Respondent testified that he eventually complied with the subpoena after the remaining patients gave him permission to provide copies of their records.²⁶

4. Respondent’s Issuance of OxyContin Prescriptions

Investigator D.M. testified that he met with Respondent in June 2005 at Respondent’s office and that during that interview Respondent said that he issued to chronic pain patients prescriptions for 60 OxyContin 80 mg and for Tylenol 3 or Tylenol 4,²⁷ and that he instructed the patients to take a half tablet of OxyContin twice a day. Respondent further said that he used to prescribe Dilaudid 2 or 4 mg. [Tr. 198] Investigator D.M. further testified that, at that meeting, Respondent indicated that a number of his patients were employed at Balmoral horse racing track and, when Investigator D.M. asked Respondent whether any of the ten patients listed on the subpoena discussed above knew one another, Respondent stated that two of the patients, S.P. and C.G., worked at Balmoral. Respondent did not, however, mention the relationships among I.S., E.M., and C.G., all of whom were also identified on the subpoena and who, as discussed below, shared a household. [Tr. 202] Respondent testified in the instant hearing that he had a personal relationship with Ms. E.M. and went to high school with her son, Mr. I.S.; Ms. C.G. was identified as Mr. I.S.’s girlfriend. [Tr. 485]

Investigator D.M. testified that he and Diversion Investigator C.R. of the DEA’s Chicago office interviewed Mr. I.S. in July 2005. Mr. I.S. told them that he was on the board of directors for harness racing at Balmoral Park; that approximately sixty percent of the employees there had drug abuse and/or dependency problems; that he had sustained some injuries from horse racing accidents; that he had been friends with Respondent for about 25 or 30 years; that Respondent issued him OxyContin prescriptions either at Respondent’s office or when they met for lunch; and that Respondent also

²⁶ As evidence of his compliance with the subpoena, Respondent admitted into evidence Respondent Ex. 1, which includes the first page of multiple patient files that appear to have the patients’ names and dates of birth and dates of treatment redacted, although a name is handwritten at the top of each page.

²⁷ I take official notice from the 2007 edition of the Physicians’ Desk Reference that Tylenol 3 and Tylenol 4 are brand names for products containing acetaminophen with codeine, a Schedule III controlled substance.

²⁴ GX 6 at 146.

²⁵ The affidavit is signed by a J.W.; there is no witness signature and the document is not notarized.

prescribed OxyContin for Mr. I.S.'s girlfriend, C.G., and his mother, E.M., who both lived with him. [Tr. 212]

Investigator D.M. testified that at the July 2005 interview, Mr. I.S. showed him OxyContin vials for Ms. E.M., Ms. C.G., and himself, all of which indicated that they had contained 60 dosage units of 80 mg strength and that Respondent issued the prescriptions. The label had been removed from Mr. I.S.'s vial; he explained that it could be embarrassing for anyone, particularly at the race track, to know that he was taking OxyContin inasmuch as he was promoting a program to help people at the track who might have addiction problems. Mr. I.S. further told the investigators that he had helped to create rules regarding drug use in both humans and horses; and that he did not think that he was abusing the medication because he was able to function and he did not have needle marks, which he said would be a sign of an addict. [Tr. 224]

Mr. I.S. testified in the instant hearing, however, that he removed the label from his OxyContin bottle so that "the kids wouldn't know what was in the bottles";²⁸ [Tr. 721] he received his pain medication from Respondent, whose office was one hour and 25 minutes away from Mr. I.S.'s residence, [Tr. 722] and that "if I couldn't get my pain medication from [Respondent], then I would get medication wherever I could if I had to, but I don't recall even having to."²⁹ Mr. I.S. then testified that "there was a time when [Respondent] was having a problem with the DEA, and I couldn't get my medication, and at that time when I was getting medication whatever way I could, and I went to another doctor once";³⁰ and before Ms. E.M. began getting the OxyContin prescriptions, he "would take her to the doctors and I would take her to a clinic" and "[y]ou only had to look at my mother and write her something right away, because she was crippled."³¹

D. E.M.

1. E.M.'s Medical Conditions

Investigator D.M. testified that he interviewed Mr. I.S. again in August 2005 at Mr. I.S.'s home. Investigator D.M. testified that Mr. I.S. advised him that Ms. E.M. had recently suffered a stroke and had been hospitalized at St. Mary's Hospital and treated by V.P., M.D.; [Tr. 226] that Respondent was Ms. E.M.'s primary physician prior to her admission to St. Mary's Hospital and

that S.D., M.D., treated Ms. E.M. while she was at a senior care center. [Tr. 312] Mr. I.S. showed Investigator D.M. prescriptions that Respondent had issued to Ms. E.M. for various medications, including Plavix, Micardis, Prevacid, aspirin, Lipitor, nitroglycerin patches, Remeron, Toprol, and Vicodin³² which Mr. I.S. typically filled near his home at a pharmacy called Doc's Drugs. Mr. I.S. stated that after the stroke Ms. E.M. had difficulty getting around and was responding to stimuli differently than before and was no longer doing household chores.

Dr. S.D., an internal medicine physician experienced in treating geriatric patients and in the medical use of controlled substances, testified that Ms. E.M. suffered from medical problems such as tachycardia (an irregular heartbeat), lower back pain, arthritis in multiple joints, and dementia; [Tr. 79] he also noted that Ms. E.M. had kyphoscoliosis, which he said was not uncommon for a patient of Ms. E.M.'s age, and often occurs after a person develops osteoporosis; and that she had been admitted to the hospital at various times for such ailments as urinary tract infection, pneumonia, chest pain, and possible seizure disorder. C.K., a licensed practical nurse specializing in geriatrics and end-of-life care and employed by Hospice of Kankakee Valley (Kankakee Hospice), testified that when Ms. E.M. was admitted to Kankakee Hospice, she suffered from "adult failure to thrive,"³³ arthritis, a steel rod in her right arm, a hump in her back, and some dementia, as indicated by her difficulty

³² Lipitor is a brand name product containing atorvastatin calcium, a non-controlled substance and synthetic lipid-lowering agent. I take official notice of the following information from the 2007 edition of the Physicians' Desk Reference: Plavix is a brand name product containing clopidogrel bisulfate, a non-controlled substance and inhibitor of platelet aggregation that helps protect against future heart attack or stroke; Micardis is a brand name product containing telmisartan, a non-controlled substance that is a nonpeptide name product containing lansoprazole, a non-controlled substance, the active ingredient of which is a compound that inhibits gastric acid secretion, typically prescribed to treat and prevent stomach and intestinal ulcers; nitroglycerin patches contain an organic nitrate, a non-controlled substance, that helps prevent chronic chest pain caused by heart disease; Remeron is a brand name product containing mirtazapine, a non-controlled substance and tetracyclic antidepressant used primarily in the treatment of depression; Toprol is a brand name product containing metoprolol succinate, a noncontrolled substance that is indicated for the treatment of hypertension; and Vicodin is a brand name drug containing hydrocodone bitartrate, a Schedule III controlled substance, and acetaminophen, and is indicated for the relief of moderate to moderately severe pain.

³³ Tr. 34.

remembering people, including her son whom she confused with her husband.

Respondent testified that Ms. E.M. suffered from vascular dementia, known as Binswanger's disease, which he characterized as a small vessel disease of the white matter; and benign myalgic encephalomyelitis, which causes fatigue, bowel disorders, and cognitive deficits. Respondent testified that because of the dysfunction of the white matter in the brain, Ms. E.M. found it difficult to walk and perform organizational tasks. [Tr. 480] Mr. I.S. testified that Ms. E.M.'s problems of loss of memory and failure to recognize her family were caused by and occurred only when Ms. E.M. was taking certain medication. [Tr. 725]

Respondent testified that he treated Ms. E.M. "in concert with the whole patient";³⁴ that diabetes affects every organ in the body and causes kidney failure, high blood pressure, coronary disease, peripheral artery disease, and cerebral vascular disease; [Tr. 472] and that Ms. E.M. suffered a series of transient ischemic attacks (TIAs), a closing of a small blood vessel in the brain, around 2004, and had elevated blood sugar levels. Respondent testified that all of these factors taken together led him to "try everything that I could to reverse the arterial sclerosis in the carotid arteries."³⁵

Respondent testified that he prescribed to Ms. E.M. a combination of high-dosage drugs, including Actos³⁶ and Metformin,³⁷ to shut down her body's glucose production and to re-sensitize the peripheral resistance to insulin, Lipitor to reverse the arterial sclerotic changes in the neck, and Lycinapro, Morvasc, and Zetia [Tr. 477] with Metformin to open up her arteries, all of which was part of an anti-inflammatory treatment to stop the progression of her carotid artery disease. [Tr. 600] Dr. S.D., however, testified that if Ms. E.M. had the blood sugar and glycosulated hemoglobin levels Respondent described, it would not have been necessary to medicate her for diabetes, and that the proper treatment would have been to try to control the condition with diet. Dr. S.D. testified that he has never prescribed Actos or Metformin for "off-label" use; and that in his opinion, Actos and Metformin

³⁴ Tr. 472.

³⁵ Tr. 486.

³⁶ See RX 22. Actos is a brand name product containing pioglitazone hydrochloride, a non-controlled substance, and is an oral antidiabetic agent that acts primarily by decreasing insulin resistance. [CX 40]

³⁷ I take official notice that Metformin is a non-controlled substance.

²⁸ Tr. 720

²⁹ Tr. 715.

³⁰ Tr. 715.

³¹ Tr. 716.

have no use other than to treat diabetes. [Tr. 133]

Investigator R. testified that she visited the Kankakee Hospice central office on April 30, 2009, [Tr. 354] where she spoke to Executive Director D.L., Patient Care Coordinator P.L., C.K., and C.D., another nurse who treated Ms. E.M. Investigator R. testified that none of the people she interviewed had any knowledge of Ms. E.M. ever having diabetes [Tr. 355] and there was no record of Ms. E.M. receiving medication such as Actos and Metformin. [Tr. 356] Investigator R. also obtained from Doc's Drugs pharmacist E.U. a prescription profile listing all the prescriptions issued to Ms. E.M. and filled at that pharmacy from January 1, 2006, through August 29, 2008, [Tr. 347] that indicates that Respondent wrote prescriptions for Ms. E.M. for Actos, Metformin, Lipitor, Plavix, and Zetia.³⁸ Dr. S.D. testified that a home health nurse caring for Ms. E.M. once asked him about giving Ms. E.M. Coumadin and Plavix, both blood thinners, but he advised that Ms. E.M. should not take either drug because she had suffered multiple falls and those medications increased the danger of bleeding in the brain.

Dr. S.D. testified that he told the nurse that Ms. E.M. should just continue taking aspirin. [Tr. 87]

2. E.M.'s Treating Physicians

Respondent testified that he began treating Ms. E.M. around 2003, when she was approximately 92 years old, and that he had "a lot invested in E.M.,"³⁹ with whom he had had a personal relationship since he attended high school with Mr. I.S. [Tr. 485] Mr. I.S. testified that the hospice to which Ms. E.M. was admitted only allowed patients to use the hospice doctors; that hospice personnel told him that the only doctor Ms. E.M. could have was Dr. S.D.,⁴⁰ [Tr. 661] and that he nonetheless admitted his mother to hospice care because he needed someone to care for her and he could not afford financially to provide that care himself. Mr. I.S. further testified that Dr. S.D. was "strictly a hospice doctor that she saw whenever she was admitted to the hospital, and he helped her get into hospice"; that Respondent was Ms. E.M.'s primary doctor, [Tr. 677] and that if another physician prescribed something for Ms. E.M., Mr. I.S. would

discuss the issue with Respondent and follow his advice as to what medication Ms. E.M. should be prescribed. [Tr. 730] Mr. I.S. testified that he would have Ms. C.G. "ask Dr. S.D. to write it, and most of the time he would."⁴¹ Mr. I.S. also testified that he took Ms. E.M. to see G.M., M.D., or T.M., M.D.⁴² "on an emergency basis, and because we didn't want to see Dr. S.D.,"⁴³ and if Ms. E.M. was sick, which, according to Mr. I.S., occurred "maybe once or twice in her life,"⁴⁴ he took her to see Dr. M. Mr. I.S. initially testified that he believed Dr. M. was aware that Respondent was treating Ms. E.M., [Tr. 698] but later said that he did not think that either Dr. T.M. or Dr. G.M. knew that Respondent was treating Ms. E.M. [Tr. 699]

Dr. S.D. testified that he, along with Dr. V.P., B.D., M.D., and M.S., M.D., all treated Ms. E.M. for approximately four years prior to her death in 2009. Dr. S.D. further testified that Ms. E.M. was admitted to St. Mary's Hospital in Kankakee, Illinois, several times and also was a patient at Manor Care Nursing Home in Kankakee and at times had hospice care and home health care; that he was listed as Ms. E.M.'s primary care physician at each of those institutions; and that he does not know Respondent and was never informed that Respondent was treating Ms. E.M. [Tr. 98] Dr. S.D. further testified that Ms. E.M. was under hospice care for the last two-and-a-half to three years of her life, during which time he was her primary care physician; that although he only saw Ms. E.M. a few times in his office and in the hospital, he gave telephone orders and communicated with the hospice nurse regarding Ms. E.M.'s condition; he had no reason to believe that Ms. E.M. was seen by any other doctor or was taking medications not included on the medication list that he approved; [Tr. 102] and that any other physician who was treating Ms. E.M. should have informed him that he or she was prescribing OxyContin to her. [Tr. 140] Dr. S.D. testified that it is out of the range of normal practice for a physician to prescribe medications to a patient without consulting with other treating physicians of which he is aware. [Tr. 144]

Ms. E.M. was first admitted to Kankakee Hospice, which provides care in the patient's home, on June 9, 2006.⁴⁵ Ms. C.K. testified that she cared for Ms.

E.M. in her home in late 2007 and early 2008, seeing her twice per week for approximately one hour per visit. [Tr. 30] At each visit Ms. C.K. performed a physical assessment of Ms. E.M. (taking her blood pressure, heart and respiration rate; listening for lung sounds, bowel sounds; assessing her skin, cognition, etc.). [Tr. 32] Ms. C.K. testified that every visit from and telephone call or other conversation with Kankakee Hospice personnel was recorded and that the hospice also kept hospital records, laboratory test results, and records received from the doctor.

Ms. C.K. further testified that Kankakee Hospice needs to know of every physician "who is on board to treat the patient";⁴⁶ that there is a primary physician and usually a secondary physician; and that Kankakee Hospice prefers to have its personnel accompany the patient to doctor appointments. Ms. C.K. testified that while she cared for Ms. E.M., none of her family members ever mentioned that Respondent was treating her, but the family did mention that Ms. E.M. saw Dr. S.D. and Dr. M. Ms. C.K. also was not aware of any physicians making home visits to Ms. E.M., although that information should have been disclosed to Kankakee Hospice.

3. Ms. E.M.'s Prescriptions and Treatment

Respondent testified that when he began treating Ms. E.M. in 2003, she was taking multiple pain medications, such as Tylenol No. 4, Lorcet,⁴⁷ and Vicodin; that she sometimes took as many as 10 or 12 pills per day; and that he changed her regimen to a more potent and controlled dosage on a regular schedule. [Tr. 498] Respondent testified that Ms. E.M. suffered from low back pain; that treatment with medication on an as-needed basis was not sufficient to relieve her pain; and that the appropriate treatment was to increase the amount of opioid medication until either the pain went away or the side effects became too drastic to continue. [Tr. 514] According to Respondent, instead of tapering a patient off a drug while he still has symptoms, a doctor should increase the level of the drug in order to extinguish the symptoms; tolerance with regard to symptoms requires an increased dosage that relieves the pain, which is different from increasing dosage to extinguish pain. [Tr. 517] Respondent testified that all patients develop dependence, which

³⁸ Zetia is a brand name product containing ezetimibe, a non-controlled substance that inhibits the intestinal absorption of cholesterol. [RX 36]

³⁹ Tr. 487.

⁴⁰ In his brief, Respondent asserts that the hospice requirement was to use a doctor located in Kankakee. See Respondent's Closing Argument Brief at 11.

⁴¹ Tr. 673.

⁴² G.M. and T.M. are physicians who practice together and appear to have each treated Ms. M. The testimony is not always clear as to which Dr. M. the witnesses are referencing.

⁴³ Tr. 698.

⁴⁴ Tr. 698.

⁴⁵ See GX 17.

⁴⁶ Tr. 35.

⁴⁷ I take official notice that Lorcet is a brand name product containing hydrocodone bitartrate and acetaminophen.

means that if the medicine is abruptly withdrawn, the patients will become antsy, shaky, and complain of nervousness, and that although some anti-anxiety agents or antihistamines may be used to treat the withdrawal symptoms, the best option is to withdraw the medication slowly over a period of time. Respondent testified that addiction “is the unworkable lifestyle that is created by a person that escalates the intake of narcotics and opioids,”⁴⁸ and is always exhibited by anti-social behavior.

Dr. S.D. testified that he never prescribed OxyContin to Ms. E.M. because he was afraid that she could not handle a strong pain medication, but that he prescribed Aricept for dementia, Toprol XL and Micardis for cardiac issues, [Tr. 83] and Tylenol, and that he maybe prescribed Darvocet, and occasionally Vicodin for pain.⁴⁹ Dr. S.D. testified that Ms. E.M.’s pain, although chronic, was not so severe that she needed constant pain medication. [Tr. 89]

Mr. I.S. testified that OxyContin seemed to work better than the other medications Ms. E.M. had tried, and that before she started taking OxyContin, Ms. E.M. sometimes took as many as four or five pills per day⁵⁰ of Vicodin, Lorcet, or “whatever I had.”⁵¹ Mr. I.S. testified that Respondent started prescribing OxyContin 80 mg to Ms. E.M. in 2003, and that Mr. I.S. was not surprised by the high dosage because he “didn’t know much about it.”⁵² Mr. I.S. further testified that Respondent never changed the strength or quantity of OxyContin he prescribed to Ms. E.M. [Tr. 708]

Mr. I.S. testified that he initially filled Ms. E.M.’s OxyContin prescriptions with the brand name drug but because it was very expensive, he then tried the generic form. According to Mr. I.S., however, Ms. E.M. insisted that she wanted the brand name product⁵³ and

the pharmacist had told him that the “deliver[y] mechanism of oxycodone was that it delivers all at once, and that the OxyContin was more of a time release thing over 12 hours.”⁵⁴ Mr. I.S. further testified that because the generic drug was not a time release product and Ms. E.M. insisted that she wanted “the other one,”⁵⁵ [Tr. 695] he thereafter filled the prescriptions with OxyContin. [Tr. 672]

Investigator R., however, testified that she spoke with Mr. E., the pharmacist from Doc’s Drugs, who informed her that if a patient presents a prescription written for a brand name drug and requests a generic, or the prescription allows a generic to be substituted for the brand name product, then the pharmacist must provide the patient with a generic medication that has the same properties as the brand name drug, including any time release effect; and that oxycodone 80 mg is not available as an immediate release tablet because it could be fatal. [Tr. 840] The Government offered into evidence copies of prescriptions Respondent issued to Ms. E.M. that investigators obtained from Doc’s Drugs; [Tr. 340; Tr. 412; Tr. 231] each prescription was written for OxyContin with substitution permitted. Respondent testified that breaking an OxyContin tablet in half only somewhat obviates the time release effect and that the active ingredient may release more quickly. [Tr. 797]

According to a Physician’s Desk Reference excerpt for OxyContin that the Government offered into evidence, “OxyContin tablets are to be swallowed whole and are not to be broken, chewed, or crushed. Taking Broken, Chewed, or Crushed OxyContin tablets leads to rapid release and absorption of a potentially fatal dose of oxycodone.”⁵⁶

Investigator D.M. testified that there is a large price differential between the brand drug and the generic, and that the OxyContin brand can sell on the street for approximately one dollar per milligram. [Tr. 297] Investigator R. testified that Mr. E. told her that Mr. I.S. always picked up Ms. E.M.’s prescriptions and that although insurance covered the prescriptions, Mr. I.S. paid the co-pay, which was sometimes as much as \$400 for the brand name drug, in cash. Mr. E. further told Investigator R. that it was unusual for a customer to request a brand name with such a high co-pay when a generic

his mother had suffered a stroke and would not recognize the difference between generic and brand name drugs. Tr. 244.

⁵⁴ Tr. 671.

⁵⁵ Tr. 671.

⁵⁶ GX 40 at 17.

alternative was available; [Tr. 414] and that the time release generic of OxyContin had been available at relevant times except for a period of approximately six months around 2007. [Tr. 840] Mr. I.S. testified that he submitted the insurance claims for the OxyContin prescriptions to Ms. E.M.’s insurance carrier and that he paid Respondent in cash for his services to Ms. E.M. [Tr. 695]

4. Administering OxyContin to E.M.

On January 18, 2006, Ms. E.M. was admitted to St. Mary’s Hospital; at that time, a home medication list indicated that she received OxyContin 80 mg every 12 hours. [GX 21 at 9] Respondent testified that he arranged to have a family member see that OxyContin was included on Ms. E.M.’s home medication list because he “wanted somebody to figure out that she was on pain medication.”⁵⁷ Dr. S.D. testified that he ordered that the OxyContin not be continued and that he was not aware of OxyContin ever again being listed on Ms. E.M.’s medication lists, [Tr. 90] but that if Ms. E.M. had been on OxyContin and it was stopped, she would suffer from withdrawal symptoms such as abdominal pain, diarrhea, and vomiting. [Tr. 106]

Dr. S.D. also testified that Ms. E.M. did not receive OxyContin while in the hospital because family members are not permitted to give medication to patients, that patients receive only those medications prescribed by the attending physician, and that he was Ms. E.M.’s attending physician and did not prescribe OxyContin to her. [Tr. 107]

Dr. S.D. testified that he never spoke with Mr. I.S. but would call his home and leave messages regarding Ms. E.M.’s condition. Dr. S.D. testified that Mr. I.S. did not return calls, but that he did speak with Mr. I.S.’s girlfriend. [Tr. 109] Mr. I.S. testified that although Dr. S.D. issued prescriptions to Ms. E.M. for Vicodin, he did not fill those prescriptions because his mother was already taking OxyContin.

Investigator R. testified that on October 23, 2006, she met with Kankakee Hospice’s executive director, D.L., who told her that the Hospice’s policy requires that the nurses be informed of all of a patient’s medications and treating physicians. Investigator R. further testified that at that meeting she also spoke with other Hospice personnel who told her that OxyContin did not appear on Ms. E.M.’s medication list and her Kankakee Hospice records did not mention that she was in pain or that Respondent

⁵⁷ Tr. 821.

⁴⁸ Tr. 519.

⁴⁹ I take official notice of the following information from the 2007 edition of the Physicians’ Desk Reference: Aricept is a brand name product containing donepezil hydrochloride, a non-controlled substance, indicated for the treatment of mild to moderate dementia; Tylenol is a brand name over-the-counter medication containing acetaminophen and is indicated for the temporary relief of minor aches and pains; propoxyphene and acetaminophen and is used to relieve mild to moderate pain.

⁵⁰ Mr. I.S. later testified that Ms. E.M.s took “[a]t least three pills a day,” in the range of three to seven pills, “whatever it took to kill her pain, that is as many pills as I gave her for the day.” Tr. 717.

⁵¹ Tr. 669.

⁵² Tr. 668.

⁵³ Investigator D.M. testified that in the August 2005 interview, Mr. I.S. had stated that he filled his mother’s prescriptions with generic drugs because

treated her. [Tr. 352] Ms. C.K. testified that Ms. E.M. complained of pain in her knees and arm and sometimes had difficulty standing and some stiffness, but that Mr. I.S. or Ms. C.G. gave her Tylenol to alleviate the pain and that Mr. I.S. said that the Tylenol worked and he did not want his mother to have anything else. Ms. C.K. testified that it seemed unusual for the caregivers to insist that only they would administer certain medications. [Tr. 40, Tr. 45] Ms. C.K. further testified that as far as she knew, the only controlled substance that Ms. E.M. took was Valium⁵⁸ for seizures; and that Ms. E.M.'s family never mentioned that she was taking OxyContin. Ms. C.K. testified that she was not aware of any controlled substances that were prescribed to Ms. E.M. on a chronic or recurring basis; that she never saw any medications prescribed by Respondent or any OxyContin vials or pills at Ms. E.M.'s home; and that the only medication that the hospice team attempted to count was Valium, which they had difficulty accessing from Ms. E.M.'s family. [Tr. 35; Tr. 42] Mr. I.S. testified that he did not want to tell the Kankakee Hospice personnel about his mother having OxyContin because Kankakee Hospice had told him that it must have control over any controlled substances Ms. E.M. took and thus hospice personnel must have access to those drugs, but that he did not want to leave the OxyContin "in a cabinet for some punk or something that may be coming in my house after school to take or whatever."⁵⁹ Mr. I.S. also testified that Ms. E.M. did not want anyone to know that she was on pain medication because "she was very old-fashioned, and * * * she just didn't think it was anybody else's business."⁶⁰

Investigator R. testified that on October 23, 2008, she interviewed Ms. D., who had treated Ms. E.M. in her home in 2006–2007. Ms. D. told Investigator R. that Ms. E.M. complained of mild arthritic pain; that Ms. D. asked Mr. I.S. whether they should look into getting something stronger to alleviate the pain; and that Mr. I.S. said that he had previously given Ms. E.M. one-half tablet of Vicodin, but that that medicine was too strong for her and she should continue to take Aleve.⁶¹ [Tr. 448]

⁵⁸ I take official notice of information in the 2007 edition of the Physicians' Desk Reference that Valium is a brand name product containing diazepam, a Schedule IV controlled substance.

⁵⁹ Tr. 697.

⁶⁰ Tr. 680.

⁶¹ I take official notice from the 2007 edition of the Physicians' Desk Reference that Aleve is a brand name product containing naproxen sodium, a non-controlled substance.

Mr. I.S. testified that Kankakee Hospice only allowed patients to use the hospice "system for drugs,"⁶² and therefore either he or someone in his family gave Ms. E.M. OxyContin while she was admitted to Kankakee Hospice and when she was in St. Mary's Hospital, at Manor Care Nursing Home, at Heritage Village Nursing Home, and at St. James Hospital. [Tr. 680] Mr. I.S. testified that Ms. E.M. received one OxyContin pill in the morning and one at night but for the two weeks before his mother died he gave her only the nighttime dose because he worried that she may have been too weak to receive more; [Tr. 682] OxyContin was the only prescription medication that the family gave to Ms. E.M.;⁶³ and to his knowledge, the hospital never gave Ms. E.M. any pain medication, not even Aleve, and that he did not know why she should need Aleve.⁶⁴ [Tr. 668]

Respondent's patient chart for Ms. E.M. includes treatment notes for at least one day each month beginning September 15, 2003, and ending on the date of her death, June 13, 2009, [RX 16] but indicates that Ms. E.M. "missed appointments" with Respondent on both February 28 and March 28, 2006.⁶⁵ Respondent explained that "at this point in time when I write missed appointment, that will mean that I did not give her a prescription for pain medication."⁶⁶ Respondent later testified that "I may have issued it at their home at a later appointment, at a later point in time, but I don't think I issued it."⁶⁷ The Government offered into evidence [GX 14] photocopies of prescriptions Respondent issued to Ms. E.M. for 80 mg OxyContin and dated February 28 and March 28, 2006. Respondent's patient chart for Ms. E.M. indicates, and Respondent testified, that he saw her on October 20 and November 17, 2006, but records from St. Mary's Hospital in evidence as a Government exhibit show that Ms. E.M. was admitted to that hospital on October 7, 2006, that she was discharged on October 12, 2006, [GX 21 at 203] and immediately admitted into Manor Care Nursing Home, where she remained until December 8, 2006. [GX 21 at 203, GX 27B at 956, GX 43 at 108]

⁶² Tr. 661.

⁶³ *But see* Section D.1. *supra*: Respondent prescribed Ms. E.M.'s Actos, Metformin, Lipitor, Plavix, and Zetia, all of which appeared on Ms. E.M.'s prescription profile from Doc's Drugs but not always on her home medication lists. GX 27.

⁶⁴ Ms. E.M. did receive pain medication such as Aleve and Tylenol.

⁶⁵ RX 16 at 5.

⁶⁶ Tr. 787.

⁶⁷ Tr. 787.

Respondent testified that he completed the continuing medical education course required under his 2003 Consent Order and that during that course he learned that it is unlawful "for a pharmacist to refill a blank and give two dispenses on the same single blank"⁶⁸ for a Schedule II controlled substance. Respondent further testified that he believes that a physician can authorize another prescription without seeing the patient and that it is "even legal under the information that I go by that you can even predate a controlled substance prescription";⁶⁹ [Tr. 739] but that he has never predated prescriptions and has never written refills although he has written new prescriptions without seeing the patient. Respondent testified that he also learned that a physician should ensure that patients to whom he prescribes a controlled substance do not obtain controlled substances from another source and that such patients should be tested to verify that they are actually taking that medication. [Tr. 740] Respondent had earlier testified that if the Government suspected diversion of OxyContin with regard to E.M. then either the Government or Dr. S.D. should have tested her for it. [Tr. 577]

Mr. I.S. testified that he discussed with Respondent the concern that Ms. E.M. receive "her proper pain medicine"⁷⁰ when she was in a nursing home or hospital. [Tr. 674] Mr. I.S. further testified that Dr. S.D. prescribed Vicodin for Ms. E.M. but that she never asked for it because she did not need it; and that when Ms. E.M. was in the nursing home or hospital he hired his girlfriend's daughter to visit her twice a day and to give her medication and food and to sit with her. [Tr. 675] Respondent testified that he had instructed "him"⁷¹ to be aware of other depressants, sleeping pills, narcotics, and opioids given Ms. E.M. so as to avoid an overdose. [Tr. 656] Mr. I.S. testified that in the three or four weeks before his mother died, he met with the St. Mary's Hospital administrator and asked that no new medications be given to Ms. E.M. without his knowledge. Mr. I.S. further testified that prior to that time, the hospital had no directions not to give pain medication to Ms. E.M. and that he reviewed her medication charts every day to make sure that she did not receive pain medication. [Tr. 711] Mr. I.S. testified that he never saw any pain medication listed in Ms. E.M.'s hospital

⁶⁸ Tr. 738.

⁶⁹ Tr. 739.

⁷⁰ Tr. 674.

⁷¹ Presumably he is referring to Mr. I.S. *See* Tr. 656.

charts, not even over-the-counter medications. [Tr. 714]

Mr. I.S. later testified that in the thirty days before Ms. E.M. died, he reviewed the charts as many times as he went to the hospital and that he “left orders with them to not introduce any new medications to my mother. * * *⁷² Mr. I.S. then testified that he always gave directions to the hospital to not give Ms. E.M. any new medications, and that he had previously told the DEA that both he and Ms. E.M. were receiving OxyContin. Mr. I.S. testified that he knew that DEA personnel could go to the hospital to see whether Ms. E.M. received any other pain medication, so he made sure that she did not get any. [Tr. 719] Mr. I.S. also testified that if an emergency arose when Ms. E.M. was in a hospital or nursing home, such as if she were to fall, then the hospital or nursing home would call him and he would issue instructions not to give her any pain medication. [Tr. 728]

Respondent testified that at times, depending on the conditions, he would omit or reduce the amount of OxyContin he prescribed to Ms. E.M. or change the dosing schedule based on her clinical situation, and that if she was suffering certain symptoms, such as from a stroke, he would have “them”⁷³ withhold the pain medication for up to 24 hours. Mr. I.S. testified that he did not recall whether Respondent ever asked him to delay the dosage or to hold back Ms. E.M.’s pain medication when she was hospitalized.

E. Respondent’s 2006 DEA Renewal Application and Registered Location

On September 25, 2006, Respondent submitted to the DEA an application to renew his registration. [Tr. 318; GX 31] Respondent’s registered location on that renewal application was listed as 120 Oakbrook Center Mall, Oakbrook, Illinois.⁷⁴ In response to question number three of the application, “Has the applicant ever had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?” Respondent provided an affirmative answer. In his explanation for that answer, submitted with the application, Respondent identified and explained the 2003 IDFP Consent Order but did not refer to the 1998 Consent Order. [GX 31] Respondent testified that his omission of the 1998 order was inadvertent and that he had

included the 1998 incident on previous renewal applications. [Tr. 618, GX 18]

Investigator R. testified that on March 13, 2009, she and another diversion investigator served upon Respondent the DEA Order to Show Cause that gave rise to this proceeding. [Tr. 323] Investigator R. testified that she served the Order to Show Cause at Respondent’s residence in Riverside, Illinois, because the investigators had not succeeded in serving it at his registered location, and that when the investigators went to Respondent’s residence and “before we had the opportunity to identify ourselves, [Respondent] slammed the door in our face when I said, ‘Dr. Herbert, I have something for you,’ and he said that ‘I am not Dr. Herbert. I am R.S.’”⁷⁵ Investigator R. further testified that a few minutes later Respondent telephoned her, indicating that he was returning one of her earlier calls.

Investigator R. testified that during that telephone conversation she arranged to serve the Order to Show Cause through Respondent’s attorney the next day; that Respondent informed her that he had moved his registered location to 2910 South Harlem Avenue, Riverside, Illinois; [Tr. 324] that she then advised Respondent that in order to modify his registered location he needed to submit a modification request along with a copy of his Illinois controlled substance license showing the new location; and that she provided him a fax number to use to send the documents. Investigator R. further advised Respondent that he needed to wait until his modification was approved before he could handle controlled substances at the new location. [Tr. 327]

Investigator R. testified that prior to March 13, 2009, the DEA had not received any notification from Respondent or anyone else that he had moved his medical practice from his DEA registered location in Oakbrook to Riverside; [Tr. 326] that she had previously made several failed attempts to contact Respondent at his registered address (she went to 120 Oakbrook Center and knocked on Suite 711; telephoned Respondent’s office and left messages requesting a call back; and identified herself in those messages and indicated that she needed to deliver something); but that she had never been able to locate Respondent at his registered location except when she arranged to do so by appointment. [Tr. 325] Investigator R. testified that on March 26, 2009, the leasing office at the Oakbrook Center Mall informed her that

as of July 31, 2008, the locks had been changed on Respondent’s Oakbrook office because he had abandoned the location. [Tr. 324]

Respondent testified that in July 2008 he moved his office to 2910 Harlem Avenue; [Tr. 577] that the DEA would not send him any address modification forms; that he could not access the forms on-line; and that he called the DEA office in Chicago multiple times and left messages in an attempt to get a change of address form.

Investigator R. testified that Respondent’s attorney filed with the DEA a request dated April 7, 2009, to modify Respondent’s registered location. [RX 15] That same day, counsel for the Government sent a letter to Respondent indicating that since he had already moved his office, he was not authorized to handle controlled substances at the new location until the DEA approved the modification of his address. [GX 9] Investigator R. testified that she served that letter in person to Respondent’s attorney and left for Respondent a telephone message summarizing the contents of the letter. [Tr. 331] On June 8, 2009, counsel for the Government sent another letter to Respondent’s attorney indicating that the registered location modification request had not yet been approved and that, until it was approved, any controlled substance prescriptions issued by Respondent would be unlawful. [GX 33] Investigator R. testified that the letter was personally delivered to Respondent and was faxed to Respondent’s attorney. [Tr. 333]

Investigator R. further testified that she obtained from the Illinois Department of Human Services Prescription Monitoring Program, to which Illinois pharmacies are required to report information pertaining to controlled substance prescriptions, a prescription profile identifying controlled substance prescriptions that Respondent issued from June through August 2009. [GX 34] During that period, according to the prescription profile, Respondent issued 29 controlled substance prescriptions to 13 different people: 60 dosage units of OxyContin 80 mg to each of seven different people, one of whom also received 30 diazepam 10 mg; 40 oxycodone 5 mg and 30 Adderal 30 mg to one person; 90 hydrocodone 7.5 mg to one person; 10 hydrocodone 5 mg to one person; 30 phentermine 37.5 mg (via two separate prescriptions written on the same day) to one person; and 14 phentermine 37.5 mg to one person. [GX 34]

Respondent testified that Investigator R. had told him on March 13, 2009, that he could not handle controlled

⁷² Tr. 712.

⁷³ Tr. 656. Presumably Respondent was referring to Ms. E.M.’s family.

⁷⁴ GX 31.

⁷⁵ Tr. 327.

subscriptions but he “didn’t take it all that seriously with the word handling, because I had not ordered any prescriptions, and I had no samples”⁷⁶ but he did not ask her what she meant by “handling.” Respondent further testified that he did not see anything about prescribing until he saw the letters from Government counsel, and that his attorney reviewed the letters and told him that it appeared that the DEA did “have the power to withhold the registration”⁷⁷ but he nonetheless continued to issue original controlled substances prescriptions until October 2009, “when the gravity of what was going on here became absolutely clear.”⁷⁸ [Tr. 778]

The Parties’ Contentions

I. The Government

The Government contends, in substance, that the Deputy Administrator should revoke Respondent’s DEA registration and that any pending applications for renewal or modification of that registration should be denied, “because Respondent made material misstatements on an application for registration and because his continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f).”⁷⁹

The Government contends that Respondent has had controlled substances violations dating back to 1994 and resulting in consent orders with the Illinois Medical Board in 1998 and 2003. The 1998 consent order involved the unlawful prescribing of Dilaudid and required Respondent to complete a course pertaining to the handling of controlled substances. The Government contends that this course had little effect on Respondent’s prescribing, that he continues to violate applicable law, and that he is evading the allegations rather than responding to them candidly.

The Government next asserts that Respondent unlawfully received dronabinol from a patient’s prescription, failed to properly record that receipt, and maintained a misleading and inaccurate record of his subsequent dispensing of the dronabinol. Further, the Government argues that Respondent’s 2003 Consent Order with the IDFPF arose because the unlawful dispensing was inevitable based on the arrangement between Respondent and the clinic owner and Respondent’s conduct therefore enabled and abetted

the clinic owner. As with the 1998 Consent Order, Respondent was again required to complete a course on proper prescribing and dispensing of controlled substances but, according to the Government, Respondent ignored this education and continued to collect violations.

The Government goes on to contend that Respondent violated state law when he failed to disclose records demanded in an IDFPF subpoena. The Government argues that the Illinois Medical Practice Act provides the IDFPF with the authority to serve an administrative subpoena *duces tecum* pursuant to a Medical Board investigation and that the Health Insurance Portability and Accountability Act (HIPAA) provides an exception for the disclosure of information that is requested by an order of an administrative tribunal.

The Government further asserts that Respondent’s omission of his 1998 Consent Order from his DEA controlled substances registration renewal application was a material omission because it involved the diversion of a Schedule II controlled substance and because Respondent was conversant with the facts of the Consent Order at the immediate hearing.

The Government argues that Respondent participated in a scheme that involved the diversion of OxyContin. It argues that there is a lack of medical history to justify issuing prescriptions for 80 mg OxyContin to Ms. E.M. and that Respondent’s attempts to provide justification for prescribing to her are essentially *post hoc* rationalizations. Additionally, the Government contends, it is unlikely that someone from Ms. E.M.’s family was able to secretly administer OxyContin twice per day during the approximately 290 days that she was in a hospital or in-patient nursing home. According to the Government, Respondent’s arguments are further diminished by not only the conflicts in testimony between Respondent and Mr. I.S. but also between the testimony and institutional records, as well as Respondent’s questionable patient chart for Ms. E.M., which includes dates of Respondent’s purported treatment of her when she was confined to a hospital or nursing home. The Government contends that if Ms. E.M. had received the OxyContin that Respondent prescribed, she would likely suffer withdrawal symptoms when institutionalized, but there is no such record. Also, the Government contends, Respondent’s and Mr. I.S.’s claims regarding the time release properties of generic oxycodone are not credible because they were refuted by

both the Physician’s Desk Reference and a pharmacist.

The Government also argues that Respondent prescribed other drugs, in addition to OxyContin, in Ms. E.M.’s name but that these drugs were never administered to her and were likely diverted. The Government points out that, although Respondent claims that he prescribed Actos and Metformin to Ms. E.M. to treat diabetes, her other treating physicians and hospital records indicate that she did not have diabetes and Mr. I.S.’s testimony is again in conflict with Respondent’s because he testified that the only prescription drug he or his family administered to Ms. E.M. was OxyContin. The Government further contends that Plavix was also diverted, relying again on the conflicting testimony of Respondent and Mr. I.S. and on the evidence that for some time both Dr. S.D. and Respondent prescribed Plavix but, although Dr. S.D. discontinued it because of injury risks, Respondent continued to prescribe it; and Respondent’s patient chart for Ms. E.M. provided no information regarding such prescriptions.

Finally, the Government asserts that Respondent unlawfully prescribed controlled substances from an unregistered location because Respondent failed to timely request a modification of his registered address and continued to issue controlled substances prescriptions at his new location even after receiving numerous warnings against such action.

II. Respondent

Respondent contends that the omission of his 1998 state probation from his renewal application was not a material falsification because the omission was inadvertent. Respondent asserts that inasmuch as he accepted the 1998 state probation related to phentermine dispensing, the DEA should not “seek additional retribution”⁸⁰ for the incident. Respondent argues his disclosure of the 1998 probation on previous DEA applications, the DEA and state investigators’ awareness of both the 1998 and 2003 disclosures, and the previous disclosures’ existence “permanently on the D.E.A. computerized files,” “clearly [indicate] no subterfuge motive.”⁸¹

Respondent argues that in mid-August 2003, because of his 2003 state probation, he “purposely discontinued all ordering of medications from wholesale suppliers for the purpose of

⁷⁶ Tr. 779.

⁷⁷ Tr. 777.

⁷⁸ Tr. 778.

⁷⁹ Government’s Proposed Findings of Fact, Conclusions of Law and Argument at 3.

⁸⁰ Respondent’s Closing Argument Brief at 8.

⁸¹ Respondent’s Closing Argument Brief at 3.

dispensing medications;”⁸² that, in the spring of 2005, when Investigator D.M. asked to inspect Respondent’s controlled substance logs, Respondent did not recall any ordering or dispensing of controlled substances in 2003 and created a handwritten log indicating such; that later that same day, he found a controlled substance log from the first seven months of 2003 that showed three instances in which he had dispensed a controlled substance; and that Respondent’s attorney contacted Investigator D.M. to notify him of that log and that Investigator D.M. was given a copy.

Respondent further contends that his dispensing of dronabinol did not violate 21 U.S.C. 844(a) because he was “acting in the course of his professional practice.”⁸³ Respondent argues that he had a patient who obtained dronabinol via a prescription issued by another physician; that the patient “lawfully transferred the medication to me * * * to be used for the benefit of another patient * * *;” and that he dispensed the dronabinol to another patient and recorded that action in the patient’s chart and in his 2003 controlled substance log. Respondent argues that his actions fall under the exception in § 844(a) permitting a physician to possess or obtain a controlled substance when “acting in the course of his professional practice”⁸⁴ and that there is no prohibition against obtaining medication from a patient to use for another patient.

Respondent then asserts that this entire proceeding was initiated against him as a form of revenge by the City of Chicago because Respondent testified on behalf of Officer D.S. at the Chicago Police Board hearing. Respondent asserts that his right to due process has been violated because Illinois and the DEA have violated the Illinois Medical Practice Act and because he was not represented by counsel at the instant hearing. Respondent argues that any evidence that was not “generated by [Investigator] R. alone or directly subpoenaed by D.E.A. has no place in evidence at this hearing.”⁸⁵

Respondent contends that the DEA has failed to meet its burden of proof of showing that he failed to comply with the IDFPF administrative subpoenas issued in 2005 and 2007; Respondent asserts that he provided the requested records but redacted all identifying information as required by 225 ILCS 60/22(A)(38). Respondent argues that

because the statute provides that “all information indicating the identity of the patient shall be removed and deleted” and that because records of prescriptions he issued and to which Illinois and the DEA have access include patient names and the date the prescriptions were issued, he was required to redact the names and treatment dates in order to allow Illinois to “review the records without tying a specific chart to a patient.”⁸⁶ Respondent further argues that he complied with the subpoena prior to March 2009 because his attorney supplied codes revealing the names and Respondent obtained permission from his patients to provide the relevant medical charts. Respondent contends that the allegation that he failed to comply with the subpoenas is another example of revenge-seeking by Chicago because of Respondent’s testimony in the Police Board hearing; that the DEA and Illinois are “doing the bidding of the City of Chicago;”⁸⁷ that the records that were the subject of the subpoenas should not have been available to the DEA because 225 ILCS 36 bars the DEA from having or using information compiled by Illinois; that Respondent was not represented by counsel at the instant hearing; and that Respondent relied on the advice of his previous counsel with regard to the redacted information provided in response to the subpoenas.

Respondent asserts that there is no evidence of diversion with regard to his prescribing OxyContin to Ms. E.M.; that he treated her for more than five and a half years prior to her death; that Ms. E.M. suffered from multiple medical problems (including severe kyphoscoliosis, cerebral vascular disease, Binswanger’s Disease, and diabetes); that Ms. E.M. and seven other patients required the prescriptions he issued them for OxyContin 80 mg because that strength was not a high dose for them because of the form of chronic pain from which they suffered; and that he properly treated Ms. E.M. for diabetes and inflammatory vascular disease by prescribing Actos and Metformin. Respondent also asserts that Actos and Metformin are not controlled substances and are therefore outside the DEA’s jurisdiction.

Respondent argues that it is not plausible that the OxyContin he prescribed to Ms. E.M. was diverted because: Respondent and his patients were aware of the DEA investigation and the patients produced their current medications when interviewed; the DEA

and Dr. S.D. failed to perform opioid level tests on Ms. E.M., even though they were free to do so and she showed signs of clinical opioid usage and rarely complained of pain despite the presence of “multiple and obvious pain sources;”⁸⁸ if Respondent performed an opioid test on Ms. E.M. it would not disprove diversion; Mr. I.S. never filled the prescriptions that Drs. S.D. and V.P. issued to Ms. E.M. for Vicodin; and Respondent had previously prescribed OxyContin 80 mg to Ms. C.G. and, after Respondent stopped treating her, a Dr. M. continued the same prescriptions. Respondent further claims that the failure of the DEA, Dr. S.D., Dr. V.P., and Dr. M.⁸⁹ to test Ms. E.M. for opioids and thereby exonerate Respondent, cannot be used against him because, if they had suspicions of diversion, they should have “[acted] to clear up this charge.”⁹⁰ Respondent contends that Investigator R. conducted her investigation with “obvious prejudice”⁹¹ to cast Respondent in an unfavorable light. Respondent asserts that Drs. S.D., P., and M. were aware that Ms. E.M. had pain because they prescribed pain medicines such as Vicodin and morphine; that Ms. E.M.’s not taking the pain medication should have alerted these doctors that her family was medicating her; that Ms. E.M.’s family asked Respondent not to communicate with her other doctors and he complied to avoid discharge as her physician; and that Respondent “placed OxyContin on the record.”⁹²

Respondent contends that the DEA acted “capriciously and in bad faith”⁹³ by invalidating his DEA registration when he moved his office from his registered location and by refusing to reinstate his license pending the instant proceedings. Respondent argues that he was not permitted access to forms or other communication methods on the DEA Web site and that none of his calls to Investigator R. and the DEA’s Chicago office were returned; that the DEA refused to transfer Respondent’s registration to his new office after “the D.E.A. finally figured out I moved”;⁹⁴ that Respondent sent a letter to the DEA advising it of his move in lieu of the forms he “was not allowed to fill

⁸⁸ Respondent’s Closing Argument Brief at 14.

⁸⁹ Although he refers to a “Dr. M.” in his brief, I presume that Respondent actually intended to refer to either Dr. G.M. or Dr. T.M. because there was no evidence presented that Ms. E.M. was ever treated by a Dr. M.

⁹⁰ Respondent’s Closing Argument Brief at 15.

⁹¹ Respondent’s Closing Argument Brief at 15.

⁹² Respondent’s Closing Argument Brief at 17.

⁹³ Respondent’s Closing Argument Brief at 17.

⁹⁴ Respondent’s Closing Argument Brief at 17.

⁸² Respondent’s Closing Argument Brief at 4.

⁸³ Respondent’s Closing Argument Brief at 5.

⁸⁴ Respondent’s Closing Argument Brief at 5.

⁸⁵ Respondent’s Closing Argument Brief at 9.

⁸⁶ Respondent’s Closing Argument Brief at 9.

⁸⁷ Respondent’s Closing Argument Brief at 10.

out”;⁹⁵ that Respondent “essentially stopped practicing medicine”⁹⁶ after he received a second letter from Government counsel; and that the DEA allowed his registration to remain active on its website even though it had the power to “shut off [his] registration by pulling it from the active list on their pharmacy access Web site,”⁹⁷ thereby creating “an incident and another charge against me”⁹⁸ that occurred for no reason other than harassment. Respondent further claims that the cases counsel for the Government cited in his letter to Respondent regarding his change of address are not applicable in this situation because those cases involved “two meth suppliers to convenience stores, a pharmacy, and a doctor whose state license had already been revoked”⁹⁹ and Respondent,¹⁰⁰ as a “practicing MD with no criminal complaint”¹⁰¹ does not fit into any of those categories. Respondent further argues that the DEA had the power to deactivate his controlled substance license on the DEA Web site, thereby “shutting down [his] ability to issue any controlled substances”¹⁰² and that because the DEA’s failure to do so was more harassment which was “clearly unethical if not illegal,”¹⁰³ Respondent should not be held responsible.

Discussion and Conclusions

I. The Applicable Statutory and Regulatory Provisions

The Controlled Substances Act provides that any person who dispenses (including prescribing) a controlled substance must obtain a registration issued by the DEA in accordance with applicable rules and regulations.¹⁰⁴ “A separate registration shall be required at each principal place of business or professional practice where the applicant * * * dispenses controlled substances.”¹⁰⁵ DEA regulations provide that any registrant may apply to modify his registration to change his address but such modification shall be handled in the same manner as an application for registration.¹⁰⁶

It is unlawful for any person to possess a controlled substance unless that substance was obtained pursuant to

a valid prescription from a practitioner acting in the course of his professional practice.¹⁰⁷ A registered individual practitioner is required to maintain records of controlled substances in Schedules II through V that are dispensed and received, including the number of dosage units, the date of receipt or disposal, and the name, address, and registration number of the distributor.¹⁰⁸

A. Revocation of DEA Registrations

The Controlled Substances Act, at 21 U.S.C. 824(a), provides, insofar as pertinent to this proceeding, that the Deputy Administrator may revoke a registration if she finds that the registrant has materially falsified an application for registration or renewal of registration¹⁰⁹ and/or if she finds that the continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f).¹¹⁰

B. The Public Interest Standard

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for a DEA Certificate of Registration if she determines that such registration would be inconsistent with the public interest. In determining the public interest, the Deputy Administrator is required to consider the following factors:

- (1) The recommendation of the appropriate state licensing board or professional disciplinary authority.
- (2) The applicant’s experience in dispensing, or conducting research with respect to controlled substances.
- (3) The applicant’s conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
- (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
- (5) Such other conduct which may threaten the public health and safety.

As a threshold matter, it should be noted that the factors specified in section 823(f) are to be considered in the disjunctive: The Deputy Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied.¹¹¹

II. The Factors To Be Considered

A. Renewal of Respondent’s DEA Registration

1. Material Falsification of a Renewal Application

Respondent materially falsified his 2006 renewal application for a DEA registration when he failed to disclose any information regarding his 1998 state probation, even though he did disclose his 2003 state probation. I find unpersuasive Respondent’s argument that the omission is irrelevant due to the DEA’s awareness of and Respondent’s previous disclosure of the 1998 probation: The DEA has repeatedly held that “[t]he provision of truthful information on applications is absolutely essential to effectuating [the] statutory purpose’ of determining whether the granting of an application is consistent with the public interest.”¹¹² A false statement is material if it “has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed.”¹¹³ While the evidence must be “clear, unequivocal, and convincing,” the “ultimate finding of materiality turns on an interpretation of the substantive law.”¹¹⁴ The Deputy Administrator has also previously held that “[t]he explanation given by an applicant who has affirmatively answered a liability question is * * * material because the public interest inquiry under section 303(f) requires, *inter alia*, that the Agency examine [t]he applicant’s experience in dispensing * * * controlled substances,’ and its [c]ompliance with applicable State, Federal, or local laws relating to controlled substances.”¹¹⁵

Although Respondent claims that his omission of the 1998 probation from his registration renewal application was inadvertent, that is irrelevant because the Government only needs to show that the applicant “knew or should have known that the response given to the liability question was false,” not that the material falsification was intentional.¹¹⁶ It is apparent that Respondent was aware of his 1998 probation because he

¹¹² *The Lawsons*, 72 FR at 74338 (quoting *Peter H. Ahles*, 71 FR 50097, 50098 (2006)). See also *Hoxie v. DEA*, 419 F.3d 477, 483 (6th Cir. 2005) (“Candor * * * is considered by the DEA to be an important factor when assessing whether a * * * registration is consistent with the public interest.”).

¹¹³ *Kungys v. United States*, 485 U.S. 759, 770 (1988) (int. quotation and other citations omitted).

¹¹⁴ *Id.* at 772 (int. quotation and other citations omitted).

¹¹⁵ *The Lawsons*, 72 FR at 74338 (citing 21 U.S.C. 823(f)).

¹¹⁶ *The Lawsons*, 72 FR at 74339; *Samuel Arnold*, 63 FR 8687 at 8688 (1998).

⁹⁵ Respondent’s Closing Argument Brief at 17.

⁹⁶ Respondent’s Closing Argument Brief at 17.

⁹⁷ Respondent’s Closing Argument Brief at 17.

⁹⁸ Respondent’s Closing Argument Brief at 18.

⁹⁹ Respondent’s Closing Argument Brief at 18.

¹⁰⁰ Respondent’s Closing Argument Brief at 18.

¹⁰¹ Respondent’s Closing Argument Brief at 18.

¹⁰² Respondent’s Closing Argument Brief at 18.

¹⁰³ Respondent’s Closing Argument Brief at 18.

¹⁰⁴ 21 U.S.C. 822(a)(2).

¹⁰⁵ 21 U.S.C. 822(e).

¹⁰⁶ 21 CFR 1301.51.

¹⁰⁷ 21 U.S.C. 844(a).

¹⁰⁸ 21 CFR 1304.03(b), 1304.22(a)(2)(ix), 1304.21(a), 1304.22(c), and 1304.22(a)(2)(iv).

¹⁰⁹ 21 U.S.C. 824(a)(1).

¹¹⁰ 21 U.S.C. 824(a)(4).

¹¹¹ See *Henry J. Schwarz, Jr. M.D.*, 54 FR 16,422 (DEA 1989).

admittedly disclosed it on previous DEA registration applications and because he entered into a consent order with the IDFPR and purportedly completed the required conditions. Respondent therefore knew or should have known that his response to the liability question was false.

Respondent's omitted 1998 probation was related to Respondent's handling of Dilaudid, which is directly related to the second and fourth factors listed in 21 U.S.C. 823(f). Regardless of whether DEA and Illinois had prior knowledge of that probation, the omission of an offense related to the handling of a schedule II controlled substance would certainly have a natural tendency to influence the decision of whether to grant Respondent's application when considering the applicant's experience in handling controlled substances and compliance with applicable State, Federal, and local laws relating to controlled substances. I thus conclude that Respondent's failure to disclose the 1998 state probation was a material misrepresentation because it "ha[d] a natural tendency to influence the * * * decision" of the DEA as to whether to grant his application for a new registration. Under DEA precedent, a material falsification "provides an independent and adequate ground for denying" Respondent's application.¹¹⁷

2. Candor and Admission of Fault

The DEA properly considers the candor of the physician and his forthrightness in assisting in the investigation and admitting fault important factors in determining whether the physician's registration should be revoked.¹¹⁸ I find that Respondent has repeatedly failed to accept responsibility for his misconduct. This failure is evidenced by Respondent's consistent denial of any wrongdoing; Respondent asserts that his actions leading to his 1998 state probations were lawful even after he agreed to enter into a consent order with the IDFPR; with regard to his 2003 state probation, Respondent asserts (1) that his only blame was in leaving his bag, without a secure lock, at the clinic when he was not present and that he clearly "could not prevent the owner's actions once I left medicine (Phentermine) in my locked bag" and (2) that the DEA should not "seek additional retribution" with regard to the incident because he accepted the state probation; Respondent repeatedly claims that the

immediate hearing is the result of a "vendetta" against him instigated by the City of Chicago; despite my previous rulings to the contrary, Respondent continues to assert that most of the evidence and testimony admitted in the instant hearing is inadmissible and should not be considered; and Respondent continues to assert that he was "not afforded a capable attorney"¹¹⁹ although he was at any time free to procure the assistance of counsel, was notified of such, and he did not request a postponement of the instant hearing prior to its commencement in order to do so.¹²⁰

B. The Public Interest Standard

As noted above, Respondent submitted a request to modify his registration, which is still pending. Pursuant to 21 CFR 1301.51, a request for a modification shall be handled in the same manner as an application for registration. Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for a DEA Certificate of Registration if she determines that such registration would be inconsistent with the public interest, consistent with the five factors described above.

In light of the circumstances of this case, I will consider Respondent's compliance with applicable law and experience in handling controlled substances together below.

1. The Recommendation of the Appropriate State Licensing Board

It is undisputed that Respondent is currently licensed as a physician and to handle controlled substances in Illinois. Inasmuch as Respondent is currently authorized to handle controlled substances in Illinois, I find that this factor weighs in favor of a finding that Respondent's registration would not be inconsistent with the public interest. However, I note that state licensure is a necessary but not sufficient condition for DEA registration, and I therefore find that this factor is not dispositive.

2. Respondent's Experience in Handling Controlled Substances and Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

I conclude that Respondent's experience in handling controlled substances and Respondent's compliance with applicable State, Federal, or local laws relating to controlled substances weighs in favor of a finding that his registration would not be consistent with the public interest.

(a) Respondent's Prior State Disciplinary Actions

In the previously discussed 1998 Consent Order, the then IDPR alleged that Respondent "may have prescribed Dilaudid to four (4) patients under questionable circumstances";¹²⁰ Respondent did not admit or deny the allegations but did agree not to contest them. As a condition of his probation, Respondent was required to complete a remedial education course in controlled substance management. In his Closing Argument Brief, Respondent asserts that there was never any finding that the probation came about as a result of unlawful prescribing of Dilaudid, and in the instant hearing Respondent testified that his actions related to the incident were lawful.

In the 2003 Consent Order the IDFPR alleged, and Respondent admitted, that he failed to supervise an unlicensed employee. In the instant hearing and in his Closing Argument Brief, however, Respondent asserts that he was the employee and that he was unable to prevent the clinic owner from removing the phentermine from Respondent's locked bag, but that he accepted the probation because he should not have left the bag at the clinic when he was not there. As a condition of his probation, Respondent was required to complete ten hours of continuing education in the area of prescribing and dispensing controlled substances. I find that Respondent's conduct leading to the 2003 Consent Order and his apparent lack of understanding of proper methods, even after completing several hours of controlled substance handling education, weigh in favor of a finding that his continued registration would be inconsistent with the public interest.

(b) Respondent's Receipt and Dispensing of Marinol

I find no merit to Respondent's assertions that he lawfully received Marinol from a patient and also lawfully provided it to another patient. Pursuant to 21 U.S.C. 844(a), "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice * * *" except as otherwise authorized by the Controlled Substances Act.

Respondent's interpretation of 21 U.S.C. 844(a) is mistaken; Respondent apparently believes that, because he is

¹¹⁷ *The Lawsons*, 72 FR at 74338; *Cf Bobby Watts*, 58 FR 46997 (1993).

¹¹⁸ *Hoxie v. DEA*, 419 F.3d 477, 483 (6th Cir. 2005).

¹¹⁹ Respondent's Closing Argument Brief at 10.

¹²⁰ GX 7 at 2.

a practitioner who was purportedly acting in the course of his professional practice at the time he received the Marinol, this section permitted him to receive the Marinol from a patient. Respondent, however, fails to recognize that 21 U.S.C. 844(a) requires that the controlled substance be obtained directly or pursuant to a prescription from a practitioner, not provided to a practitioner acting in the course of his professional practice. Respondent has made no assertion and provided no evidence that Mr. J.W., from whom Respondent admittedly obtained the Marinol, was a practitioner¹²¹ acting in the course of his professional practice or that Mr. J.W. possessed the proper DEA registration to dispense or distribute controlled substances, as required by 21 U.S.C. 822(a)(1) and 21 CFR 1307.11(a)(1),¹²² when he provided Respondent with the Marinol. Pursuant to 21 CFR 1307.12, however, a person in lawful possession of a controlled substance may, without a registration to do so, distribute such substance to the person from whom it was obtained or to the manufacturer of the substance. Respondent, however, testified at a police board hearing that the Marinol likely came from the prescription of another doctor, not Respondent. Mr. J.W., therefore, did not obtain the Marinol directly from or pursuant to a prescription from Respondent and there is no evidence indicating that Mr. J.W. possessed a DEA registration to distribute or dispense controlled substances so Respondent was subsequently not authorized to receive the Marinol from Mr. J.W. under 21 CFR 1307.12.

Respondent apparently recognizes, as indicated in his Closing Argument Brief, that he is required to record the receipt and subsequent dispensing of controlled substances. Pursuant to 21 CFR 1304.03(b), 1304.22(a)(2)(ix), 1304.21(a), 1304.22(c), and 1304.22(a)(2)(iv), a registered individual practitioner is required to maintain records of controlled substances in Schedules II–V

¹²¹ “Practitioner” is defined in 21 U.S.C. 802(21) as: “a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.”

¹²² 21 CFR 1307.11(a)(1) generally provides that a practitioner who is registered to dispense a controlled substance may distribute a quantity of such substance to another practitioner for the purpose of general dispensing to patients provided that both the distributing and the receiving practitioners record the distribution in accordance with 21 CFR 1304.22(c).

that are dispensed and received, including the number of dosage units, the date of receipt or disposal, and the name, address, and registration number of the distributor. In his brief, Respondent asserts that he has a “‘non monetary’ receipt supplied by Mr. J.W.”¹²³ The only document admitted into evidence that relates to the receipt of the Marinol, however, is an affidavit¹²⁴ with a signature reading “J.W.” and dated May 2, 2008, nearly five years after Respondent purportedly received and subsequently dispensed the Marinol. Not only is the general authenticity of that document suspect, but it also can not reasonably be viewed as a proper record of receipt, particularly considering that it was prepared nearly five years after the event and that Respondent previously claimed to have no recollection of the details of obtaining the Marinol. Respondent also entered into evidence a controlled substances log dated January 2003 through August 14, 2004, indicating that on July 21, Respondent dispensed 8 Marinol 10mg to Officer D.S., which, despite the questionable circumstances under which it was presented to the IDFPF investigator, may arguably be considered a record of dispensing.

Accordingly, I find that Respondent’s receipt of the Marinol was unlawful under 21 U.S.C. 844(a) and 21 CFR 1304.03(b), 1304.21(a), 1304.22(c), 1304.22(a)(iv), 1304.22(a)(2)(ix), 1307.11, and 1307.12 because Respondent did not receive the Marinol directly from or pursuant to a prescription or order from a practitioner acting in the course of his professional practice or from a person who was in lawful possession of and originally obtained the Marinol from Respondent, or as otherwise authorized by the Controlled Substances Act, and because the receipt of the Marinol was not properly recorded. Additionally, as the Government points out, Respondent testified in the instant hearing that he has also in the past provided to patients Tylenol III and Tylenol IV that he had obtained from other patients to whom it had been prescribed by other physicians. I find that Respondent’s unlawful receipt of a Schedule III controlled substance and failure to properly record such receipt weigh in favor of a finding that Respondent’s continued registration would be inconsistent with the public interest.

¹²³ Respondent’s Closing Argument Brief at 5.

¹²⁴ Although the document is signed, it is neither witnessed nor notarized, and when the document was admitted, no witness was presented to verify the document’s authenticity.

(c) IDFPF Administrative Subpoenas

I find that the Government has not provided sufficient evidence to indicate that Respondent violated state law when he failed to comply with a subpoena *duces tecum* issued by the IDFPF requesting copies of patient records.

The Government correctly asserts that the IDFPF has the authority to “subpoena the medical and hospital records of individual patients of”¹²⁵ licensed physicians. Respondent, however, is essentially correct in his assertion that all information provided pursuant to such a subpoena and which indicates the identity of the patient, shall be removed and deleted prior to submission to the disciplinary board or department. Respondent further correctly asserts that the term “all information indicating the identity of the patient” includes patient names and dates of treatment because the IDFPF and the DEA have the ability to match that information with prescription records. Respondent also testified at the instant hearing that disclosure of the requested information, without first obtaining patient permission, would violate the federal Health Insurance Portability and Accountability Act (HIPAA).

Although neither party has submitted any relevant case law on the topic, the Illinois Supreme Court has provided some guidance regarding the disclosure of confidential patient information pursuant to an administrative subpoena. In *People v. Manos*, the court held that the Illinois legislature did not expressly provide for the investigatory power provided to the IDFPF to override the physician-patient privilege as codified in 735 ILCS 5/8–802. The IDFPF, therefore, cannot require a physician under an administrative investigation to produce confidential patient medical records unless one of the statutory exceptions set forth in 735 ILCS 5/8–802 applies.¹²⁶ Additionally, the court adopted a finding that the mere deletion of patient names and identifying information does not remove the records from protection under the physician-patient privilege when the department that issued the subpoena knows the names of the patients whose records were sought, those patients are not parties to the investigatory proceedings, and matching the records to the names would not be difficult even if the names and other identifying information were redacted.¹²⁷ I note that at the time that

¹²⁵ 225 ILCS 60/38.

¹²⁶ *People v. Manos*, 202 Ill. 2d 563 (2002).

¹²⁷ *People v. Manos*, 202 Ill. 2d 563 (2002) (citing *Parkson v. Central DuPage Hospital*, 105 Ill. App. 3d 850 (1982)).

the IDFPF issued the subpoenas to Respondent on June 15, 2005, and June 20, 2007, no applicable exception applied under 735 ILCS 5/8–802.¹²⁸ An exception for subpoenas issued pursuant to the Medical Practice Act is now included in 735 ILCS 5/8–802,¹²⁹ however, that exception did not become effective until August 27, 2007 and is therefore not applicable.

I agree with the Government's assertion that Respondent's argument that compliance with the subpoenas would violate HIPAA is baseless because the subpoena was issued as an order of an administrative tribunal.¹³⁰ Nonetheless, I further find that because of the Illinois Supreme Court decision in *Manos*, it does not matter whether the disclosure would violate HIPAA because it was not disclosable under the physician-patient privilege law in effect in Illinois at the time of the issuance of the subpoena.¹³¹ Accordingly, I find that the Government has not met its

¹²⁸ The exceptions in effect during the applicable period are as follows: “* * * (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the healthcare practitioner for malpractice * * *, (3) with the expressed consent of the patient * * *. (4) in all actions brought by the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue * * *, (4.1) in all actions brought against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either first degree murder by abortion, attempted abortion or abortion, (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act [325 ILCS 5/1 et seq.], (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment, (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11–501.4 of the Illinois Vehicle Code [625 ILCS 5111–501.4], (10) in prosecutions where written results of blood alcohol tests are admissible under Section 5–11a of the Boat Registration and Safety Act [625 ILCS 45/5–11a], or (11) in criminal actions arising from the filing of a report of suspected terrorist offense in compliance with Section 29D–10(p)(7) of the Criminal Code of 1961 [720 ILCS 5/29D-10].

¹²⁹ “No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only * * * (12) upon the issuance of a subpoena pursuant to Section 38 of the Medical Practice Act of 1987 [225 ILCS 60/38]. * * *” 735 ILCS 5/8–802.

¹³⁰ See 45 CFR 164.512(e)(1), (2), and (3).

¹³¹ I also find no merit to Respondent's argument that he relied on the advice of counsel when he provided the redacted patient files to the IDFPF. Respondent has cited no relevant law to indicate that reliance on counsel would relieve him of responsibility for failing to comply with a subpoena.

burden of proof that Respondent violated state law in failing to comply with a subpoena *duces tecum* issued by an administrative tribunal.

I note that I have already found no merit to Respondent's argument that the patient files and the testimony of Investigator D.M. in the immediate hearing are inadmissible in this proceeding and should not be available to the DEA.¹³² Because Respondent is likely to present this argument again, however, I will add that, in addition to the reasons previously stated in my Memorandum to Parties and Rulings, dated February 12, 2010 and Memorandum to Parties and Ruling, dated April 9, 2010, the section of this opinion regarding the IDFPF subpoena *duces tecum* cannot provide the basis for an argument that the relevant patient files are inadmissible because Respondent obtained permission to provide the files, thereby waiving the physician-patient privilege.

(d) Prescribing From an Unregistered Location

I find that Respondent violated federal law by prescribing controlled substances from his new location without a valid registration. As provided in 21 U.S.C. 822(e), “[a] separate registration shall be required at each principal place of business or professional practice where the applicant * * * dispenses controlled substances.” Additionally, pursuant to 21 CFR 1301.51, any registrant may apply to modify his registration to change his address but such modification shall be handled in the same manner as an application for registration. Unlike a renewal application, which, when timely filed, remains in effect past the registration expiration date while the DEA makes a final determination on the application,¹³³ a request for a modification is treated as a new application; a registrant, therefore, is not authorized to dispense or prescribe controlled substances at his new location pending approval of a modification request to change a DEA registered address.¹³⁴

¹³² See Memorandum to Parties and Rulings, dated February 12, 2010 and Memorandum to Parties and Ruling, dated April 9, 2010. (Respondent relied on 225 ILCS 60/22(A)(5) and 60/23(B) to exclude the testimony of IDFPF Investigator D.M. and to exclude all evidence relating to Respondent's dispensing of Marinol to D.S. I denied Respondent's request and found that Section 60/23(B)'s constraint on the Medical Disciplinary Board's ability to further disclose reported information is limited to the confidentiality of medical reports and committee reports as otherwise protected by law.)

¹³³ See 5 U.S.C. 558(c).

¹³⁴ See *John J. Fotinopoulos*, 72 FR 24602 (2007).

The record demonstrates that even though Respondent moved from his registered address to a new location in July 2008, he failed to notify the DEA of this change until at least April 7, 2009,¹³⁵ after a DEA diversion investigator was unable to locate Respondent at his registered address and eventually located him at his residence. Additionally, Respondent admittedly continued to handle controlled substances not only while that modification was pending but after the DEA had notified him in writing at least two times, and Respondent's own attorney confirmed at least once, that he was not permitted to do so. Respondent's argument that the DEA actively prevented him from submitting a request for modification of his registered location is unconvincing, particularly considering that Respondent failed to provide any evidence indicating he ever attempted to submit the request.¹³⁶

Respondent's act of continuing to handle controlled substances after numerous warnings shows a flagrant disregard for the requirements of the law governing the handling of controlled substances. Additionally, Respondent not only refuses to accept any blame whatsoever for failing to properly notify the DEA of his change of address but also claims that the DEA is responsible for him continuing to issue prescriptions for controlled substances and for pharmacies continuing to fill those prescriptions. I therefore find that Respondent's failure to comply with federal law regarding modification of his controlled substances registration and his additional refusal to accept responsibility for his actions strongly support a finding that Respondent's continued registration would be inconsistent with the public interest.

(e) Diversion of OxyContin

I find that the Government has met its burden in establishing diversion by a preponderance of the evidence and the Government has also shown that even if Respondent was unaware of the diversion, Respondent was involved in a scheme that created the opportunity for diversion of a Schedule II controlled substance.

¹³⁵ RX 15.

¹³⁶ Respondent submitted several documents with his brief, marked as “Brief Exhibits.” I have not considered these documents in reaching my findings and conclusions, however, because they were not offered or admitted into evidence. See 21 CFR 1316.57. Respondent also makes several references to testimony that was offered in related state proceedings; that information also will not be considered here for the same reason.

The DEA has held that a finding that a practitioner is reckless or negligent in ignoring the warning signs that a patient is either personally abusing controlled substances or diverting them to others is an indication that the practitioner's registration would be inconsistent with the public interest; misconduct that is "unintentional, innocent or devoid of improper motivation * * * creates the opportunity for diversion and could justify revocation or denial."¹³⁷

The evidence in this case clearly demonstrates that Respondent knowingly and willingly participated in a scheme to deceive other healthcare providers with regard to Ms. E.M.'s use of a Schedule II controlled substance and was at the very least reckless or negligent in ignoring the possibility of diversion and thereby created the opportunity for diversion of OxyContin. The record establishes that Respondent willingly agreed to continue to treat and to prescribe controlled substances to Ms. E.M. and to refrain from revealing his involvement to anyone other than Ms. E.M.'s family, even while Ms. E.M. was institutionalized and while she was being treated by other physicians. The numerous inconsistencies between the testimonies of Mr. I.S. and Respondent lead me to believe that neither is a credible witness with regard to Ms. E.M.'s medication and treatment and raises the questions of whether Respondent actually even treated Ms. E.M. and whether she received OxyContin.

The evidence shows that each month for several years, Respondent provided prescriptions for 60 OxyContin 80 mg tablets to three members of the same household, including Ms. E.M., who was over 90 years old and purportedly frail. As the Government points out, Ms. E.M. was confined to a hospital or nursing home for a total of approximately 290 days during that period.

I first find it difficult to believe that Ms. E.M.'s family was able to administer OxyContin twice a day for such an expansive time without ever arousing the suspicion of the facility staff. I also find it difficult to believe that for each of those approximately 290 days, although Ms. E.M. was purportedly receiving a total of 160 mg of OxyContin per day, two doses of 80 mg each,¹³⁸ Ms. E.M.'s family was able to prevent the possibility of an overdose simply by reviewing her daily charts (with the

exception of the last three or so weeks of Ms. E.M.'s life when Mr. I.S. claims that he prohibited the facility from providing any type of pain medication to her).

Respondent ignored the warning signs of diversion by assisting in the family's scheme to conceal Ms. E.M.'s OxyContin prescriptions and by failing to test Ms. E.M.'s opioid levels to ensure that she actually received the drug. I find that Respondent was at least reckless or negligent in ignoring the warning signs of diversion with regard to the OxyContin he prescribed to Ms. E.M. and his conduct, intentional or not, thereby created the opportunity for diversion.

I find that Respondent did not issue OxyContin prescriptions for a legitimate medical purpose while acting in the scope of his professional practice. While I agree with Respondent that the DEA's governing regulations do not require him to perform a physical examination of a patient before providing each prescription, 21 CFR 1306.04(a), requires that controlled substance prescriptions be issued for a legitimate medical purpose by a practitioner acting in the scope of his professional practice.

The evidence also does not support a finding that Respondent issued OxyContin prescriptions to Ms. E.M. pursuant to 21 CFR 1306.12(b)(1), 1306.05, or 1306.04(a). What constitutes bona fide "medical practice" by a physician dispensing narcotic drugs must be determined upon consideration of the evidence and attending circumstances.¹³⁹ The Supreme Court of the United States clarified this issue in *Gonzales v. Oregon*:¹⁴⁰

Under DEA regulations, a prescription for a controlled substance is not "effective" unless it is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 CFR 1306.04(a). This regulation further provides that "an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances." *Id.* As the Supreme Court explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." (Emphasis added).

Contrary to Respondent's assertions, the evidence does not support a finding

that Respondent regularly saw Ms. E.M. as a patient; she therefore did not use controlled substances under his supervision. Mr. I.S.'s testimony combined with the discrepancies between Respondent's own records for Ms. E.M. and the admission and treatment dates for Ms. E.M. from hospice and treating hospitals indicate that it is unlikely that Respondent saw Ms. E.M. as a patient as frequently as he claims. Respondent even admitted that he relied on reports from Ms. E.M.'s family to determine the course of her treatment. Additionally, Respondent knowingly participated in a scheme to conceal Ms. E.M.'s alleged use of OxyContin from her treating physicians and other caregivers. Such actions certainly do not "ensure patients use controlled substances under the supervision of a doctor," as explained by the Supreme Court. Because Ms. E.M. was not using OxyContin under the supervision of Respondent and Respondent's actions contributed to the prevention of her other physicians to supervise her use, Respondent did not issue OxyContin prescriptions to Ms. E.M. for a legitimate medical purpose while acting in the scope of his professional practice. I therefore find that the prescriptions that Respondent issued to E.M. for OxyContin were not issued for a legitimate medical purpose.

Accordingly, I find that Respondent was at least reckless or negligent in ignoring the warning signs of diversion and issued prescriptions for other than a legitimate medical purpose and that this conduct weighs in favor of a finding that Respondent's registration would not be consistent with the public interest.

3. Respondent's Conviction Record

There is no evidence that Respondent has ever been convicted under any federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances. I therefore find that this factor, although not dispositive, weighs against a finding that his continued registration would be inconsistent with the public interest.

4. Other Conduct

In light of my findings discussed above, I find it unnecessary to determine whether Respondent's prescribing of various noncontrolled substances to Ms. E.M. should weigh in favor of a finding that his continued registration would be inconsistent with the public interest.

¹³⁷ See *Paul J. Caragine, Jr.*, 63 FR 51592 (DEA 1998).

¹³⁸ According to the Physician's Desk Reference, 80 mg is the second-highest dosage of OxyContin available in a single pill.

¹³⁹ *Moore v. U.S.*, 128 F.2d 887 (1942).

¹⁴⁰ 126 S.Ct. 904, 925 (2006) (citing *Moore*, 423 U.S. 122, 135 (1975)).

Conclusion

I conclude that Respondent's registration with the DEA would be inconsistent with the public interest.

Recommended Decision

I recommend that Respondent's controlled substances registration be revoked and his application for renewal and modification of his DEA registration be denied.

Dated: June 15, 2010.

Mary Ellen Bittner,

Administrative Law Judge.

[FR Doc. 2011-22093 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE**Drug Enforcement Administration****Importer of Controlled Substances; Notice of Registration**

By Notice dated June 7, 2011, and published in the **Federal Register** on June 16, 2011, 76 FR 35241, Wildlife Laboratories, 1401 Duff Drive, Suite 400, Fort Collins, Colorado 80524, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Etorphine Hydrochloride (9059), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance for sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Wildlife Laboratories to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Wildlife Laboratories to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with State and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: August 16, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011-22088 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE**Drug Enforcement Administration****Manufacturer of Controlled Substances; Notice of Registration**

By Notice dated April 15, 2011, and published in the **Federal Register** on April 27, 2011, 76 FR 23627, Cedarburg Pharmaceuticals, Inc., 870 Badger Circle, Grafton, Wisconsin 53024, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of 4-Anilino-N-phenethyl-4-Piperidine (8333), a basic class of controlled substance listed in schedule II.

The company plans to use this controlled substance in the manufacturer of another controlled substance.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a), and determined that the registration of Cedarburg Pharmaceuticals, Inc., to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Cedarburg Pharmaceuticals, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: August 16, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011-22089 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE**Drug Enforcement Administration****Harold Edward Smith, M.D.; Revocation Of Registration**

On April 17, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Harold Edward Smith, M.D. (Respondent), of Mt. Dora, Florida. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BS4681979, and the denial of any pending applications to renew or modify the registration, on the grounds that Respondent had materially falsified various applications for his DEA registration and had committed acts which render his registration inconsistent with the public interest. Show Cause Order at 1 (citing 21 U.S.C. 824(a)(1) & (4)).

The Show Cause Order alleged that Respondent has "a documented substance abuse history dating back as far as 1982," when he "entered treatment for alcohol and controlled substance abuse." *Id.* The Order alleged that on April 3, 1985, Respondent entered into a consent order with the Georgia Board of Medical Examiners (Georgia Board) based on his "chemical dependency," which placed him on probation for four years and imposed various conditions including that he "abstain from the consumption of alcohol or controlled substances," undergo random drug testing, and "relinquish" his controlled substance privileges. *Id.* The Order then alleged that in June 1990, Respondent tested positive for cocaine and that on October 10, 1990, he "entered into an Interim Consent Order" with the Georgia Board under which his medical license was suspended and he was ordered (1) Not to practice medicine, (2) not to use his DEA registration, and (3) "to participate in a program for impaired physicians." *Id.* at 2.

Next, the Show Cause Order alleged that during 1999 and 2000, Respondent issued prescriptions for hydrocodone to J.R.S. and L.L.S., and had failed to maintain the "records of any examinations, diagnoses, treatment[s] or * * * drugs prescribed to these individuals as required by Section 458.331(1)(q) of the Florida statutes." *Id.* The Order further alleged that based on this conduct, Respondent "entered into a Consent Agreement with the" Florida Board of Medicine, which required him to pay a fine of \$5,000, desist "from prescribing to family members" and to

take “a course on the proper prescribing of [a]busable [d]rugs.” *Id.* (int. quotations omitted).

The Show Cause Order further alleged that on February 16, 2007, the Florida Board indefinitely suspended Respondent’s medical license “based in part” on his “admission of” having “relapse[d] on crack cocaine” and “failure to submit to a urine screen while under contract with the Board’s impaired physicians’ program.” *Id.* The Order then alleged that on June 26, 2007, the Florida Board reinstated Respondent’s medical license “subject to several probationary terms.” *Id.*

Finally, the Show Cause Order alleged that “[o]n April 22, 2002, February 28, 2005, and again on January 31, 2008,” Respondent had “submitted applications for renewal” of his DEA registration. *Id.* The Order alleged that each of these applications was materially false because Respondent failed to disclose the various sanctions imposed on his state licenses by the Georgia and Florida Boards, as well as the previous “surrenders” of his DEA registration. *Id.*

On May 8, 2009, the Show Cause Order, which also notified Respondent of his right to request a hearing on the allegations (or to submit a written statement in lieu of a hearing) and the consequences if he failed to do so, *Id.* at 2, was served on Respondent by certified mail to him at the address given on his most recent application as his registered location. Since that date, neither Respondent, nor any person purporting to represent him, has filed a request for a hearing or submitted a written statement in lieu of a hearing. As thirty days have now passed since Respondent was served with the Order to Show Cause, I find that Respondent has waived his right to a hearing. See 21 CFR 1301.43(d). I therefore enter this Final Order without a hearing based on relevant evidence contained in the Investigative Record. See *Id.* at 1301.43(e). I make the following findings.

Findings

Respondent currently holds DEA Certificate of Registration BS4681979, which authorizes him to dispense controlled substances in schedules II through V as a practitioner, at the registered address of 2875 S. Orange Ave., Suite 500–600, Orlando, Florida. While Respondent’s registration was to expire on February 29, 2008, on February 7, 2008, he submitted an application to renew his registration. In accordance with the Administrative Procedure Act, Respondent’s registration remains in effect pending

the issuance of this Final Order. See 5 U.S.C. 558(c).

The State Proceedings Against Respondent

In April 1983, Respondent, who was then licensed in Arkansas and Tennessee, was discharged from an impaired physicians program. Thereafter, Respondent applied for a Georgia medical license. On April 17, 1985, Respondent entered into a Consent Order with the Georgia Board, which noted that he had “completed a treatment program for chemical dependency.” Consent Order at 1, *In re Harold Edward Smith, Jr., M.D.*, No. 91328–85 (Ga. Bd. Med. Exam’rs, April 17, 1985). Pursuant to the Consent Order, the Georgia Board issued Respondent a medical license and placed him on probation for four years subject to several conditions. *Id.* at 2–4. The conditions included that he “completely abstain from the consumption of alcohol or controlled substances, except as prescribed by a duly licensed practitioner for a legitimate purpose,” that he “undergo random alcohol/drug screening at his own expense,” that he “not possess a DEA permit or any triplicate prescription forms or Federal order forms,” and that he relinquish his right (until further order by the Board) “to prescribe, administer, dispense, order or possess (except as prescribed, administered or dispensed to [him] by another person authorized by law to do so) controlled substances.” *Id.* Respondent was also required to “submit quarterly reports regarding his physical and mental condition to the Board * * * including a report on any medication being prescribed to” him. *Id.* at 3. In April 1989, Respondent was “discharged from probation.” Interim Consent Order for Suspension of License During Treatment at 1, *In re Harold Edward Smith, Jr., M.D.*, No. 90–499 (Ga. Bd. Med. Exam’rs, Oct. 10, 1990).

In June 1990, physicians at Respondent’s place of employment requested that he provide a specimen for drug testing. *Id.* at 2. The specimen tested positive for cocaine. *Id.* Subsequently, the Georgia Board ordered Respondent to “undergo a 72-hour inpatient mental/physical examination evaluation” and thereafter, Respondent entered “treatment for relapse of chemical dependence.” *Id.*

On October 10, 1990, Respondent entered into an Interim Consent Order with the Georgia Board pursuant to which he agreed that his license would be “suspended until further order of the board”; that during the suspension, he

would “not engage in the practice of medicine or be authorized to utilize his DEA registration for controlled substances”; and that he would not resume practicing medicine or use his DEA registration “without the prior written approval of the Board.” *Id.* at 3 & 8. Respondent also agreed to “remain in treatment,” to “abide by all conditions of his treatment/aftercare program,” and to submit “quarterly reports on his mental/physical condition and progress in rehabilitation.” *Id.* at 3. Moreover, as a condition of the Board’s lifting of the suspension (after he completed treatment and executed an aftercare contract), Respondent was required to submit: (1) A certification by his monitoring physicians that he had “successfully completed treatment” and “is able to resume the practice of medicine with reasonable skill and safety,” (2) a plan to return to practice under a “physician who would actively supervise [his] practice,” and (3) “a summary of continuing education activity in the last year.” *Id.* at 4–5.

At some point, Respondent moved to Florida and obtained a medical license from the Florida Department of Health (DOH). On October 18, 2002, the DOH filed an Administrative Complaint against him. See Administrative Complaint, *Department of Health v. Smith*, No. 2000–12434 (Fla. DOH). The Complaint alleged that “[f]rom on or about July 24, 1999 to on or about August 14, 2000,” Respondent wrote hydrocodone prescriptions for J.R.S., and that “[f]rom on or about January 14, 2000 to on or about June 30, 2000,” Respondent wrote hydrocodone prescription for L.L.S., both of whom were alleged to be related to him. *Id.* at 2. The Complaint further alleged that Respondent “did not keep records of [his] examinations, diagnoses, treatment or * * * drugs prescribed” for either person. *Id.*

On June 18, 2003, Respondent entered into a Consent Agreement with the DOH. Consent Agreement at 6–7. Therein, Respondent neither admitted nor denied the allegations. *Id.* at 2. However, he agreed to pay a fine of \$2,000, to reimburse the DOH for its costs in the amount of \$4,776.58, and to complete a course entitled “Protecting Your Medical Practice, Clinical, Legal and Ethical Issues in Prescribing Abusable Drugs.” *Id.* at 2–4.

On August 18, 2003, the Florida Board of Medicine rejected the Consent

¹ The Order further noted that “[t]he terminal condition of Respondent’s mother understandably contributed to poor judgment for the time he provided prescriptions for her.” Consent Agreement at 4.

Agreement and offered a counter agreement, which the parties accepted. Final Order at 1. The Agreement increased the fine to \$5,000, imposed a restriction on his license requiring him to “remain in compliance with any and all terms of” his contract with the Professional Resource Network (PRN), and prohibited him “from writing prescriptions for controlled substances for any family member.” *Id.* at 1–2.

On May 31, 2006, the DOH filed another Administrative Complaint against Respondent. Administrative Complaint, *Department of Health v. Harold Smith, M.D.*, No. 2005–67946. The Complaint alleged that on approximately August 9, 2005, Respondent had ceased complying with his PRN contract and that, on August 16, 2005, a PRN monitor had contact with him and “recommended,” based on his “body language and general demeanor[,] * * * that [he] undergo a psychiatric evaluation.” *Id.* at 4–5. PRN then allegedly “requested that Respondent submit to a psychiatric evaluation and drug screen”; however, Respondent failed to “present for his drug screen.” *Id.* at 5. The Complaint further alleged that three weeks later, “Respondent contacted PRN and admitted to a relapse on crack cocaine and agreed to be evaluated.” *Id.*

The Complaint alleged that on or about October 7, 2005, Respondent was evaluated and “diagnosed with cocaine dependence” and “opioid dependence, in apparent relapse.” *Id.* The Complaint further alleged that the evaluator found that “Respondent was not safe to practice medicine” and recommended that he enter a “structured detoxification and stabilization unit and undergo intensive psychotherapy.” *Id.* at 5–6. The Complaint alleged that while Respondent completed this portion of his treatment, he subsequently refused to enter into a halfway house, did not have a phone, and had no money to pay for urine screens. *Id.* at 6. The State thus alleged that Respondent was “unable to practice medicine with reasonable skill and safety to patients due to his substance abuse problems and his unwillingness to undergo additional treatment” and monitoring by PRN. *Id.* at 7.

In February 2007, the Florida Board of Medicine issued a Final Order adopting a settlement agreement which Respondent had entered into with the State. Final Order at 2, *DOH v. Harold Smith, M.D.*, No. 2005–67946 (Fla. Bd. Med., Feb. 15, 2007). Apparently (as the agreement is not part of the record), Respondent had agreed to the suspension of his medical license. See Order on Reinstatement, *DOH v. Harold*

Smith, M.D., No. 2005–67946 (Fla. Bd. Med., June 26, 2007).

On June 26, 2007, the Board reinstated Respondent’s license and placed him “on probation for a period to run concurrent with his [PRN] contract.” *Id.* at 1. The Board imposed the following conditions: That he comply with his PRN contract; that he appear before the Board’s “Probationer’s Committee” each quarter; that he submit a practice plan to the Committee; that he practice only “under the indirect supervision” of a “monitoring physician” approved by the Committee, who is required to submit quarterly reports to the Committee on Respondent’s compliance and to “[r]eview 25 percent of [his] patient records selected on a random basis at least once each month” and who is also required to report any violations of applicable laws and regulations to the Board. *Id.* at 1–5. Finally, the Board prohibited Respondent “from writing prescriptions for controlled substances until such time as he is authorized to do so by the * * * Probationer’s Committee.” *Id.* at 5.

Respondent’s DEA Applications

On April 22, 2002, Respondent submitted an application to renew his DEA registration. In section 3 of the application, Respondent was required to answer four questions regarding whether he had ever been convicted of a controlled substance offense, and whether sanctions had ever been imposed against his DEA registration, any state medical license, or any state controlled substance registration.

More specifically, question 3(d) asked: “Has the applicant ever surrendered or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation? Is any such action pending?” Respondent circled “no.”

On February 28, 2005, Respondent submitted another application to renew his registration. Respondent was required to answer the same four questions as on the previous application. Once again, in answering question 3(d), Respondent circled “no.”

On January 31, 2008, Respondent submitted another application to renew his DEA registration. While there were some minor changes to the application, Respondent was required to answer the same four questions as on the previous applications. This time, however, Respondent answered “yes” to the question: “Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked,

suspended, denied, restricted, or placed on probation, or is any such action pending?” In the application’s block for explaining the “nature of incident” and the “result of incident,” Respondent wrote “see attached.” Respondent attached a copy of the Florida Board of Medicine’s June 2007 Order on Reinstatement and a letter to him from a DOH Compliance Officer relating the minutes of a September 7, 2007 meeting of the Board’s Probation Committee. The letter related that the Committee had lifted the restriction on his prescribing authority. Respondent did not, however, disclose the two Georgia proceedings or the 2003 Florida proceeding.

Discussion

Section 304(a)(1) of the Controlled Substances Act (CSA) provides that a registration “may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has materially falsified any application pursuant to or required by this subchapter.” 21 U.S.C. 824(a)(1). Section 304(a)(4) also provides that a registration to “dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.” 21 U.S.C. 824(a)(4). With respect to a practitioner, the CSA requires that the following factors be considered in making the public interest determination:

- (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
- (2) The [registrant’s] experience in dispensing * * * controlled substances.
- (3) The [registrant’s] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
- (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
- (5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f).

“[T]hese factors * * * are considered in the disjunctive.” *Robert A. Leslie*, 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application to renew a registration. *Id.* Moreover, I am “not required to make findings as to all of the factors.” *Morall v. DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005); see also

Volkman v. DEA, 567 F.3d 215, 222 (6th Cir. 2009).

Having considered the evidence, I conclude that the record establishes that Respondent materially falsified his 2002, 2005, and 2008 applications for DEA registrations. While there is evidence suggesting that Respondent is still abusing controlled substances, in light of my conclusion with respect to the material falsification allegations, I deem it unnecessary to rule on the Government's alternative ground for seeking the revocation of Respondent's registration.²

The Material Falsification Allegations

As found above, on both April 22, 2002 and February 28, 2005, Respondent submitted an application to renew his DEA registration on which he answered "no" to the question: "Has the applicant ever surrendered or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation?" In both instances, Respondent's answer was false because he failed to disclose (1) The Georgia Board's 1985 consent order which placed him on probation for four years, and (2) the Georgia Board's 1990 Consent Order which suspended his license. Moreover, Respondent's statement on his 2005 application was false for the further reason that in 2003, the Florida Board had imposed restrictions on his license which included that he remain in compliance with the PRN contract and was prohibited from writing controlled substance prescriptions "for any family member."

As for his January 31, 2008 application, it is true that Respondent gave a "yes" answer to the question regarding his state license and included a copy of the Florida Board's June 2007 reinstatement order. However, the statement was still false because Respondent failed to disclose the Georgia Board's 1985 and 1990 consent orders, as well as the 2003 Florida consent agreement.

It is likewise clear that Respondent's failure to disclose the various state proceedings on each of the three applications was a materially false statement under the CSA. A false statement is material if it "has a natural tendency to influence, or was capable of influencing, the decision of the

² As found above, while the DOH 2006 complaint makes the allegations that Respondent had admitted to a relapse on crack cocaine and had been diagnosed as being dependent on cocaine and opioids, neither the Board's Final Order nor the Order on Reinstatement contain factual findings establishing the validity of these allegations.

decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (int. quotation and other citations omitted). While the evidence must be "clear, unequivocal, and convincing," the "ultimate finding of materiality turns on a substantive interpretation of the law." *Id.* at 772 (int. quotations and citations omitted). See also *Craig H. Bammer*, 73 FR 34327, 34328 (2008).

Respondent's false statements were material because, under the public interest standard, the Agency is required to consider, *inter alia*, the applicant's experience in dispensing controlled substances, his compliance with applicable state and federal laws related to controlled substances, and whether his conduct threatens public health and safety. See 21 U.S.C. 823(f). Disclosure of each of the state orders would have provided significant information to the Agency showing that Respondent has a significant problem with drug abuse; DEA has long held that a practitioner's self-abuse of a controlled substance is a relevant consideration under factor five of the public interest standard and is grounds for the revocation of an existing registration or the denial of an application for registration even where there is no evidence that a practitioner has abused his prescription-writing authority.³ See *Kenneth Wayne Green, Jr., M.D.*, 59 FR 51453, 51454 (1994) (registrant's "continued drug usage and relapses lead[] to the conclusion that he cannot be entrusted with the responsibilities of a DEA registrant and that his continued possession of a registration would be contrary to the public interest"); *David E. Trawick*, 53 FR 5326, 5327 (1988) ("offenses or wrongful acts committed by a registrant outside of his professional practice, but which relate to controlled substances may constitute sufficient grounds for the revocation of a" registration).

Disclosure of the 2003 Florida proceeding (on the 2005 and 2008 applications) would have also provided information that Respondent had been accused of writing unlawful prescriptions for hydrocodone, a schedule III controlled substance. 21 CFR 1308.13(e). This information is material to the Agency's investigation and assessment of Respondent's experience in dispensing controlled substances and his compliance with applicable laws related to the dispensing of controlled

³ It is also relevant in assessing Respondent's compliance with applicable laws related to controlled substances. See 21 U.S.C. 823(f)(4).

substances.⁴ See 21 U.S.C. 823(f)(2) & (4).

I thus conclude that Respondent materially falsified his 2002, 2005 and 2008 applications to renew his DEA registration.⁵ Only one of these material falsifications is necessary to support the revocation of Respondent's registration; that there are three such instances manifests a shocking level of dishonesty on his part. 21 U.S.C. 824(a)(1). Accordingly, Respondent's registration will be revoked and his pending application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration, BS4681979, issued to Harold Edward Smith, M.D., be, and it hereby is, revoked. I further order that the pending application of Harold Edward Smith, M.D., to renew his registration, be, and it hereby is, denied. This Order is effective September 29, 2011.

Dated: August 17, 2011.

Michele M. Leonhart,
Administrator.

[FR Doc. 2011-22090 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Dale J. Bingham, P.A.; Revocation of Registration

On February 4, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Dale J. Bingham, P.A. (Registrant), of Ash Fork, Arizona. The Show Cause Order proposed the revocation of Registrant's DEA Certificate of Registration MB1048746, which authorizes him to dispense controlled substances in schedules II through V, as a mid-level practitioner, on the ground that Registrant had entered into a consent agreement with the Arizona Regulatory Board of Physician Assistants, pursuant to which he no longer has "authority to handle

⁴ That the State did not require Respondent to admit to the allegations in the consent agreement does not make his failure to disclose the proceeding any less material.

⁵ While the Agency did not grant Respondent's 2008 application, "[i]t makes no difference that a specific falsification did not exert influence so long as it had the capacity to do so." *United States v. Alemany Rivera*, 781 F.2d 229, 234 (1st Cir. 1985). Moreover, Respondent's false statements on his 2002 and 2005 applications obviously did influence the Agency's decision to grant them.

controlled substances in * * * Arizona, the [S]tate in which [he is] registered with DEA.” Show Cause Order at 1 (citing 21 U.S.C. 824(a)(3)). The Show Cause Order also notified Registrant of his right to either request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedures for doing either, and the consequences if he failed to do either. *Id.* at 2 (citing 21 CFR 1301.43(a), (c)–(e)).

The Government initially attempted to serve Registrant with the Order to Show Cause by certified mail addressed to him at his registered location. However, this mailing was returned unclaimed with the notations: “No City Delivery” and “Requires PO Box Number.” GX 3. On March 8, 2011, the Government served the Show Cause Order on Registrant by certified mail addressed to him at an address he had previously provided to the Agency for receiving mail.¹ GX 4. The Investigative Record includes a signed return receipt card establishing service. *Id.*

Since the date of service of the Show Cause Order, neither Registrant, nor anyone purporting to represent him, has either requested a hearing or submitted a written statement in lieu thereof. Because more than thirty days have now passed since service of the Show Cause Order, I find that Registrant has waived his right to either request a hearing or to submit a written statement. I therefore issue this Decision and Final Order based on relevant evidence contained in the Investigative Record submitted by the Government.

Findings

Registrant is the holder of DEA Certificate of Registration MB1048746, which authorizes him to dispense controlled substances in schedules II through V as a mid-level practitioner, at the registered address of 112 Ash Park Drive, Ash Fork, AZ. GX 1. Registrant’s registration does not expire until July 31, 2012. *Id.*

Registrant is also the holder of a license issued by the Arizona Regulatory Board of Physician Assistants which formerly authorized him to perform health care tasks in Arizona. GX 6, at 1. However, according to a Consent Agreement which Registrant entered into with the Board on March 26, 2010, Registrant “has a medical condition that may limit his ability to safely engage in the

performance of health care tasks.”² *Id.* Accordingly, the Board ordered that Registrant’s practice be “limited in that he shall not perform health care tasks in the State of Arizona and is prohibited from prescribing any form of treatment including prescription medication until [he] applies to the Board and receives permission to do so.” *Id.* at 2. I therefore find that Registrant is without authority to dispense controlled substances under the laws of the State of Arizona, the State in which he holds his DEA registration.

Discussion

The Controlled Substances Act (CSA) grants the Attorney General authority to revoke a registration “upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances.” 21 U.S.C. 824(a)(3). Moreover, consistent with the CSA’s definition of the term “practitioner,” DEA has long held that a practitioner must be currently authorized to handle controlled substances in “the jurisdiction in which he practices” in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) (“[t]he term ‘practitioner’ means a physician * * * or other person licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice”). *See also id.* § 823(f) (“The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.”).

As these provisions make plain, possessing authority under state law to dispense controlled substances is an essential condition for holding a DEA registration. *See David W. Wang*, 72 FR 54297, 54298 (2007); *Sheran Arden Yeates*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988). Here, while Registrant retains an Arizona P.A. license, the evidence establishes that he is no longer authorized under his license to dispense controlled substances. Because Registrant no longer satisfies this requirement, he is not entitled to maintain his registration. Accordingly, I will order that Registrant’s registration

be revoked and any pending application be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a)(3), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration MB1048746, issued to Dale J. Bingham, P.A., be, and it hereby is, revoked. I further order that any application of Dale H. Bingham, P.A., to renew or modify his registration, be denied. This Order is effective September 29, 2011.

Dated: August 17, 2011.

Michele M. Leonhart,
Administrator.

[FR Doc. 2011–22091 Filed 8–29–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1556]

Meeting of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U. S. Department of Justice.

ACTION: Notice of meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces a meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ).

Dates and Locations: The meeting will take place at the Gaylord National Hotel and Convention Center, 201 Waterfront Street, National Harbor, MD 20745, on Tuesday, October 11, 2011 from 8:30 a.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Robin Delany-Shabazz, Designated Federal Official, OJJDP, *Robin.Delany-Shabazz@usdoj.gov*, or 202–307–9963. [Note: This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App.2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of representatives from the states and territories. FACJJ member duties include: reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of

¹ In its request for final agency action, the Government also stated that it mailed the Show Cause Order to Registrant at his last known address.

² The Board noted, however, that “[t]here has been no finding of unprofessional conduct against” Registrant. GX 6, at 2.

OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information may be found at <http://www.facjj.org>.

Meeting Agenda: The agenda will include: (a) Welcome and introductions; (b) remarks from the Administrator; (c) an introduction to the FACJJ and overview of member roles and responsibilities; (d) overview of OJJDP; (e) strategies for working with non-member states and territories; (f) discussion of sub committee options and work products; (g) election of a chair and vice chair; (h) other business; and (i) adjournment.

For security purposes, members of the FACJJ and of the public who wish to attend must pre-register online at <http://www.facjj.org> by Tuesday, October 4, 2011. Should problems arise with web registration, call Daryel Dunston at 240-221-4343. [Note: these are not toll-free telephone numbers.] Photo identification will be required. Additional identification documents may be required. Space is limited.

Written Comments: Interested parties may submit written comments by Tuesday, October 4, 2011, to Robin Delany-Shabazz, Designated Federal Official for the Federal Advisory Committee on Juvenile Justice, OJJDP, at Robin.Delany-Shabazz@usdoj.gov. Alternatively, fax your comments to 202-307-2819 and call Joyce Mosso Stokes at 202-305-4445 to ensure its receipt. [Note: These are not toll-free numbers.] No oral presentations will be permitted though written questions or comments may be invited.

Dated: August 24, 2011.

Jeff Slowikowski,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2011-22132 Filed 8-29-11; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Renewal of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed

and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Certification of Medical Necessity (CM-893). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 31, 2011.

ADDRESSES: Mr. Vincent Alvarez, U.S. Department of Labor, 200 Constitution Ave., NW., Room S-3201, Washington, DC 20210, telephone (202) 693-0372, fax (202) 693-1447, E-mail Alvarez.Vincent@dol.gov. Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. Background: The Office of Workers' Compensation Programs administers the Federal Black Lung Workers' Compensation Program. The enabling regulations of the Black Lung Benefits Act, at 20 CFR 725.701, establishes miner eligibility for medical services and supplies for the length of time required by the miner's condition and disability. 20 CFR 706 stipulates there must be prior approval before ordering an apparatus where the purchase price exceeds \$300.00. 20 CFR 725.707 provides for the ongoing supervision of the miner's medical care, including the necessity, character and sufficiency of care to be furnished; gives the authority to request medical reports and indicates the right to refuse payment for failing to submit any reports required. Because of the above legislation and regulations, it was necessary to devise a form to collect the required information. The CM-893, Certificate of Medical Necessity is completed by the coal miner's doctor and is used by the Division of Coal Mine Worker's Compensation to determine if the miner meets impairment standards to qualify for durable medical equipment, home nursing, and/or pulmonary rehabilitation. This information collection is currently approved for use through October 31, 2011.

II. Review Focus: The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions: The Department of Labor seeks the approval for the extension of this currently-approved information collection in order to carry out its responsibility to determine the eligibility for reimbursement of medical benefits to Black Lung recipients.

Agency: Office of Workers' Compensation Programs.

Type of Review: Extension.

Title: Certificate of Medical Necessity.

OMB Number: 1240-0024.

Agency Number: CM-893.

Affected Public: Individuals or households; Business or other for profit, and not-for-profit institutions.

Total Respondents: 2,500.

Total Annual Responses: 2,500.

Average Time per Response: 20 to 40 minutes.

Estimated Total Burden Hours: 965.

Frequency: On occasion.

Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operating/maintenance): \$1,335.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: August 24, 2011.

Vincent Alvarez,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2011-22122 Filed 8-29-11; 8:45 am]

BILLING CODE 4510-CK-P

NATIONAL COUNCIL ON DISABILITY**Sunshine Act Meetings**

TIME AND DATES: The Members of the National Council on Disability (NCD) will meet by phone on Wednesday, September 7, 2011, 1–3 p.m., ET.

PLACE: The meeting will occur by phone. NCD staff will participate in the call from the NCD office at 1331 F Street, NW., Suite 850, Washington, DC 20004. Interested parties may join the meeting in person at the NCD office or may join the phone line in a listening-only capacity using the following call-in information: Call-in number: 1–888–819–8001; Passcode: 3417257; Meeting Name: NCD Meeting. If asked, the conference call's leader's name is Aaron Bishop.

MATTERS TO BE CONSIDERED: The Council will meet by phone to discuss the budgets for fiscal years 2012 and 2013 as well as the agency's Performance and Accountability Report (PAR).

CONTACT PERSON FOR MORE INFORMATION: Anne Sommers, NCD, 1331 F Street, NW., Suite 850, Washington, DC 20004; 202–272–2004 (V), 202–272–2074 (TTY).

ACCOMMODATIONS: Those who plan to attend and require accommodations should notify NCD as soon as possible to allow time to make arrangements.

Dated: August 25, 2011.

Aaron Bishop,

Executive Director.

[FR Doc. 2011–22202 Filed 8–26–11; 11:15 am]

BILLING CODE 6820–MA–P

NATIONAL TRANSPORTATION SAFETY BOARD**Sunshine Act Meeting**

TIME AND DATE: 9:30 a.m., Tuesday, September 13, 2011.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The ONE item is open to the public.

MATTER TO BE CONSIDERED: 8220A Highway Accident Report—Truck-Tractor Semitrailer Median Crossover Collision With 15–Passenger Van, Munfordville, Kentucky, March 26, 2010.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact

Rochelle Hall at (202) 314–6305 by Friday, September 9, 2011.

The public may view the meeting via a live or archived webcast by accessing a link under “News & Events” on the NTSB home page at <http://www.nts.gov>.

FOR FURTHER INFORMATION CONTACT: Candi Bing, (202) 314–6403 or by e-mail at bingc@nts.gov.

Dated: August 26, 2011.

Candi R. Bing

Federal Register Liaison Officer.

[FR Doc. 2011–22253 Filed 8–26–11; 4:15 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–400; NRC–2011–0200]

Carolina Power & Light, Shearon Harris Nuclear Power Plant, Unit 1; Notice of Consideration of Approval of Application for Indirect License Transfer Resulting From the Proposed Merger Between Progress Energy, Inc. and Duke Energy Corporation, and Opportunity for Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of request for indirect license transfer, opportunity to comment, opportunity to request a hearing.

DATES: Comments must be filed by September 29, 2011. A request for a hearing must be filed by September 19, 2011.

ADDRESSES: Please include Docket ID NRC–2011–0200 in the subject line of your comments. For additional instructions on submitting comments and instructions on accessing documents related to this action, see “Submitting Comments and Accessing Information” in the SUPPLEMENTARY INFORMATION section of this document. You may submit comments by any one of the following methods:

- *Federal Rulemaking Web Site:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC–2011–0200. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; e-mail: Carol.Gallagher@nrc.gov.

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

- *Fax comments to:* RADB at 301–492–3446.

SUPPLEMENTARY INFORMATION:**Submitting Comments and Accessing Information**

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

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

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to pdr.resource@nrc.gov. The application dated March 30, 2011, is available electronically under ADAMS Accession No. ML11110A031.

- *Federal Rulemaking Web Site:* Public comments and supporting materials related to this notice can be found at <http://www.regulations.gov> by searching on Docket ID NRC–2011–0200. The application dated March 30, 2011, is available electronically under ADAMS Accession No. ML11110A031.

FOR FURTHER INFORMATION CONTACT: Farideh E. Saba, Senior Project Manager, Plant Licensing Branch 2–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone:

301-415-1447; fax number: 301-415-2102; e-mail: Farideh.Saba@nrc.gov.

The Commission is considering the issuance of an order under Title 10 of *Code of Federal Regulations* (10 CFR) 50.80 approving the indirect transfer of the Renewed Facility Operating License No. NFP-63 for Shearon Harris Nuclear Power Plant, Unit 1 (HNP), currently held by Carolina Power & Light Company, as owner and licensed operator.

According to the application for approval dated March 30, 2011, filed by Carolina Power & Light Company (CP&L, the licensee), Progress Energy, Inc. (Progress Energy, the licensee's current ultimate parent corporation) seeks approval pursuant to 10 CFR 50.80 for indirect transfer of control of HNP, along with Brunswick Steam Electric Plant (BSEP), Units 1 and 2, including BSEP Independent Spent Fuel Storage Installation, H.B. Robinson Steam Electric Plant (Robinson), Unit 2, Robinson Independent Spent Fuel Storage Installations, and Crystal River Unit 3 Nuclear Generating Plant. Progress Energy would merge with Duke Energy Corporation (Duke Energy). The merged company would become the ultimate parent of the current licensee. CP&L will continue to own and operate the licensed facility in accordance with the license.

According to the application, under the terms of the Merger Agreement, Diamond Acquisition Corporation (Merger Sub), a wholly owned direct subsidiary of Duke Energy, will merge with and into Progress Energy. Progress Energy will become a wholly owned direct subsidiary of Duke Energy and the former shareholders of Progress Energy will become shareholders of Duke Energy. The current licensee will remain a wholly owned subsidiary of Progress Energy and will continue to operate the HNP facility.

According to the application, it is anticipated that Duke Energy shareholders will own approximately 63 percent of the combined company and Progress Energy shareholders will own approximately 37 percent of the combined company on a fully diluted basis.

According to the application, when the transaction is completed, Duke Energy will have an eighteen-member board of directors. All eleven current directors of Duke Energy will continue as directors when the transaction is complete, subject to their ability and willingness to serve. Progress Energy, after consultation with Duke Energy, designated seven of the current directors of Progress Energy to be added to the board of directors of Duke Energy when

the transaction is complete, similarly subject to their ability and willingness to serve.

According to the application, the technical qualifications of the licensees are not affected by the proposed indirect transfers of control of the HNP license. The current licensee will at all times remain the licensed operator of HNP. No conforming amendments will be required to the facility operating license as a result of the proposed transaction. The nuclear operating organization for the licensed facility is expected to remain essentially unchanged as a result of the acquisition. Specifically, the proposed indirect transfer of control will not result in any change in the role of the CP&L as the licensed operator of the licensed facility and will not result in any changes to its financial qualifications, decommissioning funding assurance, or technical qualifications. CP&L will retain the requisite qualifications to own and operate the licensed facility.

No physical changes to the above listed facilities or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention via electronic submission through the NRC E-Filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C "Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings," of 10 CFR part 2. In particular, such requests and petitions

must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)-(viii). NRC regulations are accessible electronically from the NRC Library on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/cfr/>.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at hearing.docket@nrc.gov, or by telephone at 301-415-1677, to request (1) A digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's

public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through Electronic Information Exchange, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by e-mail at

MSHD.Resource@nrc.gov, or by a toll-free call at 866-672-7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at <http://ehd1.nrc.gov/EHD/>, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 20 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request

should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii).

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

Within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this license transfer application, see the application dated March 30, 2011, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, or 301-415-4737 or by e-mail to pdr.resource@nrc.gov.

Dated at Rockville, Maryland this 22nd day of August 2011.

For the Nuclear Regulatory Commission.

Farideh E. Saba,

Senior Project Manager, Plant Licensing Branch 2-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011-22100 Filed 8-29-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–325 and 50–324; NRC–2011–0199; Docket No. 72–6]

Carolina Power & Light; Brunswick Steam Electric Plant, Units 1 and 2; Independent Spent Fuel Storage Installation; Notice of Consideration of Approval of Application for Indirect License Transfers Resulting From the Proposed Merger Between Progress Energy, Inc. and Duke Energy Corporation, and Opportunity for Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of request for indirect license transfer, opportunity to comment and to request a hearing.

DATES: Comments must be filed by September 29, 2011. A request for a hearing must be filed by September 19, 2011.

ADDRESSES: Please include Docket ID NRC–2011–0199 in the subject line of your comments. For additional instructions on submitting comments and instructions on accessing documents related to this action, see “Submitting Comments and Accessing Information” in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods:

- *Federal Rulemaking Web Site:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC–2011–0199. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; e-mail: Carol.Gallagher@nrc.gov.

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

- *Fax comments to:* RADB at 301–492–3446.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

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

- *NRC’s Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC’s PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

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

- *Federal Rulemaking Web Site:* Public comments and supporting materials related to this notice can be found at <http://www.regulations.gov> by searching on Docket ID NRC–2011–0199. The application dated March 30, 2011, is available electronically under ADAMS Accession No. ML11110A031.

FOR FURTHER INFORMATION CONTACT: Farideh E. Saba, Senior Project Manager, Plant Licensing Branch 2–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301–415–1447; fax number: 301–415–2102; e-mail: Farideh.Saba@nrc.gov.

The Commission is considering the issuance of an order under Title 10 of Code of Federal Regulations (10 CFR) 50.80 approving the indirect transfer of the Renewed Facility Operating Licenses Nos. DPR–71 and DPR–62 for the Brunswick Steam Electric Plant (BSEP), Units 1 and 2, including the BSEP Independent Spent Fuel Storage Installation, currently held by Carolina Power & Light Company, as owner and licensed operator.

According to the application for approval dated March 30, 2011, filed by Carolina Power & Light Company (CP&L, the licensee), Progress Energy,

Inc. (Progress Energy, the licensee’s current ultimate parent corporation) seeks approval pursuant to 10 CFR 50.80 for indirect transfer of control of BSEP Units 1 and 2, including the BSEP Independent Spent Fuel Storage Installation, along with Shearon Harris Nuclear Power Plant, Unit 1, H.B. Robinson Steam Electric Plant (Robinson), Unit 2, Robinson Independent Spent Fuel Storage Installations, and Crystal River Unit 3 Nuclear Generating Plant. Progress Energy would merge with Duke Energy Corporation (Duke Energy). The merged company would become the ultimate parent of the current licensee. CP&L will continue to own and operate the licensed facility in accordance with the licenses.

According to the application, under the terms of the Merger Agreement, Diamond Acquisition Corporation (Merger Sub), a wholly owned direct subsidiary of Duke Energy, will merge with and into Progress Energy. Progress Energy will become a wholly owned direct subsidiary of Duke Energy and the former shareholders of Progress Energy will become shareholders of Duke Energy. The current licensee will remain a wholly owned subsidiary of Progress Energy and will continue to operate the BSEP facility.

According to the application, it is anticipated that Duke Energy shareholders will own approximately 63 percent of the combined company and Progress Energy shareholders will own approximately 37 percent of the combined company on a fully diluted basis.

According to the application, when the transaction is completed, Duke Energy will have an eighteen-member board of directors. All eleven current directors of Duke Energy will continue as directors when the transaction is complete, subject to their ability and willingness to serve. Progress Energy, after consultation with Duke Energy, designated seven of the current directors of Progress Energy to be added to the board of directors of Duke Energy when the transaction is complete, similarly subject to their ability and willingness to serve.

According to the application, the technical qualifications of the licensees are not affected by the proposed indirect transfers of control of the BSEP licenses. The current licensee will at all times remain the licensed operator of BSEP. No conforming amendments will be required to the facility operating licenses as a result of the proposed transaction. The nuclear operating organizations for the licensed facility are expected to remain essentially

unchanged as a result of the acquisition. Specifically, the proposed indirect transfers of control will not result in any change in the role of the CP&L as the licensed operator of the BSEP facility and will not result in any changes to its financial qualifications, decommissioning funding assurance, or technical qualifications. CP&L will retain the requisite qualifications to own and operate the licensed facility.

No physical changes to the BSEP facility or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention via electronic submission through the NRC E-Filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C "Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings," of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)-(viii). NRC regulations are accessible electronically from the NRC Library on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/cfr/>.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at hearing.docket@nrc.gov, or by telephone at (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve

documents through Electronic Information Exchange, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by e-mail at MSHD.Resource@nrc.gov, or by a toll-free call at (866) 672-7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the

Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at <http://ehd1.nrc.gov/EHD/>, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 20 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii).

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the presiding officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

Within 30 days from the date of publication of this notice, persons may

submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this license transfer application, see the application dated March 30, 2011, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>.

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, or 301-415-4737 or by e-mail to pdr.resource@nrc.gov.

Dated at Rockville, Maryland this 22nd day of August 2011.

For the Nuclear Regulatory Commission.

Farideh E. Saba,

Senior Project Manager, Plant Licensing Branch 2-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011-22103 Filed 8-29-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50.302; NRC-2011-0198]

Florida Power Corporation, Crystal River Unit No. 3 Nuclear Generating Plant; Notice of Consideration of Approval of Application for Indirect License Transfers Resulting From the Proposed Merger Between Progress Energy, Inc. and Duke Energy Corporation, and Opportunity for Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of request for indirect license transfer, opportunity to comment and to request a hearing.

DATES: Comments must be filed by September 29, 2011. A request for a

hearing must be filed by September 19, 2011.

ADDRESSES: Please include Docket ID NRC-2011-0198 in the subject line of your comments. For additional instructions on submitting comments and instructions on accessing documents related to this action, see "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods:

- *Federal Rulemaking Web Site:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2011-0198. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov.

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB-05-B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

- *Fax comments to:* RADB at 301-492-3446.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

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

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at

<http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The application dated March 30, 2011, is available electronically under ADAMS Accession No. ML11110A031.

• *Federal Rulemaking Web Site:*

Public comments and supporting materials related to this notice can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2011-0198.

FOR FURTHER INFORMATION CONTACT:

Farideh E. Saba, Senior Project Manager, Plant Licensing Branch 2-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-415-1447; fax number: 301-415-2102; e-mail: Farideh.Saba@nrc.gov.

The Commission is considering the issuance of an order under Title 10 of Code of Federal Regulations (10 CFR) 50.80 approving the indirect transfer of the Facility Operating License No. DPR-72 for Crystal River Unit 3 Nuclear generating plant (CR-3), currently held by Florida Power Corporation, as owner and licensed operator.

According to an application dated March 30, 2011, filed by Florida Power Corporation (FPC, the licensee), Progress Energy, Inc. (Progress Energy, the licensee's current ultimate parent corporation) seeks approval pursuant to 10 CFR 50.80 for indirect transfer of control of CR-3, along with Brunswick Steam Electric Plant (BSEP), Units 1 and 2, including BSEP Independent Spent Fuel Storage Installation, Shearon Harris Nuclear Power Plant, Unit 1, H.B. Robinson Steam Electric Plant (Robinson), Unit 2, and Robinson Independent Spent Fuel Storage Installations. Progress Energy would merge with Duke Energy Corporation (Duke Energy). The merged company would become the ultimate parent of the current licensee. FPC will continue to own and operate the licensed facility in accordance with the License.

According to the application, under the terms of the Merger Agreement, Diamond Acquisition Corporation (Merger Sub), a wholly-owned direct subsidiary of Duke Energy, will merge with and into Progress Energy. Progress Energy will become a wholly owned direct subsidiary of Duke Energy and

the former shareholders of Progress Energy will become shareholders of Duke Energy. The current licensee will remain a wholly owned subsidiary of Progress Energy and will continue to operate CR-3 facility.

According to the application, it is anticipated that Duke Energy shareholders will own approximately 63 percent of the combined company and Progress Energy shareholders will own approximately 37 percent of the combined company on a fully diluted basis.

According to the application, when the transaction is completed, Duke Energy will have an eighteen-member board of directors. All eleven current directors of Duke Energy will continue as directors when the transaction is complete, subject to their ability and willingness to serve. Progress Energy, after consultation with Duke Energy, designated seven of the current directors of Progress Energy to be added to the board of directors of Duke Energy when the transaction is complete, similarly subject to their ability and willingness to serve.

According to the application, the technical qualifications of the licensees are not affected by the proposed indirect transfers of control of the CR-3 license. The current licensee will at all times remain the licensed operator of CR-3. No conforming amendments will be required to the facility operating license as a result of the proposed transaction. The nuclear operating organization for the licensed facility is expected to remain essentially unchanged as a result of the acquisition. Specifically, the proposed indirect transfer of control will not result in any change in the role of the FPC as the licensed operator of the licensed facilities and will not result in any changes to their financial qualifications, decommissioning funding assurance, or technical qualifications. FPC will retain the requisite qualifications to own and operate the licensed facility.

No physical changes to the above listed facilities or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed merger will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and

orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention via electronic submission through the NRC E-Filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C "Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings," of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)-(viii). NRC regulations are accessible electronically from the NRC Library at <http://www.nrc.gov/reading-rm/doc-collections/cfr/>.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at hearing.docket@nrc.gov, or by telephone at 301-415-1677, to request (1) A digital ID certificate, which allows the

participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through Electronic Information Exchange, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice

confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by e-mail at MSHD.Resource@nrc.gov, or by a toll-free call at (866) 672-7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is

available to the public at <http://ehd1.nrc.gov/EHD/>, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 20 days from the date of publication of this notice. Nontimely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii).

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

Within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this license transfer application, see the application dated March 30, 2011, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in

ADAMS should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, or 301-415-4737 or by e-mail to pdr.resource@nrc.gov.

Dated at Rockville, Maryland this 22nd day of August 2011.

For the Nuclear Regulatory Commission.

Farideh E. Saba,

Senior Project Manager, Plant Licensing Branch 2-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

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NUCLEAR REGULATORY COMMISSION

[NRC-2011-0195; 030-33792; 12-16941-03 (terminated); EA-10-161]

In the Matter of Professional Service Industries, Inc., Oakbrook Terrace, IL; Confirmatory Order (Effective Immediately)

I

Professional Service Industries, Inc., (PSI) was the holder of Materials License No. 12-16941-03 issued by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to Title 10 of the Code of Federal Regulations (10 CFR) part 30 on September 13, 1995, and terminated on January 29, 2010. The license authorized PSI to possess and use sealed radioactive sources in performance of industrial radiographic activities in Rock Springs, Wyoming, and at temporary job sites within Federal jurisdiction.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted on July 11, 2011.

II

On March 31, 2009, the NRC conducted an inspection at the PSI Oakbrook Terrace, Illinois, facility, and on July 27 through 30, 2009, at the PSI Rock Springs, Wyoming, facility and at a temporary jobsite in Wyoming. The NRC also continued to do in-office inspection through April 25, 2011. On April 10, 2009, the NRC Office of Investigations (OI) initiated an investigation (OI Case No. 3-2009-021) to determine whether management individuals at the PSI Rock Springs, Wyoming, office engaged in deliberate misconduct by allowing uncertified radiographers to conduct radiography and by failing to ensure that qualified individuals were present to maintain proper surveillance during radiographic operations.

The NRC inspection identified that safety and security-related violations had occurred at PSI's Rock Springs, Wyoming, office, and at temporary job sites in the vicinity of the Rock Springs, Wyoming, office during 2008 and 2009. The apparent safety violations included PSI's failure to: (1) Ensure that individuals acting as radiographers had required training; (2) ensure that individuals acting as radiographer's assistants had required training and that there were two qualified individuals present when performing radiography at temporary jobsites; (3) provide a radiographer's assistant with a personnel dosimeter to wear while conducting radiographic operations; (4) conduct annual reviews of its Radiation Protection Program content and implementation; (5) provide annual reports of the doses received by monitored individuals to those individuals; (6) use physical barriers for the restricted area perimeter; (7) prevent unauthorized personnel from being within the restricted area boundaries while industrial radiographic equipment was in use; and (8) conduct reasonable surveys to assure compliance with public dose limits. The security-related violations are described in the non-publicly available Appendix to this Confirmatory Order.

The NRC investigation determined that a manager in the PSI Rock Springs, Wyoming, office willfully assigned an individual to perform radiography on at least one occasion, knowing that the individual was not properly qualified. The NRC investigation also determined that an individual deliberately accepted the assignment and performed radiography, knowing that his Industrial Radiography Radiation Safety Personnel (IRRSP) card had expired.

On July 11, 2011, the NRC and PSI met in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. Alternative Dispute Resolution is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement on resolving any differences regarding the dispute. This Confirmatory Order is issued pursuant to the agreement reached during the ADR process.

III

In response to the NRC's offer, PSI requested use of the NRC's ADR process to resolve differences it had with the NRC. During an ADR session on July 11, 2011, a preliminary settlement agreement was reached. The elements of the agreement consisted of the following:

1. Within 90 days of the issuance of this Confirmatory Order, PSI agrees to review the training, certification and security authorization of each employee performing or assisting with radiography. Within 30 days of the completion of the review, a corporate level individual will sign a statement indicating whether the employee is authorized to work with licensed material. For radiographers, this statement will include the expiration date for their radiography training required by 10 CFR 34.43 or equivalent State requirements. A copy of the statement will be provided to the employee, the employee's immediate supervisor, and the local radiation safety officer, as well as be kept by the corporate office. Prior to the employee being assigned to a radiography crew, the person assigning work will verify that the employee is qualified. PSI will implement a periodic (at least biennial) review of the qualification statements for at least the next five years. This item will be included as a line item in the PSI annual audit (required by 10 CFR 20.1101 or the equivalent State requirements) of the Radiation Safety Program for the next five years; it may be lined through for those years not requiring review.

2. Within 90 days of the issuance of this Confirmatory Order, PSI agrees to develop and implement procedures for the corporate radiation safety office to directly perform or to observe the local radiation safety officer's performance of the field inspections/audits of radiographers and radiographer assistants required by 10 CFR 34.43(e) or equivalent State requirements. The procedures shall define the periodicity of the inspections/audits, such that each branch office is inspected by the corporate radiation safety staff at least once every year. These procedures will be maintained and revised based on lessons learned for a minimum of five years. These procedures will include safety and security areas to be evaluated by corporate radiation staff and areas that will be evaluated by branch office radiation staff.

3. Within 90 days of the issuance of this Confirmatory Order, PSI agrees to develop and implement a disciplinary program with a graded approach for radiation safety and security infractions. Under the program, corporate staff will have the authority to take direct disciplinary action for radiation safety and security issues. The disciplinary program will emphasize individual responsibility for radiation safety and radioactive material security, and will encourage reporting safety and security concerns, including the employee

hotline. Prior to implementation of the program, PSI will train its employees on the program. PSI agrees to perform biennial verification that the procedure remains current for the next five years (minimum of two verifications). This item will be included as a line item in the PSI annual audit of the Radiation Safety Program for the next five years; it may be lined through for those years not requiring review.

4. Within 90 days of the issuance of this Confirmatory Order, PSI agrees to develop, implement, and provide training to all radiation safety officers, radiographers, and assistant radiographers. Additionally, this training shall be provided to new employees prior to working with licensed material for the first time. Refresher training will be provided annually (at intervals not to exceed 12 months) thereafter for all employees involved in licensed activities. Records of training materials and course attendees shall be maintained for at least five years. Verification of training will be included as a line item in the PSI annual audit of the Radiation Safety Program for the next five years. The training shall address at a minimum:

(a) A review of requirements for safe and secure performance of radiography, including review of PSI's Operating and Emergency Procedures;

(b) A review of any radiation mishaps, audit deficiencies, or regulatory violations within PSI as well as significant events within the industry (if known);

(c) A review of the consequences of and the potential actions that could be taken for deliberate violations of PSI requirements;

(d) A review of PSI's license conditions and regulations governing the use of licensed material (including appropriate reporting requirements such as 10 CFR 30.50 and 10 CFR 34.101; and employee protection requirements such as those contained in 10 CFR 30.7, or the equivalent State requirements);

(e) A review of the changes made to PSI procedures and policies resulting from the terms of this Confirmatory Order.

5. Within 90 days of the date of this Confirmatory Order, PSI agrees to develop and schedule a training session on safety culture and the role and responsibility of the radiation safety officer to maintain an effective safety culture. The training shall be presented to each radiation safety officer within 180 days of the date of this Confirmatory Order. The training shall be conducted annually for five years and provided to newly assigned radiation safety officers within 30 days

of assignment, if that assignment occurs greater than 180 days after the issuance of this Confirmatory Order. Verification of training will be included as a line item in the PSI annual audit of the Radiation Safety Program for the next five years.

6. PSI agrees to include as part of the annual reviews of the Radiation Safety Program (including security aspects), an assessment of the effectiveness of and adherence to the terms of this Confirmatory Order. The assessment will be summarized and provided to all PSI employees who have responsibilities in the use of radiography. The complete assessment will be provided to corporate management and retained for at least five years from the date of the audit.

7. [Official Use Only—Security-Related Information. Described in the non-publicly available Appendix to this Confirmatory Order].

8. Within 30 days of issuance of this Confirmatory Order, PSI agrees to revise procedures to increase the independence of inspections/audits of each radiographer and assistant radiographer for the next two years following issuance of this Confirmatory Order. The revised procedure will have at least one quarterly inspection/audit at each branch office be conducted by an independent auditor (corporate radiation safety officer, radiation safety officer from a different branch office, an independent consultant, or another individual meeting the NRC's requirements for a radiation safety officer). As prescribed by procedure, the field audits shall be unannounced and the auditor shall observe PSI radiographers actually performing radiographic operations. Serious deficiencies (such as untrained personnel, not wearing dosimetry, unsafe operations or security issues) identified during the audit will be discussed with the local and corporate radiation safety officers within 24 hours of the observation and a plan to correct the problem will be put into place within the following 48 hours following the conversation. The auditor will provide both the local and corporate radiation safety officers with a copy of the audit results, including discussion of areas needing improvement. The annual audit of the Radiation Safety Program will include verification that field audit deficiencies have been corrected.

9. PSI agrees to make a one-time submittal to the Director, Division of Nuclear Materials Safety, U.S. Nuclear Regulatory Commission, Region III, 2443 Warrenville Road, Lisle, IL 60532-4352, as to how each of the above items

was completed, including copies of procedure changes and training materials, within 30 days following the completion of the last item (which is scheduled to be completed no later than 180 days after the issuance of this Confirmatory Order). PSI also agrees to provide the NRC a summary of its annual reviews of the Radiation Safety Program, including information about how this Confirmatory Order has been met for the next five years following issuance of this Confirmatory Order. This summary shall be provided to the NRC within 60 days of completion of the annual audit.

10. PSI agrees to provide the NRC with a minimum of eight days notice prior to entering NRC's jurisdiction beyond the requirements of 10 CFR 150.20, for a period of three years following issuance of this Confirmatory Order.

11. PSI agrees to provide written long-term corrective actions for each of the specific safety and security violations enclosed with the Order within 60 days of the issuance of this Confirmatory Order.

12. In consideration of the above actions on the part of PSI, NRC agrees to limit the civil penalty amount in this enforcement action to \$15,000. Accordingly, within 30 days of the date of this Confirmatory Order, PSI shall pay the civil penalty in the amount of \$15,000 in accordance with NRC Technical Report (NUREG)/BR-0254 and submit to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, a statement indicating when and by what method payment was made.

13. In consideration of the above actions on the part of PSI, NRC agrees to enclose Notices of Violation to this Confirmatory Order documenting the eight safety violations described above, the security-related violations described in the non-publicly available Appendix to this Confirmatory Order, and the severity level of each violation, with no additional response requirements beyond the terms specified in this agreement.

14. PSI makes no admission that any employee or former employee deliberately violated any NRC requirements and the NRC agrees not to pursue any further enforcement action in connection with events described in the NRC's May 16, 2011, letter to PSI. This does not prohibit the NRC from taking enforcement action in accordance with the NRC Enforcement Policy if PSI commits similar violations in the future or violates this Confirmatory Order.

On August 9, 2011, the licensee consented to issuing this Confirmatory

Order with the commitments, as described in Section V below. PSI further agreed that this Confirmatory Order is to be effective upon issuance and that it has waived its right to a hearing.

IV

Since the licensee has agreed to take additional actions to address NRC concerns, as set forth in Item III above, the NRC has concluded that its concerns can be resolved through issuance of this Confirmatory Order.

We find that PSI's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, we have determined that public health and safety require that PSI's commitments be confirmed by this Confirmatory Order. Based on the above and PSI's consent, this Confirmatory Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 30, *it is hereby ordered, effective immediately, that:*

1. Within 90 days of the issuance of this Confirmatory Order, PSI shall review the training, certification and security authorization of each employee performing or assisting with radiography. Within 30 days of the completion of the review, a corporate level individual shall sign a statement indicating whether the employee is authorized to work with licensed material. For radiographers, this statement shall include the expiration date for their radiography training required by 10 CFR 34.43 or equivalent State requirements. A copy of the statement shall be provided to the employee, the employee's immediate supervisor, and the local radiation safety officer, as well as be kept by the corporate office. For the next five years, the person assigning work will verify that the employee is qualified prior to the employee being assigned to a radiography crew. PSI shall implement a periodic (at least biennial) review of the qualification statements for at least the next five years. This item shall be included as a line item in the PSI annual audit (required by 10 CFR 20.1101 or the equivalent State requirements) of the Radiation Safety Program for the next five years; it may be lined through for those years not requiring review.

2. Within 90 days of the issuance of this Confirmatory Order, PSI shall develop and implement procedures for the corporate radiation safety office to directly perform or to observe the local radiation safety officer's performance of the field inspections/audits of radiographers and radiographer assistants required by 10 CFR 34.43(e) or equivalent State requirements. The procedures shall define the periodicity of the inspections/audits, such that each branch office is inspected by the corporate radiation safety staff at least once every year. These procedures shall be maintained and revised based on lessons learned for a minimum of five years. These procedures shall include safety and security areas to be evaluated by corporate radiation staff and areas that shall be evaluated by branch office radiation staff.

3. Within 90 days of the issuance of this Confirmatory Order, PSI shall develop and implement a disciplinary program with a graded approach for radiation safety and security infractions. Under the program, corporate staff shall have the authority to take direct disciplinary action for radiation safety and security issues. The disciplinary program shall emphasize individual responsibility for radiation safety and radioactive material security, and shall encourage reporting safety and security concerns, including the employee hotline. Prior to implementation of the program, PSI shall train its radiography employees on the program. PSI shall perform biennial verification that the procedure remains current and that the program remains in effect for the next five years (minimum of two verifications). This item shall be included as a line item in the PSI annual audit of the radiography Radiation Safety Program for the next five years; it may be lined through for those years not requiring review.

4. Within 90 days of the issuance of this Confirmatory Order, PSI shall develop, implement, and provide training to all radiography radiation safety officers, radiographers, and assistant radiographers. For the next five years, this training shall be provided to new radiography employees prior to working with licensed material for the first time. Additionally, for the next five years, refresher training will be provided annually (at intervals not to exceed 12 months) for all employees involved in licensed activities. Records of training materials and course attendees shall be maintained for at least five years. Verification of training shall be included as a line item in the PSI annual audit of the Radiation Safety

Program for the next five years. The training shall address at a minimum:

(a) A review of requirements for safe and secure performance of radiography, including review of PSI's Operating and Emergency Procedures;

(b) A review of any radiation mishaps, audit deficiencies, or regulatory violations within PSI as well as significant events within the industry (if known);

(c) A review of the consequences of and the potential actions that could be taken for deliberate violations of PSI requirements;

(d) A review of PSI's license conditions and regulations governing the use of licensed material (including appropriate reporting requirements such as 10 CFR 30.50 and 10 CFR 34.101; and employee protection requirements such as those contained in 10 CFR 30.7 or the equivalent State requirements);

(e) A review of the changes made to PSI procedures and policies resulting from the terms of this Confirmatory Order.

5. Within 90 days of the date of this Confirmatory Order, PSI shall develop and schedule a training session on safety culture and the role and responsibility of the radiography radiation safety officer to maintain an effective safety culture. The training shall be presented to each radiation safety officer within 180 days of the date of this Confirmatory Order. The training shall be conducted annually for five years and provided to newly assigned radiation safety officers within 30 days of assignment, if that assignment occurs greater than 180 days after the issuance of this Confirmatory Order. Verification of training shall be included as a line item in the PSI annual audit of the Radiation Safety Program for the next five years.

6. PSI shall include as part of the annual reviews of the Radiation Safety Program (including security-related aspects), an assessment of the effectiveness of and adherence to the terms of this Confirmatory Order. The assessment shall be summarized and provided to all PSI employees who have responsibilities in the use of radiography. The complete assessment shall be provided to corporate management and retained for at least five years from the date of the audit.

7. [Official Use Only—Security-Related Information. Described in the non-publicly available Appendix to this Confirmatory Order].

8. Within 30 days of issuance of this Confirmatory Order, PSI shall revise procedures to increase the independence of inspections/audits of each radiographer and assistant

radiographer for the next two years following issuance of this Confirmatory Order. The revised procedure shall have at least one quarterly inspection/audit at each branch office be conducted by an independent auditor (corporate radiation safety officer, radiation safety officer from a different branch office, an independent consultant, or another independent meeting the NRC's requirements for a radiation safety officer). As prescribed by procedure, the field audits shall be unannounced and the auditor shall observe PSI radiographers actually performing radiographic operations. Serious deficiencies (such as untrained personnel, not wearing dosimetry, unsafe operations or security issues) identified during the audit shall be discussed with the local and corporate radiation safety officers within 24 hours of the observation and a plan to correct the problem shall be put into place within the following 48 hours following the conversation. The auditor shall provide both the local and corporate radiation safety officers with a copy of the audit results, including discussion of areas needing improvement. The annual audit of the Radiation Safety Program shall include verification that field audit deficiencies have been corrected.

9. PSI shall make a one-time submittal to the Director, Division of Nuclear Materials Safety, U.S. Nuclear Regulatory Commission, Region III, 2443 Warrenville Road, Lisle, IL 60532-4352, as to how each of the above items was completed, including copies of procedure changes and training materials, within 30 days following the initial implementation of the last item (which is scheduled to be implemented no later than 180 days after the issuance of this Confirmatory Order). PSI shall provide the NRC a summary of its annual reviews of the Radiation Safety Program, including information about how this Confirmatory Order has been met for the next five years following issuance of this Confirmatory Order. This summary shall be provided to the NRC within 60 days of completion of the annual audit.

10. PSI shall provide the NRC with a minimum of eight days notice prior to entering NRC jurisdiction beyond the requirements of 10 CFR 150.20, for a period of three years following issuance of this Confirmatory Order.

11. PSI shall provide written long-term corrective actions for each of the specific safety and security-related violations enclosed with the Order within 60 days of the issuance of this Confirmatory Order.

12. Within 30 days of the date of this Confirmatory Order, PSI shall pay the civil penalty in the amount of \$15,000 in accordance with NUREG/BR-0254 and submit to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, a statement indicating when and by what method payment was made.

The Regional Administrator, Region III, NRC, may, in writing, relax or rescind any of the above conditions upon demonstration by PSI of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than PSI, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension.

All documents filed in the NRC's adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at hearing.docket@nrc.gov, or by telephone at 301-415-1677, to request: (1) A digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon

this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or

their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by e-mail at MSHD.Resource@nrc.gov, or by a toll-free call at (866) 672-7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to

copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a person (other than PSI) requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Confirmatory Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received.

A request for hearing shall not stay the immediate effectiveness of this order.

For the U.S. Nuclear Regulatory Commission.

Dated this 18th day of August 2011.

Mark A. Satorius,

Regional Administrator, NRC Region III.

[FR Doc. 2011-22109 Filed 8-29-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Thermal Hydraulics Phenomena; Notice of Meeting

The ACRS Subcommittee on Thermal Hydraulics Phenomena will hold a meeting on September 7, 2011, Room T-2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, September 7, 2011—8:30 a.m. Until 12 p.m.

The Subcommittee will review Draft Final Revision 4 to Regulatory Guide 1.82, "Water Sources for Long-Term Recirculation Cooling Following a Loss-of-Coolant Accident." The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Mrs. Ilka Berrios (Telephone 301-415-3179 or E-mail: Ilka.Berrios@nrc.gov) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be e-mailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010, (75 FR 65038-65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/acrs>. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the website cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please contact Mr. Theron Brown (Telephone 240-888-9835) to be escorted to the meeting room.

Dated: August 17, 2011.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011-22108 Filed 8-29-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2011-0006]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of August 29, September 5, 12, 19, 26, and October 3, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of August 29, 2011

Tuesday, August 30, 2011

8:55 a.m. Affirmation Session (Public Meeting) (Tentative)

Final Rule: Enhancements to Emergency Preparedness Regulations (10 CFR part 50 and 10 CFR part 52) (RIN-3150-A110) (Tentative)

This meeting will be Webcast live at the Web address—<http://www.nrc.gov>.

9 a.m. Information Briefing on Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) Related Activities (Public Meeting); (Contact: Aida Rivera-Varona, 301-415-4001)

This meeting will be Webcast live at the Web address—<http://www.nrc.gov>.

Week of September 5, 2011—Tentative

There are no meetings scheduled for the week of September 5, 2011.

Week of September 12, 2011—Tentative

There are no meetings scheduled for the week of September 12, 2011.

Week of September 19, 2011—Tentative

There are no meetings scheduled for the week of September 19, 2011.

Week of September 26, 2011—Tentative

Tuesday, September 27, 2011

9 a.m. Mandatory Hearing—Southern Nuclear Operating Co., et al.;

Combined Licenses for Vogtle Electric Generating Plant, Units 3 and 4, and Limited Work Authorizations (Public Meeting); (Contact: Rochelle Baval, 301-415-1651).

This meeting will be webcast live at the Web address—<http://www.nrc.gov>.

Week of October 3, 2011—Tentative

There are no meetings scheduled for the week of October 3, 2011.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415-1292. Contact person for more information: Rochelle Baval, (301) 415-1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/public-involve/public-meetings/schedule.html>.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301-415-6200, TDD: 301-415-2100, or by e-mail at william.dosch@nrc.gov. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301-415-1969), or send an e-mail to darlene.wright@nrc.gov.

Dated: August 25, 2011.

Richard J. Laufer,

Technical Coordinator, Office of the Secretary.

[FR Doc. 2011-22267 Filed 8-26-11; 4:15 pm]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Request for a License To Import Radioactive Waste

Pursuant to 10 CFR 110.70 (b) "Public Notice of Receipt of an Application," please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an import license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link <http://www.nrc.gov/reading-rm.html> at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). Information about filing electronically is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. To ensure timely electronic filing, at least 5 (five) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at hearingdocket@nrc.gov, or by calling (301) 415-1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications.

The information concerning this import license application follows.

NRC IMPORT LICENSE APPLICATION
[Description of Material]

Name of applicant date of application date received application No. docket No.	Material type	Total quantity	End use	Country from
GE Hitachi Nuclear Energy, LLC. August 1, 2011, Au- gust 5, 2011, IW030. 11005957	Radioactive waste consisting of used Cobalt-60 radio- active sealed sources.	Up to 210 Cobalt-60 sealed sources. Combined total activity level for all sources not to exceed 7955 TBq.	Recycling, forensic testing or storage and disposition.	China

For the Nuclear Regulatory Commission.

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

Scott Moore,

*Deputy Director, Office of International
Programs.*

[FR Doc. 2011-22102 Filed 8-29-11; 8:45 am]

BILLING CODE 7590-01-P

POSTAL REGULATORY COMMISSION

[Docket No. CP2011-68; Order No. 817]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to enter into an additional agreement under the “Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1” product offering. This document invites public comments on the request and addresses several related procedural steps.

DATES: *Comments are due:* August 29, 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:

- I. Introduction
- II. Notice of Filing
- III. Ordering Paragraphs

I. Introduction

On August 16, 2011, the Postal Service filed a notice, pursuant to 39 CFR 3015.5, that it has entered into an additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 agreement.¹ The Notice concerns the inbound portion of a Multi-Product Bilateral Agreement with China Post Group (China Post 2011 Agreement) that the Postal Service seeks to add to the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product.

In Order No. 546, the Commission approved the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product and a functionally equivalent agreement, Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement). The Notice states that for other competitive products, the Commission has authorized functionally equivalent agreements to be included within the product, provided that they meet the requirements of 39 U.S.C. 3633.² The Postal Service asserts that its filing demonstrates that the China Post 2011 Agreement fits within the Mail Classification Schedule (MCS) language in Governors’ Decision No. 10-3 originally filed in Docket Nos. MC2010-34 and CP2010-95. Additionally, it contends that the China Post 2011 Agreement to deliver inbound Air Parcel Post (Air CP), Surface Parcel Post (Surface CP) and Express Mail Service (EMS) in the United States is functionally equivalent to the agreement to deliver inbound Air CP, Surface CP and EMS in the TNT Agreement. The

¹ Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator, August 16, 2011 (Notice). *See also* Docket Nos. MC2010-34 and CP2010-95, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, September 29, 2010 (Order No. 546).

² *See* Docket No. CP2009-50, Order Granting Clarification and Adding Global Expedited Package Services 2 to the Competitive Product List, August 28, 2009 (Order No. 290).

Postal Service requests that the China Post 2011 Agreement be included within the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product. *Id.* at 3.

In support of its Notice, the Postal Service filed four attachments as follows:

- Attachment 1—a redacted copy of the China Post 2011 Agreement;
- Attachment 2—a certified statement required by 39 CFR 3015.5(c)(2);
- Attachment 3—a redacted copy of Governors’ Decision No. 10-3 which establishes prices and classifications for Inbound Competitive Multi-Service Agreements with Foreign Postal Operators agreements, proposed MCS language, formulas for prices, certification of the Governors’ vote and certification of compliance with 39 U.S.C. 3633(a); and
- Attachment 4—an application for non-public treatment of materials to maintain redacted portions of the agreement and supporting documents under seal.

China Post 2011 Agreement. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5 and in accordance with Order No. 546. The Postal Service states that the competitive services in the China Post 2011 Agreement include rates for Air CP, Surface CP, and EMS, requires performance metrics for late delivery, late information transmission and missing delivery information and imposes associated penalties. *Id.* at 3. The Postal Service states it intends for the effective date for the rates for inbound Air CP, Surface CP and EMS to be January 1, 2012.³ *Id.* at 3, Attachment 1 at 2. It maintains that the rates in the agreement are intended to remain in

³ Article 22 of the China Post 2011 Agreement provides that if an effective date for the settlement rates for EMS in the China Post 2011 Agreement is established, the China Post-United States Bilateral Agreement that was approved in Docket Nos. MC2010-13 and CP2010-12 will terminate at 11:59 p.m. on the day prior to the effective date of the settlement rates for EMS in the China Post 2011 Agreement. *Id.* at 3-4 n.6; *id.* Attachment 1 at 6.

effect for one year from the effective date unless terminated sooner. *Id.* at 3–4. The China Post 2011 Agreement provides that it becomes effective after all regulatory approvals have been received, acceptance of specific business rules by both parties, notification to China Post, and mutual agreement on an effective date. *Id.* Attachment 1 at 2. It includes a table for intended effective dates applicable to settlement rates for specific products that is variable based on notification from the Postal Service. The agreement also provides that prior to expiration, the parties will determine whether to extend or modify the agreement. *Id.* at 7–8. The agreement may, however, be terminated by either party on not less than 30 days' written notice. *Id.* at 3.

Functional equivalence. The Postal Service asserts that the China Post 2011 Agreement is substantially similar to the inbound portion of the TNT Agreement based on the products being offered and the agreement's cost characteristics. *Id.* at 5. The Postal Service identifies differences that distinguish the instant agreement from the TNT Agreement. *Id.* at 5–8. These distinctions include different foreign postal operators, execution of a separate accord, customs inspection, termination results, confidentiality terms, effective date, rate tables, term, content restrictions, and other differences. *Id.*

The Postal Service asserts that the China Post 2011 Agreement and the TNT Agreement incorporate the same cost attributes and methodology and the relevant cost and market characteristics are similar, if not the same, for the China Post 2011 Agreement and the TNT Agreement. *Id.* at 8. Despite some differences, the Postal Service asserts that the China Post 2011 Agreement is, “functionally equivalent in all pertinent respects” to the TNT Agreement previously filed. *Id.* (Footnote omitted.)

In its Notice, the Postal Service maintains that certain portions of the agreement, prices, and related financial information should remain under seal. *Id.* at 2, Attachment 4.

The Postal Service concludes that the China Post 2011 Agreement complies with 39 U.S.C. 3633 and is functionally equivalent to the TNT Agreement. Therefore, it requests that the Commission add the China Post 2011 Agreement to the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product. *Id.* at 8.

II. Notice of Filing

The Commission establishes Docket No. CP2011–68 for consideration of

matters raised by the Postal Service's Notice.

The Commission appoints James F. Callow to serve as Public Representative in this docket.

Comments. Interested persons may submit comments on whether the Postal Service's filings in the captioned docket are consistent with the policies of 39 U.S.C. 3632, 3633 or 39 CFR part 3015. Comments are due no later than August 29, 2011. The public portions of this filing can be accessed via the Commission's Web site (<http://www.prc.gov>).

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2011–68 for consideration of the matters raised in this docket.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons in this proceeding are due no later than August 29, 2011.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–22023 Filed 8–29–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. R2011–7; Order No. 818]

New Postal Product and Rate Adjustment

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently filed Postal Service request to enter into an additional agreement and Type 2 rate adjustment under the “Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1” product offering. This document invites public comments on the request and addresses several related procedural steps.

DATES: *Comments are due:* August 30, 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](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:

- I. Introduction
- II. Notice of Filing
- III. Ordering Paragraphs

I. Introduction

On August 16, 2011, the Postal Service filed a notice, pursuant to 39 CFR 3010.40 *et seq.* that it has entered into an additional Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 agreement.¹ The Notice concerns the inbound portion of a Multi-Product Bilateral Agreement with China Post Group (China Post 2011 Agreement) that the Postal Service seeks to add to the Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 product.

In Order No. 549, the Commission approved the Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 product and the Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Post Pakketerservice Benelux BV (TNT Agreement) and the China Post Group—United States Postal Service Letter Post Bilateral Agreement, and the China Post Group—United States Postal Service Letter Post Bilateral Agreement (China Post 2010 Agreement). In Order No. 700, the Commission approved the functionally equivalent HongKong Post Agreement.² The Postal Service asserts that the China Post 2011 Agreement is similar to the China Post 2010 Agreement, TNT Agreement, and the HongKong Post Agreement. The Postal Service requests that the China Post 2011 Agreement be included within the Inbound Market Dominant Multi-

¹ Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, August 16, 2011 (Notice). See also Docket Nos. MC2010–35, R2010–5 and R2010–6, Order Adding Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Approving Included Agreement, September 30, 2010 (Order No. 549).

² See Docket No. R2011–4, Order Approving Rate Adjustment for HongKong Post-United States Service Letter Post Bilateral Agreement Negotiated Service Agreement, March 18, 2011 (Order No. 700).

Service Agreement with Foreign Postal Operators 1 product. Notice at 2.

In support of its Notice, the Postal Service filed two attachments as follows:

- Attachment 1—an application for non-public treatment of materials to maintain redacted portions of the agreement and supporting documents under seal; and
- Attachment 2—a redacted copy of the China Post 2011 Agreement.

China Post 2011 Agreement. The Postal Service filed the instant contract pursuant to 39 CFR 3010.40 *et seq.* The Postal Service states that the proposed inbound market dominant rates are intended to become effective on October 1, 2011 after the rates that are currently in effect under the China Post 2010 Agreement expires on September 30, 2011. *Id.* at 3. The China Post 2011 Agreement provides that it becomes effective after all regulatory approvals have been received, acceptance of specific business rules by both parties, notification to China Post, and mutual agreement on an effective date. *Id.* Attachment 2 at 2. The agreement however, may be terminated by either party no less than 30 days' written notice. *Id.* at 3. It states that public notice of the rates is provided through its filing at least 45 days before the proposed effective date. Notice at 3. The Postal Service and China Post Group, the postal operator for China, are parties to the agreement. The Postal Service relates that the agreement covers inbound Letter Post, in the form of letters, flats, small packets, and bags, and International Registered Mail service for Letter Post along with an ancillary service for delivery confirmation scanning for Letter Post small packets. *Id.* at 3–4.

Requirements under part 3010. The Postal Service states that the China Post 2011 Agreement is expected to generate financial performance improvements including, *e.g.*, delivery confirmation service, barcodes for delivery confirmation, sortations for routing, and service updates. It contends that these improvements should enhance mail efficiency and other functions for Letter Post items under the agreement. *Id.* at 5.

The Postal Service asserts that the agreement should not cause unreasonable harm in the marketplace since it is unaware of any significant competition in this market. *Id.* at 5–6.

Under 39 CFR 3010.43, the Postal Service is required to submit a data collection plan. The Postal Service indicates that it intends to report information on this agreement through its Annual Compliance Report. While indicating its willingness to provide

information on mailflows within the annual compliance review process, the Postal Service proposes that no special data collection plan be established for this agreement. With respect to performance measurement, it requests that the Commission exempt this agreement from separate reporting requirements under 39 CFR 3055.3 as determined in Order Nos. 549 and 700 for the agreements in Docket Nos. R2010–5, R2010–6, and R2011–4, respectively. *Id.* at 7.

The Postal Service advances reasons why the agreement is functionally equivalent to the previously filed China Post 2010 Agreement, TNT and HongKong Post Agreements and contains the same attributes and methodology. *Id.* at 8–10. It asserts that the instant agreement fits within the Mail Classification Schedule language for the Inbound Multi-Service Agreements with the Foreign Postal Operators 1 product. Additionally, it states that the China Post 2011 Agreement includes similar terms and conditions, *e.g.*, is with a foreign postal operator, conforms to a common description, and relates to rates for Letter Post tendered from the postal operator's territory with accompanying ancillary services. *Id.* at 9.

The Postal Service identifies specific terms that distinguish the instant agreement from the three existing agreements. These distinctions include the term, purpose of the agreement, effective date, confidentiality terms, signatory, revision of product stream rates, detailed air conveyance charges, specifications for letters, related updates, and other changes. *Id.* at 10–12. The Postal Service contends that the instant agreement is nonetheless functionally equivalent to existing agreements and “[t]he Postal Service does not consider that the specified differences affect either the fundamental service the Postal Service is offering or the fundamental structure of the contracts.” *Id.* at 12.

In its Notice, the Postal Service maintains that certain portions of the agreement, prices, and related financial information should remain under seal. *Id.* at 12; *id.* Attachment 1.

The Postal Service concludes that the China Post 2011 Agreement should be added as a functionally equivalent agreement under the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. *Id.* at 13.

II. Notice of Filing

Interested persons may submit comments on whether the Postal Service's filing in the captioned docket

is consistent with the policies of 39 U.S.C. 3622 and 39 CFR part 3010.40. Comments are due no later than August 30, 2011.³ 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 to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. R2011–7 to consider matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons in this proceeding are due no later than August 30, 2011.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,
Secretary.

[FR Doc. 2011–22057 Filed 8–29–11; 8:45 am]

BILLING CODE 7710-FW-P

POSTAL REGULATORY COMMISSION

[Docket No. CP2011–69; Order No. 822]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to enter into an additional agreement (referred to as Norway Post Agreement) under the “Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1” product offering. This document invites public comments on the request and addresses several related procedural steps.

DATES: *Comments are due:* August 31, 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

³ To provide interested persons sufficient time to comment in these proceedings, the Commission finds it appropriate to waive the 10-day comment period specified in 39 CFR 3010.44(a)(5). The modest extension will not prejudice either party to the agreement given the 45 days' advance notice required for Type 2 rate adjustments.

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:

- I. Introduction
- II. Notice of Filing
- III. Ordering Paragraphs

I. Introduction

On August 18, 2011, the Postal Service filed a notice, pursuant to 39 CFR 3015.5, that it has entered into an additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 agreement.¹ The Notice concerns a bilateral agreement for inbound competitive services with Posten Norge AS (Norway Post Agreement) that the Postal Service seeks to add to the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product.

In Order No. 546, the Commission approved the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product and a functionally equivalent agreement, Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement). The Postal Service asserts that its filing demonstrates that the Norway Post Agreement fits within the Mail Classification Schedule (MCS) language in Governors' Decision No. 10-3 originally filed in Docket Nos. MC2010-34 and CP2010-95. Notice at 2.

In support of its Notice, the Postal Service filed four attachments as follows:

- Attachment 1—an application for non-public treatment of materials to maintain redacted portions of the agreement and supporting documents under seal;
- Attachment 2—a redacted copy of Governors' Decision No. 10-3 that establishes prices and classifications for Inbound Competitive Multi-Service Agreements with Foreign Postal Operators agreements, proposed MCS

¹ Notice of United States Postal Service of Filing Additional Functionally Equivalent Agreement, August 18, 2011 (Notice); see also Docket Nos. MC2010-34 and CP2010-95, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, September 29, 2010 (Order No. 546).

language, formulas for prices, certification of the Governors' vote and certification of compliance with 39 U.S.C. 3633(a);

- Attachment 3—a redacted copy of the Norway Post Agreement; and
- Attachment 4—a certified statement required by 39 CFR 3015.5(c)(2).

Norway Post Agreement. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5 and in accordance with Order No. 546. The Postal Service states that the inbound air parcel post competitive services in the Norway Post Agreement conform to the proposed MCS language for Inbound Multi-Service Agreements with Foreign Postal Operators 1. The Postal Service states it will notify the mailer of the effective date within 30 days after all necessary regulatory approvals have been received. *Id.* The agreement provides that the parties will mutually agree on the effective date. *Id.* at 3; Attachment 3 at 1. The parties intend for the agreement to become effective on October 1, 2011, and to remain in effect for 1 year with the option for renewal for another year. *Id.* at 2; Attachment 3 at 1.

Functional equivalence. The Postal Service asserts that the Norway Post Agreement and the TNT Agreement incorporate the same cost and market characteristics. Notice at 3. It states that the TNT Agreement includes similar terms and conditions, e.g., is an agreement with a foreign postal operator and conforms to a common description. *Id.* Additionally, the Postal Service contends that the Norway Post Agreement is similar in cost characteristics with the TNT Agreement other than certain minor adjustments, such as expression of costs in different currencies, which are slight modifications that do not affect the agreement's functional equivalence. *Id.* It maintains that because of the limited changes, the cost characteristics are essentially the same as the TNT Agreement.²

The Postal Service identifies specific terms that distinguish the instant agreement from the existing agreement. These distinctions include the term, products, services, applicable law and dispute resolution methods. *Id.* at 3-4.

Despite some minor differences, the Postal Service asserts that the Norway Post Agreement is functionally equivalent to the TNT Agreement previously filed. *Id.* at 4.

In its Notice, the Postal Service maintains that certain portions of the agreement, prices, and related financial

² The Postal Service's Notice refers to the TNT Agreement as the "baseline agreement." *Id.*

information should remain under seal. *Id.* at 2; Attachment 1.

The Postal Service concludes that the Norway Post Agreement complies with 39 U.S.C. 3633 and is functionally equivalent to the TNT Agreement. Notice at 4. Therefore, it requests that the Commission add the Norway Post Agreement to the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product. *Id.*

II. Notice of Filing

The Commission establishes Docket No. CP2011-69 for consideration of matters raised by the Postal Service's Notice.

The Commission appoints James F. Callow to serve as Public Representative in this docket.

Comments. Interested persons may submit comments on whether the Postal Service's filings in the captioned docket are consistent with the policies of 39 U.S.C. 3632, 3633 or 39 CFR part 3015. Comments are due no later than August 31, 2011. The public portions of this filing can be accessed via the Commission's Web site (<http://www.prc.gov>).

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2011-69 for consideration of the matters raised in this docket.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons in this proceeding are due no later than August 31, 2011.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,
Secretary.

[FR Doc. 2011-22131 Filed 8-29-11; 8:45 am]

BILLING CODE

POSTAL REGULATORY COMMISSION

[Docket No. A2011-50; Order No. 820]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Prairie Hill, Texas 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):* September 2, 2011; *deadline for notices to intervene:* September 16, 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 August 18, 2011, the Commission received a petition for review of the Postal Service’s determination to close the Prairie Hill post office in Prairie Hill, Texas. The petition was filed by Stell Waldrop, Jr. (Petitioner) and is postmarked August 12, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–50 to consider Petitioner’s appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than September 22, 2011.

Categories of issues apparently raised. Petitioner contends that: (1) The Postal Service failed to consider the effect of the closing on the community (see 39 U.S.C. 404(d)(2)(A)(i)); (2) the Postal Service failed to consider whether or

not it will continue to provide a maximum degree of effective and regular postal services to the community (see 39 U.S.C. 404(d)(2)(A)(iii)); and (3) the Postal Service failed to adequately consider the economic savings resulting from the closure (see 39 U.S.C. 404(d)(2)(A)(iv)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those 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 September 2, 2011. See 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is September 2, 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., eastern time, 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 Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. See 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before September 16, 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 September 2, 2011.
2. Any responsive pleading by the Postal Service to this notice is due no later than September 2, 2011.
3. The procedural schedule listed below is hereby adopted.
4. Pursuant to 39 U.S.C. 505, Malin Moench is designated officer of the Commission (Public Representative) to represent the interests of the general public.
5. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

PROCEDURAL SCHEDULE

August 18, 2011	Filing of Appeal.
September 2, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
September 2, 2011	Deadline for the Postal Service to file any responsive pleading.
September 16, 2011	Deadline for notices to intervene (see 39 CFR 3001.111(b)).
September 22, 2011	Deadline for Petitioner’s Form 61 or initial brief in support of petition (see 39 CFR 3001.115(a) and (b)).
October 12, 2011	Deadline for answering brief in support of the Postal Service (see 39 CFR 3001.115(c)).
October 27, 2011	Deadline for reply briefs in response to answering briefs (see 39 CFR 3001.115(d)).
November 3, 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).

PROCEDURAL SCHEDULE—Continued

December 12, 2011	Expiration of the Commission's 120-day decisional schedule (see 39 U.S.C. 404(d)(5)).
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By the Commission.

Shoshana M. Grove,
Secretary.

[FR Doc. 2011-22055 Filed 8-29-11; 8:45 am]

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POSTAL REGULATORY COMMISSION

[Docket No. A2011-49; Order No. 819]

Post Office Closing

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Pinehurst Village Station, Pinehurst, North Carolina 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):* September 2, 2011; *deadline for notices to intervene:* September 16, 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 August 18, 2011, the Commission received a petition for review of the Postal Service's determination to close the Pinehurst Village Station in Pinehurst, North Carolina. The petition was filed by John M. Marcum and Bettye M. Marcum (Petitioners) and is postmarked August 12, 2011. The Commission hereby institutes a proceeding under 39 U.S.C.

404(d)(5) and establishes Docket No. A2011-49 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 September 22, 2011.

Categories of issues apparently raised. Petitioners contend that: (1) The Postal Service failed to consider the effect of the closing on the community (see 39 U.S.C. 404(d)(2)(A)(i)); and (2) and failure of the Postal Service to follow procedures required by law regarding closures (see 39 U.S.C. 404(d)(5)(B)).

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 September 2, 2011. See 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is September 2, 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., eastern time, 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 September 16, 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 September 2, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than September 2, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Malin Moench 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

August 18, 2011	Filing of Appeal.
September 2, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
September 2, 2011	Deadline for the Postal Service to file any responsive pleading.
September 16, 2011	Deadline for notices to intervene (<i>see</i> 39 CFR 3001.111(b)).
September 22, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (<i>see</i> 39 CFR 3001.115(a) and (b)).
October 12, 2011	Deadline for answering brief in support of the Postal Service (<i>see</i> 39 CFR 3001.115(c)).
October 27, 2011	Deadline for reply briefs in response to answering briefs (<i>see</i> 39 CFR 3001.115(d)).
November 3, 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 (<i>see</i> 39 CFR 3001.116).
December 12, 2011	Expiration of the Commission's 120-day decisional schedule (<i>see</i> 39 U.S.C. 404(d)(5)).

[FR Doc. 2011-22056 Filed 8-29-11; 8:45 am]

BILLING CODE 7710-FW-P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, September 1, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, September 1, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551-5400.

Dated: August 25, 2011.

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2011-22217 Filed 8-26-11; 11:15 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65186; File No. SR-DTC-2011-06]

Self-Regulatory Organizations; The Depository Trust Company; Order Granting Approval of a Proposed Rule Change To Amend Rules Relating to the Early Redemption of Certificates of Deposit

August 23, 2011.

I. Introduction

On July 1, 2011, The Depository Trust Company ("DTC") filed proposed rule change SR-DTC-2011-06 with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposed rule change was published in the **Federal Register** on July 18, 2011.² The Commission received no comment letters. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

Recently, several issuers of Certificates of Deposit ("CDs") have contacted DTC in an attempt to redeem or "call" their CDs prior to the maturity date. The master certificate of these CDs did not expressly specify that they were callable or subject to early redemption. In some instances, the issuer offered to pay DTC participants the principal plus interest through the date of maturity. In other instances, the issuer offered to pay principal plus interest only through the date of redemption. Because the master

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 64864 (July 12, 2011), 76 FR 42149 (July 18, 2011). A technical correction to this notice was made on July 18, 2011. 76 FR 45309 (July 28, 2011).

certificates did not expressly indicate the CDs could be redeemed early, a number of DTC participants expressed their concerns that the CDs had been sold to investors without disclosing the possibility of early redemption.

Over the past several months, DTC has worked with industry representatives, including the Retail Fixed Income Committee of The Securities Industry and Financial Markets Association ("SIFMA"), to better understand the issues related to the early redemption of CDs that do not contain express early redemption provisions. As a result, DTC is amending its Redemption Service Guide to state that DTC will not process early redemptions or calls on CDs unless (1) There is an explicit provision in the master certificate that permits early redemption by the issuer and specifies the payment to be made in connection therewith or (2) written consent to an early redemption in a form designated by DTC is obtained by the issuer from all of the holders of the CD. Furthermore, in the event that an issuer sends such payment to DTC in contravention of the rule, DTC will return the payment, less any costs associated with facilitating the attempted redemption and return of funds, to the issuer.

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.³ The Commission finds that DTC's rule change should clarify the terms and conditions under which DTC will process the early redemption of certain CDs and thus should facilitate the prompt and accurate clearance and settlement of transactions involving

³ 15 U.S.C. 78q-1(b)(3)(F).

these CDs and should remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.

Accordingly, for the reasons stated above the Commission believes that the proposed rule change is consistent with DTC's obligation under Section 17A of the Act and the rules and regulations thereunder.⁴

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, particularly with the requirements of Section 17A of the Act, and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2011-06) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁵

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2011-22098 Filed 8-29-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65188; File No. SR-EDGA-2011-27]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the EDGA Fee Schedule To Establish an Annual Membership Fee, Monthly Trading Rights Fee, and a Monthly MPID Fee

August 24, 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 19, 2011, the EDGA Exchange, Inc. (the "Exchange" or the "EDGA") 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 self-regulatory organization. The

⁴ In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 the fee schedule assessed on members, effective September 1, 2011, to establish: (i) An Annual Membership Fee; (ii) a monthly Trading Rights Fee; and (iii) a monthly fee for each member Market Participant Identifier ("MPID") in excess of five MPIDs. The text of the proposed rule change is available on the Exchange's Web site at <http://www.directedge.com>, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Purpose

To help pay for the costs of regulating EDGA members, the Exchange proposes to establish the following membership fees: (i) An Annual Membership Fee for EDGA members; (ii) a Trading Rights Fee for EDGA members; and (iii) a fee for each MPID approved by EDGA for use by a member firm on EDGA's systems in excess of five. The Exchange believes that each fee is warranted in order to provide for a dedicated source of revenue to be applied toward funding the overall regulation of the Exchange and its members. On July 26, 2011, the Exchange provided its Members with notice about these proposed fees, which would be implemented on September 1, 2011, pending SEC approval.

Annual Membership Fee & Trading Rights Fee

First, EDGA proposes to charge an Annual Membership fee of \$2,000 to each member firm of EDGA which will support their exchange membership for the calendar year. The fee will be

charged per member firm. For 2011, the Exchange proposes to charge firms on a pro-rated basis beginning September 1, 2011. Beginning in January 2012, the Exchange plans to charge an Annual Membership Fee which will be assessed on all EDGA members as of a date determined by EDGA in January of each year. For any month in which a firm is approved for membership with the Exchange after the January renewal period, the Annual Membership Fee will be pro-rated beginning on the date on which membership is approved. The pro-rated fee will be calculated based on the remaining trading days in that year, and assessed in the month following membership approval. For example, if a firm applies for membership with the Exchange on or before the close of the January renewal period, and is approved for membership in the same month, the new Member will pay a \$2000 Annual Membership fee. However, if a firm applies and is accepted for membership with the Exchange in February 2012, the new Member will be assessed a pro-rated Annual Membership Fee for the period beginning the first trading day in February in which they are a member through the end of 2012. The fee will be assessed in the next month's billing cycle. In this case, March 2012.

In addition, the fee will not be refundable in the event that the firm ceases to be an EDGA member following the date on which fees are assessed. However, if a Member is pending a voluntary termination of rights as a Member pursuant to Rule 2.8 prior to the date any Annual Membership Fee for a given year will be assessed (*i.e.*, September 1, 2011, January 1, 2012, etc.) and the Member does not utilize the facilities of EDGA³ during such time, then the Member will not be obligated to pay the Annual Membership Fee. For example, if a Member submits a request to terminate their membership prior to close of business on August 31, 2011, the Member will not be charged any Annual Membership Fee regardless of how long it takes for the Member's voluntary termination of membership to become effective. Prior to the September 1, 2011 implementation date for these fee changes only, the Exchange will also waive monthly Trading Rights and MPID fees, as described below, if a Member is pending a voluntary termination of rights pursuant to Rule 2.8 and the Member does not utilize the facilities of EDGA during such time. This waiver of such fees by the Exchange will again occur regardless of how long it takes for the Member's

³ This would include Members adding, removing, or routing liquidity to EDGA.

voluntary termination of membership to become effective. The Exchange believes this to be appropriate since ordinarily there is a 30 day waiting period before such resignation shall take effect provided the conditions provided for in Rule 2.8 are satisfied.⁴

Second, EDGA proposes to charge member firms a monthly Trading Rights Fee of \$300 per month for the ability to trade on the EDGA Exchange. Firms will be charged per month, regardless of the volume of shares traded. For any month in which a firm is approved for membership with the Exchange, the monthly Trading Rights Fee will be pro-rated beginning on the date on which membership is approved. The pro-rated fee will be calculated based on the remaining trading days in that month. In any month in which the firm terminates membership with the Exchange, the monthly Trading Rights Fee will be pro-rated based on the number of trading days which have elapsed in that month. The Exchange plans to implement the Trading Rights Fee and charge firms directly beginning September 1, 2011.

EDGA believes that even with these proposed fees, the cost of EDGA membership is generally lower than the cost of membership in other SROs.⁵

Market Participant Identifier (“MPID”) Fee

An MPID is a four character identifier that is approved by the Exchange and assigned to the member firm for use on the EDGA exchange to identify the firm on the orders sent to the Exchange and resulting executions. Many member firms request the use of one MPID as the identifier for their exchange transactions. However, a member firm may request additional MPIDs for use by separate business units and trading

desks or to support sponsored access participants. EDGA notes that certain member firms possess many underutilized MPIDs through which very little or no activity occurs. These unused or underutilized MPIDs provide negligible benefit to the market, yet represent an administrative and regulatory burden to EDGA. In order to address the burden of administering and supporting multiple MPIDs for member firms, EDGA proposes to assess a monthly fee of \$250 per month beginning September 1, 2011 for each MPID approved by the Exchange for use by a member firm on EDGA’s systems in excess of five MPIDs. The MPID Fee will be assessed on a pro-rated basis by charging the firm based on the trading day in the month during which an MPID greater than five becomes effective for use. If the MPID is terminated within a month, the MPID Fee will be charged in full regardless of the number of trading days elapsed or remaining in that month. The Exchange believes that this practice is appropriate because of the administrative costs associated with disabling MPIDs. The Exchange also believes that assessing a fee on supplemental MPIDs will benefit the markets and investors because such fee will promote efficiency in MPID use.

The Exchange notes that NASDAQ currently assesses a Supplemental MPID Fee of \$1,000 per month, per MPID, for any MPID in excess of one. Similarly, the New York Stock Exchange (“NYSE”) charges fees for access to its floor which are analogous to the proposed MPID fee. The NYSE fees are based on the number of individuals that a member firm wishes to employ on the floor of the exchange and include, among other things, an annual fee of \$40,000 per trading license per floor broker, a \$5,000 annual fee per handheld device used on the floor, and a \$250 annual badge maintenance fee per badge. Under the proposed MPID Fee schedule, EDGA member firms would not be charged for maintaining five or less MPIDs, but would pay the proposed \$250 monthly MPID fee only if the member maintains more than five MPIDs. In addition, members would be charged a proposed \$2,000 annual membership fee and trading rights fee of \$300 per month, totaling \$5,600 annually.⁶ Thus, EDGA believes that even with the proposed MPID fee, the cost of EDGA membership is generally lower than the cost of membership in other SROs.

Basis

EDGA believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,⁷ in general, and Section 6(b)(4) of the Act,⁸ in particular, because 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 that EDGA operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers.

First, the Exchange believes that assessing an Annual Membership Fee and a Trading Rights Fee provides an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. EDGA believes the Annual Membership Fee and monthly Trading Rights Fee are a reasonable and equitable method of ensuring that its fees fund a greater portion of the cost of regulating the EDGA market, and that even after assessing these fees, the overall cost of EDGA membership is reasonable as compared with the costs of membership in other SROs.

Second, with respect to MPID fees, member firms will continue to have discretion to request EDGA approval to use additional MPIDs on EDGA. Use of more than five MPIDs is voluntary and solely determined by the member firm’s needs. The Exchange believes that charging for more than five MPIDs is reasonable given that other exchanges charge members for having more than one MPID.⁹ The proposed Market Participant Identifier Fee will be imposed on all member firms equally based on the number of MPIDs approved for use on EDGA. EDGA also believes that the proposed fee will encourage efficiency in member firm’s use of MPIDs.

Further, the market for transaction execution and routing services is highly competitive. Broker-dealers currently have numerous alternative venues for their order flow, including multiple competing self-regulatory organizations markets, as well as broker-dealers and aggregators such as electronic communications networks. A member

⁴ These conditions include: (i) The Exchange’s receipt of such written resignation; (ii) the member’s having satisfied all outstanding indebtedness due the Exchange; (iii) any Exchange investigation or disciplinary action brought against the Member having reached a final disposition; and (iv) any examination of such Member in process having been completed, and all exceptions arising out of such examination having been satisfactorily resolved.

⁵ See, e.g., NASDAQ OMX Group, Inc., Equity Rule 7001, at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Fdequityrules%2F> (assessing a \$3,000 annual membership fee and \$500 per month trading rights fee on members); New York Stock Exchange Price List 2011, at http://www.nyse.com/pdfs/nyse_equities_pricelist.pdf (assessing a \$40,000 annual trading license fee for the first two licenses held by a member organization, among other itemized regulatory and trading rights fees); Chicago Stock Exchange Fees and Assessments, at http://www.chx.com/content/Participant_Information/Downloadable_Docs/Rules/CHX_Fee_Schedule_04252011.pdf (assessing a \$7,200 annual trading permit fee).

⁶ See *supra* note 5 (explaining the fee structure of the NASDAQ OMX Group, Inc., the New York Stock Exchange, and the Chicago Stock Exchange).

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(4).

⁹ See, e.g., NASDAQ OMX Group, Inc., Equity Rule 7001, at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Fdequityrules%2F> (assessing a Supplemental MPID Fee of \$1,000 per month, per MPID, for any MPID in excess of one).

firm is able to select any venue of which it is a member or participant to send its order flow. As such, if member firms believe that the proposed (i) Annual membership fee, (ii) trading rights fee, or (iii) fee for MPIDs in excess of five, is excessive they may easily choose to move their order flow elsewhere. EDGA believes that its proposed fees are comparable to, and lower than, analogous NASDAQ and NYSE fees.

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.

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) of the Act¹⁰ and Rule 19b-4(f)(2)¹¹ thereunder. 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-EDGA-2011-27 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-EDGA-2011-27. 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-EDGA-2011-27 and should be submitted on or before September 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2011-22130 Filed 8-29-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65189; File No. SR-EDGX-2011-26]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the EDGX Fee Schedule To Establish an Annual Membership Fee, Monthly Trading Rights Fee, and a Monthly MPID Fee

August 24, 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 19, 2011, the EDGX Exchange, Inc. (the "Exchange" or the "EDGX") 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule assessed on members, effective September 1, 2011, to establish: (i) An Annual Membership Fee; (ii) a monthly Trading Rights Fee; and (iii) a monthly fee for each member Market Participant Identifier ("MPID") in excess of five MPIDs. The text of the proposed rule change is available on the Exchange's Web site at <http://www.directedge.com>, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 19b-4(f)(2).

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Purpose

To help pay for the costs of regulating EDGA members, the Exchange proposes to establish the following membership fees: (i) An Annual Membership Fee for EDGA members; (ii) a Trading Rights Fee for EDGA members; and (iii) a fee for each MPID approved by EDGA for use by a member firm on EDGA's systems in excess of five. The Exchange believes that each fee is warranted in order to provide for a dedicated source of revenue to be applied toward funding the overall regulation of the Exchange and its members. On July 26, 2011, the Exchange provided its Members with notice about these proposed fees, which would be implemented on September 1, 2011, pending SEC approval.

Annual Membership Fee and Trading Rights Fee

First, EDGA proposes to charge an Annual Membership fee of \$2,000 to each member firm of EDGA which will support their exchange membership for the calendar year. The fee will be charged per member firm. For 2011, the Exchange proposes to charge firms on a pro-rated basis beginning September 1, 2011. Beginning in January 2012, the Exchange plans to charge an Annual Membership Fee which will be assessed on all EDGA members as of a date determined by EDGA in January of each year. For any month in which a firm is approved for membership with the Exchange after the January renewal period, the Annual Membership Fee will be pro-rated beginning on the date on which membership is approved. The pro-rated fee will be calculated based on the remaining trading days in that year, and assessed in the month following membership approval. For example, if a firm applies for membership with the Exchange on or before the close of the January renewal period, and is approved for membership in the same month, the new Member will pay a \$2,000 Annual Membership fee. However, if a firm applies and is accepted for membership with the Exchange in February 2012, the new Member will be assessed a pro-rated Annual Membership Fee for the period beginning the first trading day in February in which they are a member through the end of 2012. The fee will be assessed in the next month's billing cycle. In this case, March 2012.

In addition, the fee will not be refundable in the event that the firm ceases to be an EDGA member following the date on which fees are assessed.

However, if a Member is pending a voluntary termination of rights as a Member pursuant to Rule 2.8 prior to the date any Annual Membership Fee for a given year will be assessed (*i.e.*, September 1, 2011, January 1, 2012, etc.) and the Member does not utilize the facilities of EDGA³ during such time, then the Member will not be obligated to pay the Annual Membership Fee. For example, if a Member submits a request to terminate their membership prior to close of business on August 31, 2011, the Member will not be charged any Annual Membership Fee regardless of how long it takes for the Member's voluntary termination of membership to become effective. Prior to the September 1, 2011 implementation date for these fee changes only, the Exchange will also waive monthly Trading Rights and MPID fees, as described below, if a Member is pending a voluntary termination of rights pursuant to Rule 2.8 and the Member does not utilize the facilities of EDGA during such time. This waiver of such fees by the Exchange will again occur regardless of how long it takes for the Member's voluntary termination of membership to become effective. The Exchange believes this to be appropriate since ordinarily there is a 30 day waiting period before such resignation shall take effect provided the conditions provided for in Rule 2.8 are satisfied.⁴

Second, EDGA proposes to charge member firms a monthly Trading Rights Fee of \$300 per month for the ability to trade on the EDGA Exchange. Firms will be charged per month, regardless of the volume of shares traded. For any month in which a firm is approved for membership with the Exchange, the monthly Trading Rights Fee will be pro-rated beginning on the date on which membership is approved. The pro-rated fee will be calculated based on the remaining trading days in that month. In any month in which the firm terminates membership with the Exchange, the monthly Trading Rights Fee will be pro-rated based on the number of trading days which have elapsed in that month. The Exchange plans to implement the Trading Rights Fee and charge firms directly beginning September 1, 2011.

³ This would include Members adding, removing, or routing liquidity to EDGA.

⁴ These conditions include: (i) The Exchange's receipt of such written resignation; (ii) the member's having satisfied all outstanding indebtedness due the Exchange; (iii) any Exchange investigation or disciplinary action brought against the Member having reached a final disposition; and (iv) any examination of such Member in process having been completed, and all exceptions arising out of such examination having been satisfactorily resolved.

EDGA believes that even with these proposed fees, the cost of EDGA membership is generally lower than the cost of membership in other SROs.⁵

Market Participant Identifier ("MPID") Fee

An MPID is a four character identifier that is approved by the Exchange and assigned to the member firm for use on the EDGX exchange to identify the firm on the orders sent to the Exchange and resulting executions. Many member firms request the use of one MPID as the identifier for their exchange transactions. However, a member firm may request additional MPIDs for use by separate business units and trading desks or to support sponsored access participants. EDGX notes that certain member firms possess many underutilized MPIDs through which very little or no activity occurs. These unused or underutilized MPIDs provide negligible benefit to the market, yet represent an administrative and regulatory burden to EDGX. In order to address the burden of administering and supporting multiple MPIDs for member firms, EDGX proposes to assess a monthly fee of \$250 per month beginning September 1, 2011 for each MPID approved by the Exchange for use by a member firm on EDGX's systems in excess of five MPIDs. The MPID Fee will be assessed on a pro-rated basis by charging the firm based on the trading day in the month during which an MPID greater than five becomes effective for use. If the MPID is terminated within a month, the MPID Fee will be charged in full regardless of the number of trading days elapsed or remaining in that month. The Exchange believes that this practice is appropriate because of the administrative costs associated with disabling MPIDs. The Exchange also believes that assessing a fee on supplemental MPIDs will benefit the markets and investors because such fee will promote efficiency in MPID use.

The Exchange notes that NASDAQ currently assesses a Supplemental MPID Fee of \$1,000 per month, per MPID, for

⁵ See, e.g., NASDAQ OMX Group, Inc., Equity Rule 7001, at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Fdequityrules%2F> (assessing an \$3,000 annual membership fee and \$500 per month trading rights fee on members); New York Stock Exchange Price List 2011, at http://www.nyse.com/pdfs/nyse_equities_pricelist.pdf (assessing a \$40,000 annual trading license fee for the first two licenses held by a member organization, among other itemized regulatory and trading rights fees); Chicago Stock Exchange Fees and Assessments, at http://www.chx.com/content/Participant_Information/Downloadable_Docs/Rules/CHX_Fee_Schedule_04252011.pdf (assessing a \$7,200 annual trading permit fee).

any MPID in excess of one. Similarly, the New York Stock Exchange (“NYSE”) charges fees for access to its floor which are analogous to the proposed MPID fee. The NYSE fees are based on the number of individuals that a member firm wishes to employ on the floor of the exchange and include, among other things, an annual fee of \$40,000 per trading license per floor broker, a \$5,000 annual fee per handheld device used on the floor, and a \$250 annual badge maintenance fee per badge. Under the proposed MPID Fee schedule, EDGA member firms would not be charged for maintaining five or less MPIDs, but would pay the proposed \$250 monthly MPID fee only if the member maintains more than five MPIDs. In addition, members would be charged a proposed \$2,000 annual membership fee and trading rights fee of \$300 per month, totaling \$5,600 annually.⁶ Thus, EDGA believes that even with the proposed MPID fee, the cost of EDGA membership is generally lower than the cost of membership in other SROs.

Basis

EDGX believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,⁷ in general, and Section 6(b)(4) of the Act,⁸ in particular, because 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 that EDGX operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers.

First, the Exchange believes that assessing an Annual Membership Fee and a Trading Rights Fee provides an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. EDGX believes the Annual Membership Fee and monthly Trading Rights Fee are a reasonable and equitable method of ensuring that its fees fund a greater portion of the cost of regulating the EDGX market, and that even after assessing these fees, the overall cost of EDGX membership is reasonable as compared with the costs of membership in other SROs.

Second, with respect to MPID fees, member firms will continue to have

discretion to request EDGX approval to use additional MPIDs on EDGX. Use of more than five MPIDs is voluntary and solely determined by the member firm’s needs. The Exchange believes that charging for more than five MPIDs is reasonable given that other exchanges charge members for having more than one MPID.⁹ The proposed Market Participant Identifier Fee will be imposed on all member firms equally based on the number of MPIDs approved for use on EDGX. EDGX also believes that the proposed fee will encourage efficiency in member firm’s use of MPIDs.

Further, the market for transaction execution and routing services is highly competitive. Broker-dealers currently have numerous alternative venues for their order flow, including multiple competing self-regulatory organization’s markets, as well as broker-dealers and aggregators such as electronic communications networks. A member firm is able to select any venue of which it is a member or participant to send its order flow. As such, if member firms believe that the proposed (i) Annual membership fee, (ii) trading rights fee, or (iii) fee for MPIDs in excess of five, is excessive they may easily choose to move their order flow elsewhere. EDGX believes that its proposed fees are comparable to, and lower than, analogous NASDAQ and NYSE fees.

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.

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) of the Act¹⁰ and Rule 19b-4(f)(2)¹¹

thereunder. 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-EDGX-2011-26 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-EDGX-2011-26. 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

⁶ See *supra* note 5 (explaining the fee structure of the NASDAQ OMX Group, Inc., the New York Stock Exchange, and the Chicago Stock Exchange).

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(4).

⁹ See, e.g., NASDAQ OMX Group, Inc., Equity Rule 7001, at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F> (assessing a Supplemental MPID Fee of \$1,000 per month, per MPID, for any MPID in excess of one).

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 19b-4(f)(2).

available publicly. All submissions should refer to File Number SR-EDGX-2011-26 and should be submitted on or before September 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011-22134 Filed 8-29-11; 8:45 am]

BILLING CODE 8011-01-P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA-2011-0074]

Occupational Information Development Advisory Panel Meeting

AGENCY: Social Security Administration (SSA).

ACTION: Notice of Upcoming Quarterly Panel Meeting.

DATES: September 21, 2011, 9 a.m.–5 p.m. (EDT); September 22, 2011, 8:30 a.m. to 4 p.m. (EDT).

Location: Radisson Plaza Lord Baltimore.

ADDRESSES: 20 West Baltimore Street, Baltimore, MD 21201.

By Teleconference: 1-866-882-0470.

SUPPLEMENTARY INFORMATION:

Type of meeting: The meeting is open to the public.

Purpose: This discretionary panel, established under the Federal Advisory Committee Act of 1972, as amended, shall report to the Commissioner of Social Security. The panel will advise the agency on the creation of an occupational information system tailored specifically for the our disability determination process and adjudicative needs. Advice and recommendations will relate to our disability programs in the following areas: Medical and vocational analysis of disability claims; occupational analysis, including definitions, ratings and capture of physical and mental/cognitive demands of work and other occupational information critical to our disability programs; data collection; use of occupational information in our disability programs; and any other area(s) that would enable us to develop an occupational information system suited to its disability programs and improve the medical-vocational adjudication policies and processes.

Agenda: The panel will meet on Wednesday, September 21, 2011, from 9 a.m. until 5 p.m. (EDT) and on Thursday, September 22, 2011, from 8:30 a.m. until 4 p.m. (EDT).

The tentative agenda for this meeting includes: Presentations by staff from the Department of Labor's Employment and Training Administration, National Center for O*NET Development and the U. S. Census Bureau; a presentation on the status of ongoing SSA FY 2011 OIS Development project and research activities currently underway; Occupational Information Development Advisory Panel Chair and subcommittee reports; public comment; panel discussion and deliberation; and, an administrative business meeting. We will post the final agenda on the Internet prior to the meeting at <http://www.socialsecurity.gov>.

The panel will hear public comment during the quarterly meeting on Wednesday, September 21, 2011 from 3:15 p.m. to 3:45 p.m. (EDT) and Thursday, September 22, 2011 from 2:15 p.m. to 2:45 pm. (EDT). Members of the public must reserve a time slot—assigned on a first come, first served basis—in order to comment. In the event that scheduled public comment does not take the entire time allotted, the panel may use any remaining time to deliberate or conduct other business.

Those interested in providing testimony in person at the meeting or via teleconference should contact the panel staff by e-mail to OIDAP@ssa.gov. Individuals providing testimony are limited to a maximum five minutes; organizational representatives, a maximum of ten minutes. You may submit written testimony, no longer than five (5) pages, at any time in person or by mail, fax or e-mail to OIDAP@ssa.gov for panel consideration.

Seating is limited. Those needing special accommodation in order to attend or participate in the meeting (e.g., sign language interpretation, assistive listening devices, or materials in alternative formats, such as large print or CD) should notify Leola Brooks via e-mail to leola.brooks@ssa.gov no later than September 15, 2011. We will attempt to accommodate requests made but cannot guarantee availability of services. All meeting locations are barrier free.

For telephone access to the meeting on both days, please dial toll-free to (866) 882-0470.

FOR FURTHER INFORMATION CONTACT:

Records of all public panel proceedings are maintained and available for inspection. Anyone requiring further information should contact the panel staff at: Occupational Information Development Advisory Panel, Social Security Administration, 6401 Security Boulevard, 3-E-26, Robert M. Ball Federal Building, Baltimore, MD 21235-

0001. Fax: 410-597-0825. E-mail to: OIDAP@ssa.gov. For additional information, please visit the panel Web site at <http://www.ssa.gov/oidap>.

Leola S. Brooks,

Designated Federal Officer, Occupational Information Development Advisory Panel.

[FR Doc. 2011-22147 Filed 8-29-11; 8:45 am]

BILLING CODE 4191-02-P

DEPARTMENT OF STATE

[Public Notice: 7572]

Culturally Significant Objects Imported for Exhibition Determinations: "New Photography 2011: Zhang Dali, Moyra Davey, George Georgiou, Deana Lawson, Doug Rickard, Viviane Sassen"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236-3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition "New Photography 2011: Zhang Dali, Moyra Davey, George Georgiou, Deana Lawson, Doug Rickard, Viviane Sassen," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at The Museum of Modern Art, New York, New York, from on or about September 27, 2011, until on or about January 16, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Kevin M. Gleeson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6473). The mailing address is U.S. Department of State, SA-5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522-0505.

¹² 17 CFR 200.30-3(a)(12).

Dated: August 24, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011-22142 Filed 8-29-11; 8:45 am]

BILLING CODE 4710-05-P

TENNESSEE VALLEY AUTHORITY

Final Environmental Impact Statement, Single Nuclear Unit at the Bellefonte Plant Site, Jackson County, AL

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Issuance of Record of Decision.

SUMMARY: This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR 1500 to 1508) and TVA's procedures implementing the National Environmental Policy Act (NEPA). On August 18, 2011, the TVA Board of Directors approved the recommendation to complete and operate Bellefonte Nuclear Plant Unit 1. A notice of availability (NOA) of the *Final Supplemental Environmental Impact Statement for a Single Nuclear Unit at the Bellefonte Plant Site* (hereafter referred to as Bellefonte FSEIS) was published in the **Federal Register** on May 21, 2010. On August 20, 2010, the TVA Board approved the expenditure of \$248 million for additional engineering, design, and licensing activities, as well as the procurement of long lead-time components for the partially complete Bellefonte Unit 1. The ROD documenting this decision was published on September 9, 2010 (75 FR 54961). Bellefonte Unit 1 is a 1,260-megawatt (MW) Babcock and Wilcox-designed pressurized light water reactor. This interim decision was made in order to maintain Unit 1 as a viable alternative to meet the projected need for base load generation on the TVA system in 2018-2020.

FOR FURTHER INFORMATION CONTACT:

Ruth Horton, Senior NEPA Specialist, Environmental Permits and Compliance, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 11D, Knoxville, Tennessee 37902-1499; telephone: 865-632-3719; e-mail: blnp@tva.gov or Zackary Rad, Bellefonte Unit 1 Licensing Manager, Nuclear Generation Development and Construction, Tennessee Valley Authority, P.O. Box 2000, OSB 1A-BLN, Hollywood, Alabama 35752; telephone: 256-574-8265; e-mail: zwrad@tva.gov.

SUPPLEMENTARY INFORMATION: The September 2010 Bellefonte ROD provides information about this action,

and reference should be made to that notice for more details, including information about the need for base load capacity, alternatives considered by TVA, the history of the Bellefonte project, environmental consequences, and other background information.

With almost 37,000 MW of net dependable summer generating capacity, TVA operates the nation's largest public power system, producing 4 percent of all electricity in the nation. TVA provides electricity to most of Tennessee and parts of Virginia, North Carolina, Georgia, Alabama, Mississippi, and Kentucky. It serves about 9 million people in this seven-state region through 155 independent power distributors and 56 directly served large industries and Federal facilities. The TVA Act requires the TVA power system to be self-supporting and to be operated on a non-profit basis and directs TVA to sell power at rates as low as are feasible. Most of TVA's power is supplied by three nuclear plants, 11 coal-fired plants, 12 gas-fired plants, 29 hydroelectric dams, and a pumped-storage facility and through power purchase agreements from a variety of energy sources including, but not limited to, wind, solar, natural and methane gas, hydroelectric, and lignite coal. TVA also purchases renewable energy from small producers in its Generation Partners Program. TVA transmits electricity from these facilities over almost 16,000 miles of transmission lines.

The Bellefonte FSEIS supplements and updates the original TVA *Final Environmental Statement for Bellefonte Nuclear Plant Units 1 and 2* (May 1974); the TVA *Final Environmental Impact Statement for the Bellefonte Conversion Project* (October 1997); the U.S. Department of Energy's *Final Environmental Impact Statement for the Production of Tritium in a Commercial Light Water Reactor* (March 1999), which TVA adopted; and the TVA *Bellefonte Nuclear Plant Units 3 and 4, Combined License Application Part 3, Environmental Report, Revision 1* (October 2008). Where pertinent, the Bellefonte FSEIS incorporates by reference, utilizes, tiers from, or updates information from this substantial environmental record.

The Bellefonte FSEIS also tiered from and incorporated by reference two TVA programmatic reviews, *Energy Vision 2020 Integrated Resource Plan Final Programmatic Environmental Impact Statement* (December 1995) and *Reservoir Operations Study Final Programmatic Environmental Impact Statement* (May 2004). In March 2011, TVA issued a new Integrated Resource

Plan (IRP) and IRP Final Environmental Impact Statement (FEIS) for meeting future demand on the TVA power system over the next 20 years. The need for power analysis in the Bellefonte FSEIS is compatible with, and is updated by, the analysis in the 2011 IRP FEIS.

TVA's 2011 IRP sets forth a planning direction to guide TVA in making future energy resource decisions. This direction includes, among other actions, significant increased investment in energy efficiency and demand response programs, the idling of existing coal units in an amount ranging from 2,400 to 4,700 MWs, and the addition of 1,150 to 3,650 MWs of nuclear capacity. Completion and operation of the 1,260-MW Bellefonte Unit 1 was one of the resource options analyzed in the 2011 IRP and is consistent with the planning direction approved by the TVA Board.

Analyses show that even with substantial energy replacement through conservation measures, TVA must still add new base load generation to balance resources with the projected load requirements. Neither coal-fired nor natural gas-fired power was found to be environmentally preferable to nuclear power, and renewable energy sources were not found sufficient to meet power needs in the required time frame. Completing Bellefonte Unit 1 also would provide TVA more flexibility to idle existing coal plants. These conclusions are confirmed in TVA's new IRP.

The decision to complete Bellefonte Unit 1 precludes further consideration of any of the options for converting the existing facilities at the Bellefonte site to a coal- or natural gas-fired plant that were analyzed in the 1997 FEIS for the Bellefonte Conversion Project.

Public Involvement

TVA published a notice of intent to prepare a supplemental environmental impact statement (SEIS) in the **Federal Register** on August 10, 2009. The NOA for the draft SEIS (DSEIS) was published in the **Federal Register** by the U.S. Environmental Protection Agency (USEPA) on November 13, 2009. TVA accepted comments on the DSEIS until December 28, 2009. Approximately 50 people attended a public meeting on December 8, 2009, in Scottsboro, Alabama. Comments both for and against nuclear power generation were received from 35 individuals and four Federal and state agencies. After considering and responding to all substantive comments, TVA completed and issued the Bellefonte FSEIS, which identifies Alternative B, Completion and Operation of Bellefonte Unit 1, as TVA's

Preferred Alternative. The NOA of the Bellefonte FSEIS was published in the **Federal Register** on May 21, 2010.

TVA also invited comments on the Bellefonte FSEIS during a 30-day period from May 21 through June 21, 2010. Comments were received from 11 persons or entities, including the USEPA. No new issues were raised, and similar comments were addressed in the FSEIS.

Two USEPA comments were addressed in TVA's September 9, 2010, ROD. TVA reported that further examination of U.S. Census data related to neighboring block groups for minority and impoverished populations confirmed the environmental justice finding in the Bellefonte FSEIS that these groups are not expected to be disproportionately affected by completion and operation of a nuclear plant at the Bellefonte site. In response to USEPA comments about the adequacy of housing supply for the construction workforce, TVA committed to undertake an in-depth housing study prior to making a final decision about plant construction. The purpose of the study was to better identify the extent and location of housing impacts and to develop a strategy for addressing those concerns.

An in-depth housing survey was completed in October 2010. The survey identified 16 communities and four counties near the Bellefonte site that were most likely to be considered for relocation by the in-migrating construction and operational workforce, based on commute distances/times, school district options, transportation routes, and available permanent, temporary, and planned housing. The survey assumed that half of the workforce would in-migrate, and half would be existing residents within the region. The study concluded that, overall, demands on housing by the in-migrating construction and operational workforce are anticipated to be met for the first two years of the construction schedule and met entirely for the operational workforce. Based on interviews with city and county officials, local realtors, and area developers, the study indicated that the start of construction and the increase of housing demand are expected to spur both temporary and permanent housing development. TVA will monitor the availability of construction workforce housing. If housing development does not occur as expected, TVA will consider mitigation measures such as transportation assistance for commuting employees living farther than 30 miles away, remote parking areas with shuttles to the Bellefonte site,

development of a temporary RV park and campground located on TVA-owned property or a collaborative development off site to alleviate community pressures from construction-related housing demand. The 2010 Housing Survey report is available upon request.

Environmental Consequences

The Bellefonte FSEIS updated the analyses presented in earlier environmental reviews of the natural, human, and radiological environment that could be affected by completion and operation of a nuclear unit at the Bellefonte site, including discussion of nuclear plant safety, plant security, and decommissioning. Environmental consequences of completing and operating Bellefonte Unit 1 and associated transmission system improvements, as well as alternatives to them, are summarized in the September 2010 Bellefonte ROD.

During the course of the SEIS preparation, TVA consulted with the U.S. Fish and Wildlife Service (USFWS) and the State Historic Preservation Officers (SHPOs) in Alabama, Tennessee, and Georgia, as well as interested tribes. On January 21, 2010, USFWS concluded that only the pink mucket (*Lampsilis abrupta*) mussel could be affected by the proposed nuclear plant construction and operation. In a biological opinion issued April 15, 2010, USFWS issued an incidental take permit for pink mucket under either Action Alternative. TVA committed to providing \$30,000 to be used for research and recovery of the pink mucket should either of the Action Alternatives be selected.

In a September 9, 2009, letter, the Alabama SHPO concurred with TVA's finding of no effects on historic properties associated with completion and operation of a nuclear unit on the Bellefonte site. TVA completed a memorandum of agreement (MOA) with the Georgia SHPO on April 28, 2010, and with the Alabama SHPO on June 1, 2010, for the treatment of potential impacts to historic properties from transmission system improvements on existing rights-of-way. Instead of entering into an MOA, in a May 20, 2010, letter the Tennessee SHPO requested TVA follow procedures to conduct a phased identification and evaluation of historic properties pursuant to 36 CFR 900.4(b)(2).

Following the seismic and tsunami-induced events at the Fukushima (Japan) Daiichi Nuclear Plant on March 11, 2011, TVA performed a review to determine whether that event presented new information about the likelihood or

consequences of severe accidents associated with the Bellefonte Unit 1 design. The review indicated that the likelihood or consequences of an event similar to the one in Japan were already adequately evaluated in the probabilistic safety assessment and risk calculations presented in the FSEIS. Bellefonte Unit 1 is designed to withstand all types of extreme weather, flood, and seismic events. Design-basis improvements to withstand terrorist attacks addressed in recent years will increase the plant's ability to mitigate severe accidents. Based upon TVA's post-Fukushima review, TVA concludes that the severe accident analysis in the FSEIS adequately bounds the potential for environmental and public health consequences.

In addition to the site-specific review of the Bellefonte design, TVA has developed a fleet-wide action plan designed to strengthen its nuclear facilities to withstand combinations of large-scale disasters, both man-made and natural. This plan tracks closely with the July 12, 2011, NRC report *Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident*. TVA's Fukushima action plan includes short-term, intermediate, and long-term actions designed to address lessons learned from the accident in Japan. A primary focus is looking at additional backups to existing emergency power systems, diesel generators, and battery banks to increase the ability to weather an extended loss of outside power at any of TVA's nuclear plants. This means the purchase and staging of more diesel and gasoline-fueled electric generators. Plans include purchasing additional pumps and hoses that can draw water from the Tennessee River, providing another emergency alternative to maintain water levels in reactors and used fuel pools. The benefits and feasibility of more rapid transfer of spent fuel to dry cask storage are being examined. Emergency plans and control room simulators have been revamped to include scenarios for events that occur simultaneously, like the earthquake and tsunami in Japan. Implementing TVA's Fukushima action plan will further improve the safety of TVA's operating plants.

TVA will continue to meet all regulatory requirements and nuclear power industry recommendations that result from the Fukushima event at its six operating nuclear units, Watts Bar Unit 2, which is currently under construction, and at Bellefonte Unit 1. As new information becomes available and new insights are developed from

the Fukushima event, TVA will consider what further steps might be taken to ensure the safe operation of its nuclear fleet.

Decision

On August 20, 2010, the TVA Board approved a budget allocation of \$248 million in support of continued engineering, design, and regulatory-basis development, as well as the procurement of long-lead components such as steam generators for Unit 1. This helped to preserve Bellefonte Unit 1 as a feasible energy resource option. After considering the analyses done for TVA's 2011 IRP, the IRP FEIS, the results of engineering and financial studies conducted since August 2010, and analyses in response to the Fukushima Daiichi accident, the TVA Board approved the completion and operation of Bellefonte Unit 1 on August 18, 2011. The Board directed TVA staff to not resume construction activities at Bellefonte Unit 1 until fuel is initially loaded at TVA Watts Bar Unit 2. Subject to this condition, plant construction can commence 120 days after TVA submits a written notice to the Nuclear Regulatory Commission (NRC) containing certain information regarding plant status, schedules, and other descriptions as set forth in the NRC Policy Statement on Deferred Plants (52 FR 38077 [October 14, 1987]).

Environmentally Preferred Alternative

As discussed in the September 2010 Bellefonte ROD, TVA has concluded that the environmental impacts of the two Action Alternatives would be very similar and that neither Action Alternative would be environmentally preferable to the other. However, either Action Alternative likely would be environmentally preferable to the No Action Alternative, assuming TVA would build new base load generation elsewhere.

Mitigation Measures

The following measures will be used to minimize environmental impacts from completion and operation of Bellefonte Unit 1:

- Avoid disturbance of archaeological site 1JA111.
- Take appropriate steps to monitor and mitigate potential housing, traffic, and school impacts in Jackson County, Alabama, during plant construction and mitigate such impacts if needed. Mitigation could include measures such as transportation assistance for commuting employees living outside a 30-mile commuting distance, remote parking areas with shuttles to the Bellefonte site, development of a

temporary on-site RV park and campground or a collaborative development off site.

- In accordance with the permit issued by USFWS on April 15, 2010, provide \$30,000 for research and recovery of the pink mucket.

The following mitigation measures would be implemented to respond to the potential impacts of the proposed transmission system improvements. Prior to implementing any ground-disturbing work, TVA would:

- Survey areas to be disturbed where endangered or threatened plant species have been previously reported to verify if the rare species are still present in the transmission line right-of-way. The locations of any listed species would be identified on construction plans and avoided during construction activities.

- Survey wetlands in the areas that may be disturbed as a result of upgrading/reenergizing activities. Mitigation measures that avoid, minimize, or compensate for impacts to wetlands would be implemented to ensure no significant impacts or loss of wetland function occurs.

- In consultation with the SHPO (for the state in which the property is located) and other consulting parties, develop and evaluate alternatives or modifications that would avoid, minimize, or mitigate any adverse effects to historic properties, if any. With the implementation of the above measures, TVA has determined that adverse environmental impacts of completing and operating Bellefonte Unit 1 would be substantially reduced.

Dated: August 24, 2011.

Ashok S. Bhatnagar,

Senior Vice President, Nuclear Generation Development and Construction.

[FR Doc. 2011-22079 Filed 8-29-11; 8:45 am]

BILLING CODE 8120-08-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 139(J)(1). The actions relate to a proposed bridge widening and

rehabilitation project, the North Spring Street Viaduct Widening and Rehabilitation in the County of Los Angeles, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(J)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before February 27, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Ollie Jackson, Senior Environmental Planner, Caltrans, District 7, Division of Environmental Planning, 100 South Main Street, Suite 100, Los Angeles, CA 90012-3712, (213) 897-8610, ollie_jackson@dot.ca.gov.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that Caltrans have taken final agency actions subject to 23 U.S.C. 139(J)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: The City of Los Angeles in cooperation with Caltrans proposes improvements and rehabilitation to the existing North Spring Viaduct and its adjoining roadways. The proposed project area is situated northeast of downtown Los Angeles in an area that includes residential, commercial, industrial, and open space land uses. The proposed project area straddles portions of the Central City North and Northeast Los Angeles Community Planning areas. Regional transportation facilities in the area include interstate 110 (I-110), Interstate 5 (I-5), and State Route 101 (SR-101). Completing the project would correct existing geometrical and design deficiencies, and to address seismic vulnerability issues in order to increase the viaduct's SR to a minimum of 80. An additional purpose of the project is to improve bicycle and pedestrian circulation and safety across the river and railroad tracks. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Finding of No Significant Impact (FONSI) for the project, approved on June 30, 2011. The FONSI and other project records are available by

contacting Caltrans at the addresses provided above. The Caltrans FONSI can be viewed and downloaded from the project Web site at <http://www.dot.ca.gov/dist07/resources/envdocs/>.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

- *General*: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal Aid Highway Act; [23 U.S.C. 109].
- *Air*: Clean Air Act 42 U.S.C. 7401–7671(q).
- *Migratory Bird Treaty Act* [16 U.S.C. 703–712]
- *Historic and Cultural Resources*: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa)–11].
- *Social and Economic*: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d) (1)]; The Uniform Relocation Assistance Act and Real Property Acquisition Policies Act of 1970, as amended.
- *Hazardous Materials*: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675; Superfund Amendments and Reauthorization Act of 1986 (SARA);
- *Executive Orders*: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: August 24, 2011.

Vincent P. Mammano.

Division Administrator, Federal Highway Administration, Sacramento, California.

[FR Doc. 2011–22077 Filed 8–29–11; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2006–24812]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR),

this document provides the public notice that by a document dated July 27, 2011, BNSF Railway (BNSF) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain requirements of Federal railroad safety regulations contained at 49 CFR part 232. FRA has assigned the petition Docket Number 2006–24812.

BNSF seeks a waiver of compliance from certain provisions of 49 CFR part 232, *Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment*. Specifically, BNSF is requesting to expand the scope of the existing waiver that granted relief from the maximum mileage and inspection requirements specified by 49 CFR 232.213, *Extended haul trains*. BNSF would like to perform the 1,500-mile extended haul inspection for two designated trains at points that slightly exceed the 1,500-mile limit. The two destination points are Kansas City Power and Light (KCP&L); Iatan Generating Plant in Sadler, MO; and Dynegy, Hennepin Plant in Havana, IL. The origination points are various coal mines in the Powder River Basin that would exceed the 1,500-mile Class 1 inspection limit between 30.8 and 103.2 miles. Also, BNSF would like to realign the inspection points. Some inspections normally performed at Lincoln, NE, may be reduced on the Dynegy trains by shifting inspections to Guernsey, WY. Also, KCP&L train inspections may be shifted to Guernsey or Donkey Creek, WY, from Lincoln, NE.

Given the increased demand for coal by the utility industry, BNSF believes that granting this relief is critical to relieving congestion at Lincoln, NE, while maintaining high-quality inspections; and the railroad believes this will not compromise railroad safety. The following trains are covered by the requested relief: E–SAIATM, E–SAIBAM, E–SAIBTM, E–SAICAM, E–SAICDM, E–SAICRM, E–SAIWTM, C–ATMPHH, C–BTMPHH, C–ETMPHH, and C–NAMPHH.

In summary, BNSF respectfully requests that these trains be granted inclusion in FRA Waiver 2006–24812, which was established to resolve congestion issues in 2006. In the 4 years that these trains have been operating under the current waiver, there has been no adverse impact to safety. Since the trains covered by this request operate the very same type of equipment, there is no anticipated deviation from the current high level of safety.

BNSF states that it will provide both mechanical and operating forces with the list of trains allowed to operate past the 1,500-mile threshold. Additionally,

BNSF would maintain records of defective conditions discovered during inspections, as currently required, including any defective equipment set out en route.

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 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 by October 14, 2011 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

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 DOT'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 24, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–22059 Filed 8–29–11; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****[Docket Number FRA-2010-0010]****Petition for Waiver of Compliance**

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated July 11, 2011, CSX Transportation (CSX) has petitioned the Federal Railroad Administration (FRA) for reconsideration of a denied waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 236. FRA has assigned the petition Docket Number FRA-2010-0010 Reconsideration.

The application had been reviewed by the FRA Railroad Safety Board on September 9, 2010, with the decision being that more information was required. CSX was provided, by the FRA Region 3 Regional Office, with a request for the following:

- CSX to address security of dual-tone multiple frequency (DTMF) tones.
- CSX to provide FRA with an understanding of how the bridge closing without visual is safely accomplished.
- CSX to provide the proposed operating instructions of the bridge.

Subsequent to CSX failing to respond to requests for the information, FRA denied the application on February 4, 2011, and considered FRA-2010-0010 closed.

CSX has, in the enclosure to the July 11, 2011, letter, provided the requested information; FRA, therefore, considers Docket Number FRA-2010-0010 opened for reconsideration.

CSX seeks reconsideration of the proposed modification of the bridge tender controlled signals to automatic signals at Big Manatee Drawbridge in Bradenton, Florida, at Milepost AZA 915.8, in the Jacksonville Division, Palmetto Subdivision. The modification consist of the conversion of bridge tender controlled signals to automatic signals.

The reason given for the proposed change is that the drawbridge tender position is being eliminated. Train crews will request that the bridge open and close via DTMF radio. Signals will clear automatically for train movements once the bridge has been closed and locked and an approach circuit is occupied.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at <http://www.regulations.gov> and in person at the U.S. Department of Transportation's (DOT) Docket

Operations Facility, 1200 New Jersey Avenue, SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

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 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 by October 14, 2011 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or at <http://www.dot.gov/privacy.html>.

Issued in Washington, DC on August 23, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011-22053 Filed 8-29-11; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****[Docket Number FRA-2011-0064]****Petition for Waiver of Compliance**

In accordance with Part 211 of Title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that by a document dated July 12, 2011, the Association of American Railroads (AAR) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR 229.135(b)(5) and (b)(6). FRA assigned the petition Docket Number FRA-2011-0064.

Specifically, the AAR seeks a waiver exempting railroads from meeting the 49 CFR Part 229, Appendix D, requirements until December 31, 2015, due to Positive Train Control (PTC) requirements unforeseen at the time 49 CFR 229.135(b5) and (b6) were adopted. The PTC mandate will require an entirely new event recorder module, inclusive of the Appendix D requirements. Title 49 CFR Section 229.135(b) requires that certain locomotives be equipped with an event recorder that includes a certified crashworthy event recorder memory module (ERMM). The Appendix D section prescribes the requirements for certifying ERMM as being crashworthy, including the performance criteria and test sequence for establishing the crashworthiness of the ERMM, as well as the marking of the event recorder containing the crashworthy ERMM. The railroads are spending as much as \$5,000.00 on modules that will have to be replaced prematurely when these locomotives are equipped with PTC. Therefore, a waiver of the Appendix D requirement will enable the industry to avoid the expense of this compliance for modules that will only be used for a short period of time.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at <http://www.regulations.gov> and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave., SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

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 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 by October 14, 2011 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

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 DOT'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 23, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011-22058 Filed 8-29-11; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2011-0162; Notice No. 11-7]

Safety Notice: Transportation of DOT Special Permit Packages in Commerce

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice.

SUMMARY: In this safety notice, PHMSA is alerting the regulated community to

the importance of adhering to Federal requirements when offering and transporting hazardous materials in DOT Special Permit (SP) packages. PHMSA is concerned that many persons who offer or transport SP packages fail to recognize the additional requirements applicable to filling, offering, and moving SP packages. By issuing this safety notice, PHMSA is attempting to raise awareness within the hazardous materials community of the inherent characteristics of DOT SPs and underscore the possible consequences of failing to recognize an SP package and react accordingly.

FOR FURTHER INFORMATION CONTACT: For questions regarding specifics on the cryogenic gas incident, please contact: Mr. John Heneghan, Director, Southern Region Office, Office of Hazardous Materials Safety, (404) 832-1135. For general questions regarding Special Permits, please contact: Mr. Ryan Paquet, Director, Approvals and Permits Division, Office of Hazardous Materials Safety, (202) 366-4512.

SUPPLEMENTARY INFORMATION:

I. Background

DOT SPs (previously known as DOT Exemptions) allow the SP grantee to perform some function contrary to, or in addition to, the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180). SPs may be used to allow an exemption from provisions of the HMR. SPs can also grant permission to third parties, *i.e.*, persons who are not SP grantees or otherwise party to an SP, to receive, use, retest, or reship an SP package according to the requirements of the HMR and the additional requirements or exceptions described in the SP. SPs are commonly used to authorize: (i) Packaging construction standards that differ from a UN Standard or DOT Specification, (ii) alternative means of testing or closure, (iii) reuse of the packaging in general, (iv) alternative hazard communication requirements, (v) alternative segregation requirements, or (vi) transportation of forbidden materials.

PHMSA's purpose in authorizing the use of SPs is to allow industry to benefit from alternative technologies, materials, and/or processes while maintaining a level of safety at least equal to the safety level required under the HMR. However, PHMSA wishes to emphasize that failure to comply with SP requirements can result in breakdowns in hazard communication, packaging failures, property damage, injury, loss of life and even catastrophic events.

In many cases, maintaining an equivalent level of safety while

pursuing alternatives to the normal requirements of the HMR will require additional safety measures. For example, consider the case of a DOT 3HT cylinder that has been manufactured and re-qualified for service under an SP to be used in a fire suppression system onboard an aircraft. The SP may require the cylinder to be tested more frequently and at a different test pressure than the HMR would otherwise require. If a cylinder re-qualifier fails to recognize the cylinder's SP markings and apply the more stringent SP requirements, it might wait too long to retest the cylinder or apply the wrong test pressure. These errors put lives and property at risk when defective cylinders are improperly tested and allowed to function as part of an emergency response system, such as a fire suppression system.

Hazardous materials training is an important tool for ensuring proper hazard communication and compliance with SP and HMR requirements. Part of the training process involves learning to identify SP packages. Pursuant to the HMR, each SP package is required to be marked "DOT-SP" with a number identifying the SP associated with that package, unless specifically excepted by the SP. PHMSA expects trained employees to recognize SP packages and react accordingly by following the requirements of the HMR and the applicable SP. PHMSA recently concluded an investigation where a hazardous material shipper's failure to recognize an SP package and comply with the safety requirements of the applicable SP and HMR cost the lives of three transportation workers.

II. Current Regulatory Requirements

The HMR specifies that persons may offer or transport packages authorized by DOT SPs under the terms specified therein and that if an SP contains requirements applicable to a carrier of an SP package, the offeror shall provide a copy of the SP to the respective carrier (see § 173.22a), unless excepted by the SP. In addition to specific requirements contained in DOT SPs, the HMR includes requirements for hazard communication and handling of SP packages. SP packages must be:

- Plainly and durably marked "DOT-SP" followed by the SP number assigned (see §§ 172.301(c) and 172.302(c)), unless excepted by the SP; and

- Accompanied by shipping papers bearing the notation "DOT-SP" followed by the SP number assigned and clearly associated with the shipping description to which the SP applies (see § 172.203(a)), unless excepted by the SP.

Furthermore, under the training requirements in § 172.704(a)(2), each hazmat employee must be provided function-specific training concerning requirements of the HMR, and exemptions or special permits issued under subchapter A of Title 49 that are specifically applicable to the functions the employee performs.

Non-compliance with SP package requirements has serious safety consequences. PHMSA seeks to encourage compliance by aggressively enforcing SP safety standards and increasing its awareness and outreach efforts.

Accordingly, PHMSA is publishing this safety notice to further promote awareness of the ongoing safety concern and ensure that industry is aware of its responsibilities associated with the offering and transportation of hazardous materials in SP packaging, the current regulatory requirements applicable to such transportation, and that regulatory violations will be prosecuted to the maximum extent permitted under the law.

Persons who violate the HMR may be subject to significant civil penalties and/or criminal fines and imprisonment. Maximum civil penalties may be imposed of up to \$55,000 per violation or \$110,000 per violation if a death, serious illness, or severe injury occurs to a person or substantial destruction of property. Potential criminal penalties include fines of up to \$500,000 and/or ten years in jail.

More detailed information on the requirements in the HMR governing the offering and transportation of SP packages is available on DOT's Hazmat Safety Web site: <http://www.phmsa.dot.gov/hazmat>. The HMR are also accessible through PHMSA's Web site, and answers to specific questions may be obtained from the Hazardous Materials Information Center at 1-800-467-4922 (in Washington, DC, call 202-366-4488).

III. Recommended Action

PHMSA recommends that industry institute quality control measures to identify and properly handle DOT SP packages and packages containing hazardous materials in general:

(1) Shippers and carriers should stress the importance of recognizing an SP package to their employees. The importance of recognizing an SP package should be given the same level of attention as when they determine whether a packaging specification meets a UN standard or DOT specification. This is especially important to those operations that re-ship packages.

(2) Once a person has identified a DOT SP package, that person should obtain a current copy of the SP and review it for applicable requirements. Copies of SPs may be obtained from PHMSA's Web site at: <http://phmsa.dot.gov/hazmat/regs/sp-a/special-permits>. The person should also review the HMR requirements applicable to SP packages.

(3) Shippers and carriers should evaluate hazardous materials training programs and communication protocols in their operations with respect to recognizing and handling SP packages to ensure that the subject is discussed and included during knowledge testing. Any person performing a function required by an SP or shipping an SP package is required to receive "function-specific" training of the requirements contained in each special permit.

(4) Third-party hazardous materials or dangerous goods instructors, consultants, and others, should review their training programs to ensure that the subject of SP packages is discussed and included during knowledge testing.

(5) Shippers should implement or review existing pre-shipment procedures to ensure that a particular packaging is prepared as authorized by an SP and/or the HMR and that all communication requirements have been met.

These recommendations are not exclusive; we hope that industry representatives will use the information provided herein, together with any other available information, to consider other reasonable measures they believe appropriate to increase awareness of DOT SPs and their responsibility in the handling and transporting such packages.

Issued in Washington, DC on August 24, 2011.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 2011-22110 Filed 8-29-11; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

August 24, 2011.

The Department of the Treasury will submit the following public information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13 on or after the date of publication of this notice. A copy of the submission may be obtained by

contacting the Treasury Departmental Office Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury PRA Clearance Officer, Department of the Treasury, 1750 Pennsylvania Avenue, NW., Suite 11010, Washington, DC 20220.

DATES: Written comments should be received on or before September 29, 2011 to be assured of consideration.

Office of Foreign Assets Control (OFAC)

OMB Number: 1505-0198.

Type of Review: Extension without change of a currently approved collection.

Title: Requirement to Report Information About the Shipment of Rough Diamonds.

Abstract: The information collection is needed to monitor the integrity of international rough diamond shipments.

Respondents: Private Sector; Businesses or other for-profits.

Estimated Total Annual Burden Hours: 1,750.

Departmental Office Clearance Officer: James Earl, DO/Office of Foreign Assets Control, 1500 Pennsylvania Ave., NW., Rm. 5205, Washington, DC 20220; (202) 622-1947

OMB Reviewer: Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395-7873.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2011-22061 Filed 8-29-11; 8:45 am]

BILLING CODE 4810-25-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8308

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 8308, Report of a Sale or Exchange of Certain Partnership Interests.

DATES: Written comments should be received on or before October 31, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. 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(s) and instructions should be directed to Joel Goldberger, (202) 622-6665, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet to Joel.P.Goldberger@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Report of a Sale or Exchange of Certain Partnership Interests.

OMB Number: 1545-0941.

Form Number: 8308.

Abstract: Form 8308 is an information return that gives the IRS the names of the parties involved in an exchange of a partnership interest under Internal Revenue Code section 751(a). It is also used by the partnership as a statement to the transferor and transferee. It alerts the transferor that a portion of the gain on the sale of a partnership interest may be ordinary income.

Current Actions: There are no changes being made to Form 8308 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, and farms.

Estimated Number of Respondents: 200,000.

Estimated Time Per Respondent: 7 hrs., 18 minutes.

Estimated Total Annual Burden Hours: 1,460,000.

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: August 16, 2011.

Gerald Shields,

IRS Reports Clearance Officer.

[FR Doc. 2011-22043 Filed 8-29-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0594]

Agency Information Collection (Election To Apply Selected Reserve Services to either Montgomery GI Bill-Active Duty or to the Montgomery GI Bill-Selected Reserve) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0594" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-

7485, FAX (202) 461-0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0594."

SUPPLEMENTARY INFORMATION:

Title: Election to Apply Selected Reserve Services to Either Montgomery GI Bill-Active Duty or to the Montgomery GI Bill-Selected Reserve.

OMB Control Number: 2900-0594.

Type of Review: Extension of a previously approved collection.

Abstract: Reservist who participant in the Montgomery GI Bill—Active Duty and served on active duty for two years followed by six years in the Selected Reserve must elect to apply the selected reserved credit either toward the Montgomery GI Bill-Active Duty or toward the Montgomery GI Bill-Selected Reserve benefits. Reservists must make this election in writing, which will take effect when the individual either negotiates a check or receives education benefits via direct deposit or electronic funds transfer under the program elected. VA uses the election to determine which benefit is payable based on the individual's Selected Reserve service.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 8, 2011, at page 33416.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,667 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 8,000.

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011-22018 Filed 8-29-11; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0621]

Agency Information Collection (National Practitioner Data Bank (NPDB) Regulations) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov>; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0621" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 461–0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900–0621."

SUPPLEMENTARY INFORMATION:
Title: National Practitioner Data Bank Regulations (NPDB).

OMB Control Number: OMB Control No. 2900–0621.

Type of Review: Extension of a previously approved collection.

Abstracts: The National Practitioner Data Bank, authorized by the Health Care Quality Improvement Act of 1986 and administered by the Department of Health and Human Service, was established for the purpose of collecting and releasing certain information concerning physicians, dentists, and other licensed health care practitioners. The Act requires VA to obtain information from the Data Bank on health care providers who provide or seek to provide health care services at VA facilities and report information regarding malpractice payments and adverse clinical privileges action to the Data Bank.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 7, 2011, at page 33032.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,500.
Frequency of Response: On occasion.
Estimated Average Burden per Respondent: 5 hours.
Estimated Annual Responses: 500.

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–22015 Filed 8–29–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0747]

Agency Information Collection (Fully Developed Claims) (Applications for Compensation; Applications for Pension; Applications for DIC, Death Pension, and/or Accrued Benefits): Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0747" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900–0747."

SUPPLEMENTARY INFORMATION:
Titles: Fully Developed Claims (Applications for Compensation; Applications for Pension; Applications for DIC, Death Pension, and/or Accrued Benefits, VA Forms 21–526EZ, 21–527EZ and 21–534EZ.

OMB Control Number: 2900–0747.

Type of Review: Extension of a currently approved collection.

Abstract: VA Forms 21–526EZ, 21–527EZ and 21–534EZ will be used to process a claim within 90 days after receipt from a claimant. Claimants are required to sign and date the certification, certifying as of the signed date, no additional information or evidence is available or needs to be submitted in order to adjudicate the claim.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 15, 2011, at page 35086.

Affected Public: Individuals or Households.

Estimated Annual Burden: 43,516 hours.

Estimated Average Burden per Respondent: 25 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 104,440.

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–22021 Filed 8–29–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New]

Agency Information Collection (Nonprofit Research and Education Corporations (NPCs) Data Collection) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov>; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-New" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, fax (202) 461-0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-New."

SUPPLEMENTARY INFORMATION:

Titles: Nonprofit Research and Education Corporations (NPCs) Data Collection:

a. Nonprofit Research and Education Corporations (NPCs) PC Annual Report Template, VA Form 10-0510.

b. Nonprofit Research and Education Corporations (NPCs) Audit Actions Items Remediation Plans, VA Form 10-0510a.

c. Nonprofit Program Office (NPPO) Internal Control Questionnaire, VA Form 10-0510b.

d. Nonprofit Program Office (NPPO) Operations Oversight Questionnaire, VA Form 10-0510c.

OMB Control Number: 2900-New.

Type of Review: In use without an OMB number.

Abstracts:

a. VA Form 10-0510 is used to monitor the progress of NPC programs.

b. VA Form 10-0510a is used to review the NPC's resolutions for audit deficiencies and recommendations.

c. VA Form 10-0510b is used to conduct reviews, audits, and investigations of the NPCs. The questionnaire will also be used to uncover weaknesses and lapses in internal controls.

d. VA Form 10-0510c, or portions of it, will be used to conduct operational reviews of the NPCs. The major objective of the questionnaire is to uncover operating problems and areas that need improvement.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 8, 2011, at pages 33416-33417.

Affected Public: Federal Government.
Estimated Annual Burden:

a. Nonprofit Research and Education Corporations (NPCs) PC Annual Report Template, VA Form 10-0510—301 hours.

b. Nonprofit Research and Education Corporations (NPCs) Audit Actions Items Remediation Plans, VA Form 10-0510a—84 hours.

c. Nonprofit Program Office (NPPO) Internal Control Questionnaire, VA Form 10-0510b—387 hours.

d. Nonprofit Program Office (NPPO) Operations Oversight Questionnaire, VA Form 10-0510c—129 hours.

Estimated Average Burden Per Respondent:

a. Nonprofit Research and Education Corporations (NPCs) PC Annual Report Template, VA Form 10-0510—210 minutes.

b. Nonprofit Research and Education Corporations (NPCs) Audit Actions Items Remediation Plans, VA Form 10-0510a—120 minutes.

c. Nonprofit Program Office (NPPO) Internal Control Questionnaire, VA Form 10-0510b—270 minutes.

d. Nonprofit Program Office (NPPO) Operations Oversight Questionnaire, VA Form 10-0510c—90 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents:

a. Nonprofit Research and Education Corporations (NPCs) PC Annual Report Template, VA Form 10-0510—86.

b. Nonprofit Research and Education Corporations (NPCs) Audit Actions Items Remediation Plans, VA Form 10-0510a—42.

c. Nonprofit Program Office (NPPO) Internal Control Questionnaire, VA Form 10-0510b—86.

d. Nonprofit Program Office (NPPO) Operations Oversight Questionnaire, VA Form 10-0510c—86.

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.
[FR Doc. 2011-22022 Filed 8-29-11; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0014]

Agency Information Collection (Authorization and Certification of Entrance or Reentrance into Rehabilitation and Certification of Status): Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0014" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, FAX (202) 273-0443 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0014."

SUPPLEMENTARY INFORMATION:

Title: Authorization and Certification of Entrance or Reentrance into Rehabilitation and Certification of Status, VA Form 28-1905.

OMB Control Number: 2900-0014.

Type of Review: Extension of a currently approved collection.

Abstract: VA case managers use VA Form 28-1905 to identify program participants and provide specific guidelines on the planned program to facilities providing education, training, or other rehabilitation services. Facility officials certify that the claimant has enrolled in the planned program and submit the form to VA. VA uses the data collected to ensure that claimants do not receive benefits for periods for which they did not participate in any rehabilitation, special restorative or specialized vocational training programs.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 30, 2011, at pages 38460-38461.

Affected Public: Not-for-profit institutions.

Estimated Annual Burden: 7,500 hours.

Estimated Average Burden per Respondent: 5 minutes.
Frequency of Response: One time.
Estimated Number of Respondents: 90,000

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011-22019 Filed 8-29-11; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0545]

Agency Information Collection (Report of Medical, Legal, and Other Expenses Incident to Recovery for Injury or Death) Activity under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0545" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, FAX (202) 273-0443 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0545."

SUPPLEMENTARY INFORMATION:

Title: Report of Medical, Legal, and Other Expenses Incident to Recovery for Injury or Death, VA Form 21-8416b.

OMB Control Number: 2900-0545.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21-8416b to report compensation

awarded by another entity or government agency for personal injury or death. Such award is considered as countable income; however, medical, legal or other expenses incident to the injury or death, or incident to the collection or recovery of the compensation may be deducted from the amount awarded or settled. The information collected is use to determine the claimant's eligibility for income based benefits and the rate payable.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 14, 2011, at page 34812.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,125 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,500.

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011-22016 Filed 8-29-11; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0768]

Agency Information Collection (Joint Application for Comprehensive Assistance and Support Services for Family Caregivers) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 29, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov>; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0768" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, fax (202) 461-0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0768."

SUPPLEMENTARY INFORMATION:

Title: Joint Application for Comprehensive Assistance and Support Services for Family Caregivers, VA Form 10-10CG.

OMB Control Number: OMB Control No. 2900-0768.

Type of Review: Extension of a previously approved collection.

Abstracts: VA Form 10-10CG is completed by Veterans who served in Operation Enduring Freedom/Operation Iraqi Freedom/Operation New Dawn or active duty service member undergoing medical discharge to determine their eligibility to receive certain medical, travel, training, and financial benefits under the Caregiver Program. Individuals designated as primary or secondary family caregiver also complete VA Form 10-10CG to determine whether they meet the criteria to serve as caregiver and their eligibility receive stipend and certain benefits under the Caregiver Program.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 14, 2011, at pages 34812-34813.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 1,250 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 5,000.

Dated: August 24, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011-22020 Filed 8-29-11; 8:45 am]

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Part II

National Labor Relations Board

29 CFR Part 104

Notification of Employee Rights Under the National Labor Relations Act;
Final Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 104

RIN 3142-AA07

Notification of Employee Rights Under the National Labor Relations Act

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: On December 22, 2010, the National Labor Relations Board (Board) issued a proposed rule requiring employers, including labor organizations in their capacity as employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights as employees under the NLRA. This final rule sets forth the Board's review of and responses to comments on the proposal and incorporates any changes made to the rule in response to those comments.

The Board believes that many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute. A beneficial side effect may well be the promotion of statutory compliance by employers and unions.

The final rule establishes the size, form, and content of the notice, and sets forth provisions regarding the enforcement of the rule.

DATES: This rule will be effective on November 14, 2011.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570, (202) 273-1067 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The NLRA, enacted in 1935, is the Federal statute that regulates most private sector labor-management relations in the United States.¹ Section 7 of the NLRA, 29 U.S.C. 157, guarantees that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all such activities[.]

In Section 1, 29 U.S.C. 151, Congress explained why it was necessary for those rights to be protected:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce[.] * * *

* * * * *

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * * * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Thus, Congress plainly stated that, in its judgment, protecting the rights of employees to form and join unions and to engage in collective bargaining would benefit not only the employees themselves, but the nation as a whole. The Board was established to ensure that employers and, later, unions respect the exercise of employees' rights under the NLRA.²

For employees to fully exercise their NLRA rights, however, they must know that those rights exist and that the Board protects those rights. As the Board explained in its Notice of Proposed Rulemaking (NPRM), 75 FR 80410, it has reason to think that most do not.³

² The original NLRA did not include restrictions on the actions of unions; those were added in the Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. 141 *et seq.*, Title I.

³ The Board cited three law review articles in which the authors contended that American workers are largely unaware of their NLRA rights, that the Board can take action to vindicate those rights, and that this lack of knowledge stands in the way of employees' effectively exercising their rights. Peter D. DeChiara, "The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act," 32 Harv. J. on Legis. 431, 433-434 (1995); Charles J. Morris,

The Board suggested a number of reasons why such a knowledge gap could exist—the low percentage of employees who are represented by unions, and thus lack an important source of information about NLRA rights; the increasing proportion of immigrants in the work force, who are unlikely to be familiar with their workplace rights; and lack of information about labor law and labor relations on the part of high school students who are about to enter the labor force.⁴

Of greatest concern to the Board, however, is the fact that, except in very limited circumstances, no one is required to inform employees of their NLRA rights.⁵ The Board is almost unique among agencies and departments administering major

"Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board," 23 Stetson L. Rev. 101, 107 (1993); Morris, "NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct," 137 U. Pa. L. Rev. 1673, 1675-1676 (1989). 75 FR at 80411.

⁴ *Id.*

⁵ The Board requires that employees be notified of their NLRA rights in only the following narrow circumstances: (1) For the three working days before a Board-conducted representation election, the employer is required to post a notice of election including a brief description of employee rights; see 29 CFR 103.20. (2) When an employer or a union has been found to have violated employee rights under the NLRA, it is required to post a notice containing a brief summary of those rights. (3) Before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right under *NLRB v. General Motors*, 373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988), to be or remain nonmembers and that nonmembers have the right to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees of such activities. *California Saw & Knife Works*, 320 NLRB 224, 233 (1995), *enfd.* sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied* sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). The same notice must also be given to union members if they did not receive it when they entered the bargaining unit. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995), *rev'd.* on other grounds sub nom. *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *vacated* sub nom. *United Paperworkers Intern. Union v. Buzenius*, 525 U.S. 979 (1998). (4) When an employer voluntarily recognizes a union, the Board has required that the employer must post a notice informing employees: (i) That the employer recognized the union on the basis of evidence that it was designated by a majority of the unit employees; (ii) the date of recognition; (iii) that all employees, including those who previously signed cards for the recognized union, have the right to be represented by a labor organization of their choice, or no union at all; (iv) that within 45 days of the date of the notice a decertification or rival petition, supported by 30 percent or more of the unit employees, may be filed with the Board and will be processed to an election; and, (v) that if no petition is filed within 45 days, the recognition will not be subject to challenge for a reasonable period to allow the employer and union to negotiate a collective-bargaining agreement. *Dana Corp.*, 351 NLRB 434 (2007).

¹ Labor-management relations in the railroad and airline industries are governed by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

Federal labor and employment laws in not requiring employers routinely to post notices at their workplaces informing employees of their statutory rights.⁶ Given this common practice of workplace notice-posting, it is reasonable for the Board to infer that a posting requirement will increase employees' awareness of their rights under the NLRA.⁷ Further support for that position is President Obama's recent Executive Order 13496, issued on January 30, 2009, which stressed the need for employees to be informed of their NLRA rights. Executive Order 13496 requires Federal contractors and subcontractors to include in their Government contracts specific provisions requiring them to post notices of employees' NLRA rights. On May 20, 2010, the Department of Labor issued a Final Rule implementing the order effective June 21, 2010. 75 FR 28368, 29 CFR part 471.

After due consideration, the Board has decided to require that employees of all employers subject to the NLRA be informed of their NLRA rights. Informing employees of their statutory rights is central to advancing the NLRA's promise of "full freedom of association, self-organization, and designation of representatives of their own choosing." NLRA Section 1, 29 U.S.C. 151. It is fundamental to employees' exercise of their rights that the employees know both their basic rights and where they can go to seek help in understanding those rights. Notice of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities, and to refrain from such activities, and of the Board's role in protecting those statutory rights is necessary to effectuate the provisions of the NLRA.

The Board believes that the workplace itself is the most appropriate place for communicating with employees about their basic statutory rights as employees. Cf. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) ("[T]he plant is a particularly appropriate place for the distribution of [NLRA] material.").

Accordingly, and pursuant to its rulemaking authority under Section 6 of the NLRA, the Board proposed a new rule requiring all employers subject to the NLRA to post a copy of a notice advising employees of their rights under

the NLRA and providing information pertaining to the enforcement of those rights. 75 FR 80411. For the reasons discussed more fully below, the Board tentatively determined that the content of the notice should be the same as that of the notice required under the Department of Labor's notice posting rule, 29 CFR part 471. *Id.* at 80412. Also, as discussed at length below, the Board proposed that failure to post the notice would be found to be an unfair labor practice—*i.e.*, to interfere with, restrain, or coerce employees in the exercise of their NLRA rights, in violation of Section 8(a)(1) of the NLRA. *Id.* at 80414. The Board also proposed that failure to post the notice could lead to tolling of the 6-month statute of limitations for filing unfair labor practice charges, and that knowing and willful failure to post the notice could be considered as evidence of unlawful motive in unfair labor practice cases. *Id.* The Board explained that the burden of compliance would be minimal—the notices would be made available at no charge by the Board (both electronically and in hard copy), and employers would only be required to post the notices in places where they customarily post notices to employees; the rule would contain no reporting or recordkeeping requirements. *Id.* at 80412. Finally, the Board expressed its position that it was not required to prepare an initial regulatory flexibility analysis of the proposed rule under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and that the notice posting requirement was not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* *Id.* at 80415–80416.

The Board invited comments on its legal authority to issue the rule, the content of the notice, the requirements for posting the notice, the proposed enforcement scheme, the definitions of terms in the proposed rule, and on its positions concerning the Regulatory Flexibility Act and the Paperwork Reduction Act. The Board stated that comments would be accepted for 60 days following the publication of the NPRM in the **Federal Register**, or until February 22, 2011. The Board received 6,560 comments by February 22. However, many late-filed comments were also submitted, and the Board decided to accept all comments that it received on or before March 23.⁸

In all, 7,034 comments were received from employers, employees, unions, employer organizations, worker assistance organizations, and other concerned organizations and individuals, including two members of Congress. The majority of comments, as well as Board Member Hayes' dissent, oppose the rule or aspects of it; many opposing comments contain suggestions for improvement in the event the Board issues a final rule. Many comments, however, support the rule; a few of those suggest changes to clarify or strengthen the rule. The Board wishes to express its appreciation to all those who took the time to submit thoughtful and helpful comments and suggestions concerning the proposed rule.⁹

After careful consideration of the comments received, the Board has decided to issue a final rule that is similar to that proposed in the NPRM, but with some changes suggested by commenters. The most significant change in the final rule is the deletion of the requirement that employers distribute the notice via email, voice mail, text messaging or related electronic communications if they customarily communicate with their employees in that manner. Other significant changes include clarifications of the employee notice detailing employee rights protected by the NLRA and unlawful conduct on the part of unions; clarification of the rule's requirements for posting notices in foreign languages; allowing employers to post notices in black and white as well as in color; and exemption of the U.S. Postal Service from coverage of the rule. The Board's responses to the comments, and the changes in the rule and in the wording of the required notice of employee rights occasioned by the comments, are explained below. (In his dissent, Board Member Hayes raises a number of points that are also made in some of the comments. The Board's responses to those comments should be understood as responding to the dissent as well.)¹⁰

comments received are included in the numbers cited in text above, those numbers overstate somewhat the number of individuals, organizations, etc. that submitted comments.

⁹ Many comments charge that the Board is issuing the rule for political reasons, to encourage and spread unionism, to discourage employers and employees from engaging in direct communication and problem solving, to drive up union membership in order to retain agency staff, and even to "line [its] pockets." The Board responds that its reasons for issuing the rule are set forth in this preamble.

¹⁰ The Board majority's reasoning stands on its own. By its silence, the majority does not adopt any characterization made by the dissent of the majority's rationale or motives.

⁶ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–10(a); Age Discrimination in Employment Act, 29 U.S.C. 627; Family and Medical Leave Act, 29 U.S.C. 2601, 2619(a); Fair Labor Standards Act, 29 CFR 516.4 (implementing 29 U.S.C. 211). 75 FR 80411.

⁷ As set forth in the NPRM, two petitions were filed to address this anomaly. 75 FR 80411.

⁸ March 23, 2011 was the date that the Board downloaded all of the electronic and (pdf. versions of) hard copy comments it had received from <http://www.regulations.gov> and subsequently uploaded into a text analytics tool for coding and review.

A few commenters submitted their comments in both electronic and hard copy form. Because all

II. Authority

Section 6 of the NLRA, 29 U.S.C. 156, provides that “The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act.” As discussed in detail below, the Board interprets Section 6 as authorizing the rule.

A. The Board’s Section 6 Rulemaking Authority

Numerous comments dispute the Board’s statutory authority to enact the proposed rule. Many note the fact that the Board’s rulemaking is constrained by Congressional intent as evidenced in its enabling statute. For instance, the American Trucking Association quotes a Ninth Circuit case explaining that Section 6 “does not authorize the Board to promulgate rules and regulations which have the effect of enlarging its authority beyond the scope intended by Congress,”¹¹ and similarly, the Motor & Equipment Manufacturers Association asserts, “A regulation cannot stand if it is contrary to the statute.”¹² The Board agrees that it may not exercise its rulemaking authority in a way contrary to that intended by Congress, but for the reasons discussed below it also does not believe that it has done so in this rule.

Several comments assert that because NLRA Section 6 is written in general, rather than specific, terms, the Board is not empowered to enact the proposed rule. For example, Associated Builders and Contractors argues that “the lack of express statutory language under Section 6 of the NLRA to require the posting of a notice of any kind ‘is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement * * *.’”¹³ And the Heritage Foundation likewise argues that the Board’s reliance upon its general Section 6 rulemaking authority does not suffice to meet the Administrative Procedure Act’s requirement that the NPRM must

“reference the legal authority under which the rule is proposed.”¹⁴

The Board believes that these comments are in error because the courts’ construction of other statutes’ general rulemaking authority, as well as Section 6 in particular, fully support its reading of this statutory provision. In fact, earlier this year, the Supreme Court issued a decision in *Mayo Foundation for Medical Education and Research v. United States*¹⁵ (discussed more fully below), unanimously reaffirming the principle that a general grant of rulemaking authority fully suffices to confer legislative (or binding) rulemaking authority upon an agency.

Even prior to *Mayo*, a long line of both non-NLRA and NLRA cases supported reading Section 6 in the manner suggested by the Board. Over forty years ago, in *Thorpe v. Housing Authority*,¹⁶ the Supreme Court found that the expansive grant of rulemaking authority in Section 8 of the Housing Act was sufficient to grant legislative rulemaking power to the Department of Housing and Urban Development. The Court further noted that “[s]uch broad rule-making powers have been granted to numerous other federal administrative bodies in substantially the same language.”¹⁷ A few years later, in *Mourning v. Family Publication Services*,¹⁸ the Court reaffirmed its stance in *Thorpe*:

Where the empowering provision of a statute states simply that the agency may ‘make * * * such rules and regulations as may be necessary to carry out the provisions of this Act,’ we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’¹⁹

Following the Supreme Court’s lead, key circuit decisions then extended the

notion that broad grants of rulemaking authority conveyed legislative rulemaking power.²⁰ Although the Board had historically chosen to make policy by adjudications, the Supreme Court, consistent with the non-NLRA case law, used a pair of Board enforcement cases to unanimously emphasize the existence of the Board’s legislative rulemaking authority, *NLRB v. Wyman-Gordon Co.*²¹ and *NLRB v. Bell Aerospace*.²²

In 1991, after the Board enacted a rule involving health care units, the Supreme Court unanimously upheld that rule in *American Hospital Association v. NLRB*.²³ The Supreme Court found that that the general grant of rulemaking authority contained in Section 6 of the Act “was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act.”²⁴ As in *AHA*, there is no such limitation here on the Board’s authority to enact the proposed Rule, as explained further below. As Senator Tom Harkin and Representative George Miller²⁵ emphasized in their comment, the Supreme Court in *AHA* examined “the structure and the policy of the NLRA,” in order to conclude:

As a matter of statutory drafting, if Congress had intended to curtail in a particular area the *broad rulemaking authority* granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section.²⁶

Thus, the Court could not have been clearer that unless the Board is “expressly” limited in some manner, Section 6 empowers the Board to make “such rules and regulations as may be necessary to carry out the provisions of this Act.” This point was underscored

²⁰ *Nat’l Ass’n. of Pharm. Mfrs. v. FTC*, 637 F.2d 877, 880 (2d Cir. 1981) (“this generous construction of agency rulemaking authority has become firmly entrenched”); *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 686 (D.C. Cir. 1973) (“plain, expansive language” of the rulemaking grant at issue, together with the “broad, undisputed policies” meant to be furthered by Congress’s enactment of the Federal Trade Commission Act of 1914, sufficed to grant the FTC substantive rulemaking authority).

²¹ 394 U.S. 759, 764 (1969) (plurality opinion of Fortas, J., joined by Warren, C.J., Stewart, J., and White, J.), 770 (Black, J., Marshall, J., and Brennan, J.), 777, 779 (Douglas, J.), 783 n. 2 (Harlan, J.).

²² 416 U.S. 267, 295 (1974) (majority opinion of Powell, J., and dissenting opinion of White, J. (and three other justices)).

²³ 499 U.S. 606 (1991) (*AHA*).

²⁴ *Id.* at 609–10 (emphasis added).

²⁵ (Hereafter, Harkin and Miller.) Senator Harkin is the Chairman of the Senate Committee on Health, Education, Labor, and Pensions. Representative Miller is Ranking Member on the House Committee on Education and the Workforce.

²⁶ *Id.* at 613 (emphasis added).

¹¹ *Gen. Eng’g, Inc. v. NLRB*, 341 F.2d 367, 374 (1965).

¹² Citing *United States v. O’Hagan*, 521 U.S. 642, 673 (1997). However, the Supreme Court actually held there that an agency’s interpretation of its enabling statute must be given “controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.” (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). There, the Court upheld the rule and found it was not arbitrary, capricious, or manifestly contrary to the statute.

¹³ Quoting Member Hayes’ dissent, 75 FR 80415.

¹⁴ See 5 USC 553(b)(2). For this conclusion, the Heritage Foundation cites *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1297–98 (5th Cir. 1983). But *Global Van Lines* did not find that a general statement of authority can never meet the APA’s requirements to specify the legal authority for the rule. Instead, the Fifth Circuit held that that portion of the APA is violated when an agency chooses to rely on additional statutory provisions in support of its rule for the first time on appeal, and those grounds do not appear elsewhere in the administrative record. See *id.* at 1298–99. Here, in contrast, the grounds for the Board’s rule are clearly laid out in subsection B, Statutory Authority, below.

¹⁵ 131 S.Ct. 704, 713–14 (2011).

¹⁶ 393 U.S. 268 (1969).

¹⁷ *Id.* at 277 n. 28 (citations omitted). The rulemaking grant there at issue provided that HUD may, “from time to time * * * make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act,” *id.* at 277, quite similar to Section 6 of the NLRA.

¹⁸ 411 U.S. 356 (1973).

¹⁹ *Id.* at 369 (quoting *Thorpe*, 393 U.S. at 280–81).

in a Wagner Act-era Senate hearing, as cited by Americans for Limited Government (ALG), in which it was acknowledged that the language of Section 6 indeed grants “broad powers” to the Board.²⁷

And in January of this year, a unanimous Supreme Court, in *Mayo Foundation for Medical Education and Research v. United States*, affirmed this key principle that a broad grant of statutory rulemaking authority conveys authority to adopt legislative rules.²⁸ *Mayo* concerned in part the question of how much deference a Treasury Department tax regulation should receive. In *Mayo*, an amicus argued that the Treasury Department’s interpretation should receive less deference because it was issued under a general grant of rulemaking authority, as opposed to an interpretation issued under a specific grant of authority.²⁹ The Court responded by first explaining its earlier holding in *U.S. v. Mead*, that *Chevron* deference is appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁰ Then, in significant part, the Court observed:

Our inquiry in that regard does not turn on whether Congress’s delegation of authority was general or specific.

* * * * *

The Department issued the full-time employee rule pursuant to the explicit authorization to “prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code. 26 U.S.C. 7805(a). We have found such “express congressional authorizations to engage in the process of rulemaking” to be “a very good indicator of delegation meriting *Chevron* treatment.”³¹

And so, all nine members of the Supreme Court agreed on the following key principle: an express, albeit general, grant of rulemaking authority is fully sufficient for an agency to receive *Chevron* deference for its rulemaking. It follows that a broad grant of rulemaking authority will suffice for the agency to engage in legislative rulemaking in the first place. Thus, the Supreme Court’s

rulings continue to fully support a broad construction of Section 6.

Disputing this conclusion, ALG asserts that Section 6 was intended to be used “primarily” for procedural rulemaking, and cites a Senate report from the Wagner Act’s legislative history. That Senate report explains: “[i]n no case do the rules have the force of law in the sense that criminal penalties or fines accrue for their violation, and it seems sufficient that the rules prescribed must be ‘necessary to carry out the provisions’ of the act.”³² The Board disagrees. The cited language merely proclaims the obvious, that no criminal penalties or fines accrue for violating the Board’s rules. However, laws such as the NLRA that do not impose criminal penalties or fines for their violation can also have the “force of law” (which is perhaps why the Senate report used the limiting phrase “in the sense of”). The Supreme Court has previously recognized that final Agency orders under Sections 10 (e) and (f) of the Act, despite their non-self enforcing nature, have “the force and effect of law.”³³ So too, do the Board’s rules have the force and effect of law, as held by the Supreme Court in *AHA*.³⁴

Several comments discuss whether Board Rule 103.20, which mandates the posting of an election notice in a workplace three working days prior to a representation election, should be considered analogous to the proposed rule. The United Food and Commercial Workers International Union (UFCW) comments that the election rule is, like the proposed rule, only minimally burdensome and further noted that it has never been challenged.³⁵ ALG disagrees that the election rule should be considered analogous here, because although in the election context a notice posting is the most feasible means to inform employees about an upcoming election that is occurring at a specific

place and time, that is not the case in the NLRA rights context, in which employees can just search the Internet to find out more information. The Board agrees with the UFCW that posting a notice is a minimally burdensome way to ensure that employees receive certain information, although obviously, the proposed notice will reach many more employers over a much longer period of time than do election notices. And ALG’s acknowledgment that a notice posting in the workplace is in fact sometimes the most feasible means to inform employees of important information supports the Board’s belief, explained below, that workplace notice posting is a more efficient way of informing employees of their NLRA rights than relying on information available on the Internet.

A few comments argue that the Board is a law enforcement agency only, and should not be engaging in rulemaking for that reason. One comment asserts that “Congress did not intend to ‘empower the NLRB to be a rulemaking body, but rather an investigatory/enforcement agent of the NLRA.’”³⁶ The Board responds that by enacting Section 6, Congress plainly and explicitly intended to, and did, “empower the NLRB to be a rulemaking body.” And, as shown above, *AHA* conclusively found that the Board is empowered to use its rulemaking powers, as the Court had previously indicated in *Wyman-Gordon and Bell Aerospace*.³⁷

A joint comment submitted by Douglas Holtz-Eakin and Sam Batkins argues against the Board’s assertion of Section 6 authority here by asserting that “the Supreme Court has circumscribed NLRB rulemaking in the past: ‘The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.’” However, that comment neglects to provide the citation for that quotation, *American Ship Building Co. v. NLRB*,³⁸ which was not a rulemaking case but an adjudication. In any event, the Board does not agree that this rule presumes to make a major policy decision properly made by Congress alone. As explained in subsection B,

³⁶ Comment of Manufacturers’ Association of South Central Pennsylvania.

³⁷ In *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the court rejected the argument that the FTC’s prosecutorial functions rendered it unsuitable for issuing rules. By way of example, it noted that the NLRB is similar to the FTC in its methods of adjudication and enforcement, but the Supreme Court had repeatedly encouraged the Board to utilize its rulemaking powers. *Id.* at 684.

³⁸ 380 U.S. 300, 318 (1965).

²⁷ Statement of Donald A. Callahan, U.S. Senate Committee on Education and Labor, March 29, 1935, *Legislative History of the National Labor Relations Act*, U.S. Government Printing Office, 1949, p. 2002.

²⁸ 131 S. Ct. 704, 713–14 (2011).

²⁹ *Id.* at 713.

³⁰ *Id.* (quoting *United States v. Mead*, 533 U.S. 218, 226–27 (2001)); see also *Chevron*, 467 U.S. at 842–43 (announcing two-part framework for determining whether courts should grant deference to agency interpretations of enabling statutes).

³¹ *Mayo*, 131 S. Ct. at 713–14 (emphasis added and citations omitted).

³² See Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) 24 (Comm. Print 1935), reprinted in 1 *Legislative History of the National Labor Relations Act, 1935*, (1949) at 1349.

³³ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54 (1975) (ordering disclosure of such Agency opinions under the FOIA, and quoting legislative history of the FOIA to that effect, H.R. Rep. No. 1497, p. 7, U.S. Code Cong. & Admin. News, 1966, p. 2424).

³⁴ 499 U.S. at 609–10. But even if one were to construe the report in the way advocated by the comment, such reports themselves do not have the force and effect of law, see *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *AHA*, 499 U.S. at 616, and thus at best are only potential evidence of legislative intent.

³⁵ However, it is incorrect that the rule has never been challenged; it has been challenged and upheld. See *Pannier Corp. v. NLRB*, 120 F.3d 603, 606–07 (6th Cir. 1997) (rejecting an as-applied challenge to Rule 103.20).

Statutory Authority, below, the Board believes that it has been Congressionally authorized to make this regulatory decision in the interests of carrying out the provisions of the Act.

Many comments argue that the Board should heed the use of the word "necessary" in Section 6. For instance, the Portland Cement Association comments that Section 6 requires the Board to demonstrate that: (1) The specific rule being proposed is, in fact, necessary, and (2) the adoption of the proposed rule will carry out one or more specific provisions of the Act.³⁹ The Board believes, for the reasons expressed in subsection C, Factual Support, below, that the requisite showing of necessity has been made. And, as explained below, the adoption of the proposed rule is consistent with Section 1 and will help effectuate Sections 7, 8, 9 and 10 of the NLRA.

The Board, however, disagrees with the Motor & Equipment Manufacturers Association's assertion based upon the case of *West Virginia State Board of Education v. Barnette*⁴⁰ that the Board needs to show "a grave and immediate danger" before enacting a rule. First, that case held that that very rigorous standard of review is required only where a First Amendment freedom is alleged to have been infringed. The Court further noted that where the First Amendment is not implicated, the government may regulate an area so long as it has a "rational basis" for doing so. As explained in subsection B, Statutory Authority, below, this rule infringes upon no First Amendment interests, and consequently, the rule should be judged on a standard similar to the "rational basis" test laid out in *Barnette*. It was in fact just such a deferential standard which the Supreme Court used to examine the Board's health care rule in *AHA*. There, the Court found that even if it read Section 9 to find any ambiguity, it still would have deferred to the Board's "reasonable interpretation of the statutory text," and found the Board authorized under Sections 6 and 9 to enact the health care bargaining unit rule at issue.⁴¹ No "grave and immediate danger" was found to be required prior to the Board enacting that rule. This ruling was also consistent with the Supreme Court's earlier holdings in *Thorpe* and *Mourning*, in which regulations promulgated under broadly phrased grants of authority needed to be only

"reasonably related to the purposes of the enabling legislation."⁴² For the reasons shown below, that standard is more than met in the present rule.

B. The Board's Statutory Authority To Issue This Rule

The National Labor Relations Act does not directly address an employer's obligation to post a notice of its employees' rights arising under the Act or the consequences an employer may face for failing to do so. However, as stated, NLRA Section 6 empowers the Board to promulgate legislative rules "as may be necessary to carry out the provisions" of the Act. 29 U.S.C. 156. A determination of necessity under Section 6 made by the Board, as administrator of the NLRA, is entitled to deference. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002).

Furthermore, even in the absence of express rulemaking authority, "the power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Under the well-known test articulated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts will defer to the Board's reasonable interpretation of a gap left by Congress in the NLRA.

An examination of the provisions of the whole law demonstrate how the notice-posting rule is a legitimate exercise of both legislative rulemaking authority under Section 6 and implied gap-filling authority under *Chevron*, 467 U.S. at 843. Section 1 of the NLRA explains that Congress deliberately chose the means of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing" in order to combat the substantial burdens on commerce caused by certain employer and labor union practices as well as by the inherent "inequality of bargaining power between employees * * * and employers." 29 U.S.C. 151.⁴³ Section 7

therefore sets forth the core rights of employees "to self-organization"; "to form, join, or assist labor organizations"; "to bargain collectively"; and "to engage in other concerted activities"; as well as the right "to refrain from any or all such activities." *Id.* § 157. Section 8 defines and prohibits union and employer "unfair labor practices" that infringe on employees' Section 7 rights, *id.* § 158, and Section 10 authorizes the Board to adjudicate unfair labor practice claims, *id.* § 160, subject to the NLRA's procedural six-month statute of limitations, *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). Finally, Section 9 authorizes the Board to conduct representation elections and issue certifications. 29 U.S.C. 159.

Notably, the NLRA does not give the Board or its General Counsel roving investigatory powers. Although the Board is specifically empowered to "prevent" unfair labor practices, *id.* § 160(a), "[t]he Board may not act until an unfair labor practice charge is filed * * * alleging a violation of the Act." 2 The Developing Labor Law 2683 (John E. Higgins, Jr. ed., 5th ed. 2006). In addition, certification "procedures are set in motion with the filing of a representation petition." *Id.* at 2662. In both instances, the initiating document is filed by a private party. *Id.* at 2683 (citing 29 CFR 102.9); *id.* at 2662-63 (citing 29 U.S.C. 159(c)(1)(A), (B), and (e)(1)).

Enforcement of the NLRA and effectuation of Congress's national labor policy therefore depend on the existence of outside actors who are not only aware of their rights but also know where they may seek to vindicate them within appropriate timeframes. The Department of Labor made a similar finding in an analogous rulemaking proceeding under the Fair Labor Standards Act: "effective enforcement of the [FLSA] depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them, and a greater degree of compliance with the act has been effected in situations where employees are aware of their rights under the law." 14 FR 7516, 7516 (Dec. 16, 1949). Given the direct relationship between employees' timely awareness of their rights under the NLRA and the Board's

necessary effect of burdening or obstructing commerce," *id.*, depends on workers' knowledge of their rights and the protections provided by the NLRB. The Board therefore rejects the argument of the Manufacturer's Association of South Central Pennsylvania that both the notice-posting rule and the Board's general assertion of rulemaking authority are inconsistent with Section 1.

³⁹ See also comment of Americans for Limited Government, citing to *AFL-CIO v. Chao*, 409 F.3d 377, 391 (D.C. Cir. 2005) for the same principle.

⁴⁰ 319 U.S. 624, 639 (1943).

⁴¹ 499 U.S. at 614.

⁴² *Mourning*, 411 U.S. at 369 (quoting *Thorpe*, 393 U.S. at 280-81).

⁴³ These regulations are entirely compatible with the national labor policy, as expressed in Section 1, "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred." 29 U.S.C. 151 (fifth paragraph). As explained below, the Board's ability to "eliminate" the causes of labor strife and depressed wage rates, "which have the intent or

ability to protect and enforce those rights, this rule is “necessary” for purposes of Section 6.

Aside from the rule’s manifest necessity, the notice posting requirement fills a *Chevron*-type gap in the NLRA’s statutory scheme. Thus, as discussed, the purpose of Section 1, as implemented in Sections 7 and 8, is to encourage the free exercise and enforcement of the Act’s provisions, and fulfillment of that purpose depends on the private initiative of employees and employers to commence Board representation proceedings pursuant to Section 9 and Board unfair labor practice proceedings pursuant to Section 10. The effective working of the NLRA’s administrative machinery therefore presupposes that workers and their employers have knowledge of the rights afforded by the statute and the means for their timely enforcement. The statute, however, has no provision with respect to making that knowledge available, a subject about which the statute is completely silent.

This statutory gap has always been present but was of less significance in earlier years when the density of union organization was greater, since, as is widely recognized, unions have been a traditional source of information about the NLRA’s provisions. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 531–32 (1992) (reaffirming that the Section 7 rights of employees interested in union organization depend to some extent on their having access to unions); *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938) (holding that the rights guaranteed to employees by Section 7 include “full freedom to receive aid, advice and information from others concerning [their self-organization] rights”); cf. *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 68 (2008) (observing that Section 7 “implies an underlying right to receive information”). Moreover, as rates of unionization have declined, employees are less likely to have experience with collective bargaining or to be in contact with other employees who have had such experience. The statutory gap is thus now important to the Board’s administration of the NLRA and its role in enforcing employees’ rights.

As the Supreme Court has observed,

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. * * * It is the province of the Board, not the courts, to determine whether or not the “need” [for a Board rule] exists in light of changing industrial practices and the Board’s cumulative experience in dealing with labor-management relations. For the Board has the “special function of applying the general

provisions of the Act to the complexities of industrial life,” and its special competence in this field is the justification for the deference accorded its determination.

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) (citations omitted). Consistent with this understanding of the Board’s role, the notice-posting regulations represent an attempt to “adapt the Act” in light of recent realities and “the Board’s cumulative experience.” *Id.* The rule is wholly consistent with the aims of the NLRA, and the “need” for it now is heightened given the “changing patterns of industrial life.” *Id.*

For all these reasons, this rule is entitled to deference regardless of how it is characterized because it is “reasonably related to the purposes of the enabling legislation,” *Thorpe*, 393 U.S. at 280–81, and constitutes a “‘reasonable interpretation’ of the enacted text,” *Mayo*, 131 S. Ct. at 714 (quoting *Chevron*, 467 U.S. at 844).

In response to the NPRM, a number of arguments have been made challenging the Board’s statutory authority to promulgate the notice posting rule. As explained below, the Board does not find merit in any of these arguments.

1. Limitations on the Board’s Rulemaking Authority Implied by Sections 9 and 10 of the Act

Of the comments that address the Board’s statutory authority to issue this rule, many express agreement with the dissenting views of Member Hayes that were published in the NPRM. Member Hayes criticized the basis for the rule and questioned the Board’s statutory authority to promulgate and enforce it. *See* 75 FR 80415. He specifically referred to Section 10 as an obstacle to the proposed rule, because it “indicate[d] to [him] that the Board clearly lacks the authority to order affirmative notice-posting action in the absence of an unfair labor practice charge filed by an outside party.” *Id.*

Many comments submitted in response to the NPRM, such as those of the Texas Association for Home Care & Hospice and those of the Independent Bakers Association, interpret Section 10 to prohibit the Board from ordering any affirmative act that does not address the consequences of an unfair labor practice. Although this proposition may be true when the Board acts through adjudication—the administrative function to which Section 10 directly applies—it does not perforce apply when the Board specifies affirmative requirements via rulemaking under Section 6. *See Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997) (“Agencies are often allowed through rulemaking to

regulate beyond the express substantive directives of the statute, so long as the statute is not contradicted.”) (citing *Mourning*). If it did, then the Board’s longstanding rule mandating that employers post an election notice three days before a representation election would be subject to challenge on that ground. *See* 29 CFR 103.20; *see also Pannier Corp., Graphics Div. v. NLRB*, 120 F.3d 603, 606–07 (6th Cir. 1997) (rejecting an as-applied challenge to § 103.20). Furthermore, under *American Hospital Association*, the Board’s exercise of its broad rulemaking authority under Section 6 is presumed to be authorized unless elsewhere in the Act there is “language expressly describing an exception from that section or at least referring specifically to the section.” 499 U.S. at 613. Section 10 does not refer to the Board’s Section 6 authority.

Some comments, such as those of the Council on Labor Law Equality (COLLE), contend that the Board has no authority whatsoever to administer the NLRA unless a representation petition or unfair labor practice charge has been filed under Sections 9 or 10, respectively. The Board declines to adopt such a narrow view of its own authority. Certainly, the Board cannot issue certifications or unfair labor practice orders via rulemaking proceedings. But that is not what this rule does. As explained above, by promulgating the notice-posting rule, the Board is taking a modest step that is “necessary to carry out the provisions” of the Act, 29 U.S.C. 156, and that also fills a statutory gap left by Congress in the NLRA.

Moreover, the argument advanced by COLLE and others fails to appreciate that the Board’s authority to administer the Act is not strictly limited to those means specifically set forth in the NLRA. Rather, as the Supreme Court has recognized, the NLRA impliedly authorizes the Board to take appropriate measures “to prevent frustration of the purposes of the Act.” *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142 (1971). By way of example, the Supreme Court pointed out that its decisions had recognized the Board’s implied authority to petition for writs of prohibition against premature invocation of the review jurisdiction of the courts of appeals, *see In re NLRB*, 304 U.S. 486, 496 (1938); to institute contempt proceedings for violation of enforced Board orders, *see Amalgamated Util. Workers v. Con. Edison Co.*, 309 U.S. 261 (1940); and to file claims in bankruptcy for Board-awarded backpay, *see Nathanson v. NLRB*, 344 U.S. 25 (1952). Relying on

that precedent in *Nash-Finch Co.*, the Supreme Court concluded that the Board also had implied authority “to enjoin state action where [the Board’s] federal power preempts the field.” 404 U.S. at 144. Like these judicially recognized powers, the notice-posting requirement that is the subject of this rulemaking has not been specifically provided for by Congress. But the cited cases demonstrate that Congress need not expressly list a power for the Board to legitimately exercise it. Indeed, the notice-posting requirement is not even an implied power of the Board in the same sense as those previously mentioned. Rather, it is the product of the Board’s exercise of express rulemaking authority and inherent gap-filling authority, both of which have been delegated to the Board by Congress.

2. The First Amendment and Section 8(c) of the NLRA

A handful of commenters argue that the notice-posting requirement violates the First Amendment to the Constitution, Section 8(c) of the NLRA, or both. For example, the Center on National Labor Policy, Inc. maintains that “compelling an employer to post its property with a Notice that asserts the statutory ‘rights’ and employer obligations, runs counter to constitutional views long protected by the Supreme Court.” The Center also argues that the “proposed poster would impede the employer’s statutory right to express itself on its own property.” Along these same lines, the National Right to Work Legal Defense Foundation, Inc. and others on whose behalf it writes contend that “the Board’s proposal for forced speech favoring unionization directly conflicts with the First Amendment and longstanding federal labor policy under Section 8(c) that employers and unions should be able to choose themselves what to say about unionization.” These concerns were echoed by the National Association of Wholesaler-Distributors. In addition, two attorneys affiliated with Pilchak Cohen & Tice, P.C., which they describe as “a management-side labor and employment law firm,” argue that the notice-posting requirement “tramples upon employers’ Free Speech rights by regulating the content of information that employers are required to tell employees and by compelling them to post the Notice containing pro-union NLRA rights, when it is almost assuredly not the employers’ prerogative to do so.” The Independent Association of Bakers goes further and characterizes the regulation as an unconstitutional “gag order” that “prohibits the

employer from telling the truth about the impact a union might pose to his business.” The Board rejects these arguments.

As an initial matter, requiring a notice of employee rights to be posted does not violate the First Amendment, which protects the freedom of speech. Indeed, this rule does not involve employer speech at all. The government, not the employer, will produce and supply posters informing employees of their legal rights. The government has sole responsibility for the content of those posters, and the poster explicitly states that it is an “official Government Notice”; nothing in the poster is attributed to the employer. In fact, an employer has no obligation beyond putting up this government poster. These same considerations were present in *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, 89 (5th Cir. 1975), where the Fifth Circuit rejected as “nonsensical” an employer’s First Amendment challenge to the Occupational Safety and Health Act requirement that it post an “information sign” similar to the one at issue here. As in *Lake Butler*, an employer subject to the Board’s rule retains the right to “differ with the wisdom of * * * this requirement even to the point * * * of challenging its validity. * * * But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice * * * thought to be essential.” *Id.*; see also *Stockwell Mfg. Co. v. Usery*, 536 F.2d 1306, 1309–10 (10th Cir. 1976) (*dicta*) (rejecting a constitutional challenge to a requirement that an employer post a copy of an OSHA citation).

But even if the Board’s notice-posting requirement is construed to compel employer speech, the Supreme Court has recognized that governments have “substantial leeway in determining appropriate information disclosure requirements for business corporations.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15 n.12 (1985). This discretion is particularly wide when the government requires information disclosures relevant to the employment relationship. Thus, as the D.C. Circuit has observed, “an employer’s right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks.” *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (*UAW v. Chao*) (citing *Lake Butler*, 519 F.2d at 89). Accordingly, the Board’s notice-posting requirement is

not susceptible to a First Amendment challenge.⁴⁴

The Board is equally satisfied that the rule does not violate NLRA Section 8(c), 29 U.S.C. 158(c), which creates a safe harbor for noncoercive speech in the unfair labor practice area. Specifically, Section 8(c) shields from unfair labor practice liability “[t]he expressing of any views, argument or opinion,” provided that “such expression contains no threat of reprisal or force or promise of benefit.” *Id.* (emphasis added). A government poster containing accurate, factual information about employees’ legal rights “merely states what the law requires.” *Lake Butler*, 519 F.2d at 89. For that reason, “[t]he posting of the notice does not by any stretch of the imagination reflect one way or the other on the views of the employer.” *Id.*⁴⁵

⁴⁴ The decision of the intermediate state court in *Smith v. Fair Employment & Housing Commission*, 30 Cal. Rptr. 2d 395 (Cal. Ct. App. 1994), *rev’d* on other grounds, 913 P.2d 909 (Cal. 1996), lends no support to arguments challenging these regulations on First Amendment grounds. There, the California Court of Appeal held that a landlord’s right to freedom of speech was “implicate[d],” *id.* at 401–02, by a state fair housing agency’s remedial order requiring her to sign, post, and distribute notices “setting out the provisions of [the fair housing statute], the outcome of th[e] case, and the statement that [she] practices equal housing opportunity.” 913 P.2d at 914. The *Smith* case is not persuasive here because the notice at issue in *Smith* would not merely have set forth the rights of prospective buyers or renters but also would have contained a signed statement from the landlord which would have given the false appearance that she agreed with the state’s fair housing “concepts and rules,” despite her religious beliefs to the contrary. 30 Cal. Rptr. 2d at 401. That feature of the case has no parallel here. Here, by contrast, employers are not required to sign the informational notice, and as noted, nothing in the poster is attributed to them. The Board further notes that the *Smith* decision is not authoritative because it was superseded by the California Supreme Court’s grant of review in that case. See 913 P.2d at 916 n.*.

⁴⁵ The Employers Association of New Jersey is therefore off the mark when it argues that the notice-posting requirement is preempted under the principles of *Lodge 76, International Ass’n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), as an attempt to regulate employer speech “about unionization and collective bargaining.” As explained above, the employer’s choice whether to express its own views, arguments, or opinions is wholly unaffected by a requirement to post a government-provided notice summarizing what the law requires. Indeed, consistent with both *Machinists* and the policy of Section 8(c) “to encourage free debate on issues dividing labor and management,” *Brown*, 554 U.S. at 67 (quoting *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966)), employers remain free under this rule—as they have in the past—to express noncoercive views regarding the exercise of these rights as well as others. See, e.g., *United Techs. Corp.*, 274 N.L.R.B. 609, 609, 618–20, 624–26 (1985), enforced sub nom. *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121 (2d Cir. 1986); *Warrenburg Bd. & Paper Corp.*, 143 N.L.R.B. 398, 398–99 (1963), enforced, 340 F.2d 920 (2d Cir. 1965). For this reason, the Board finds it unnecessary to adopt the proposal made by the

But even if the new rule is understood to compel employer speech, Section 8(c) “merely implements the First Amendment.” *Brown*, 554 U.S. at 67 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Thus, if a First Amendment challenge to the rule must fail, so too must a challenge based on Section 8(c). Such was the holding of the D.C. Circuit in *UAW v. Chao*. There, the court was presented with a preemption argument, grounded in Section 8(c), challenging a Federal procurement regulation that required contractors to post a notice informing their employees of certain NLRA rights. The D.C. Circuit interpreted Section 8(c) as coextensive with the scope of free speech rights protected by the First Amendment and upheld the procurement regulation in light of well-established free speech jurisprudence in the labor context. *See* 325 F.3d at 365.

3. Lack of Contemporaneity With the Enactment of the NLRA

Several comments attack the notice-posting regulation for its lack of contemporaneity with the enactment of the NLRA. For example, many comments criticize the regulation by noting that “this is a new rule interpreted into the Act 75 years after its passage.” The Board rejects these contentions for two reasons.

First, the Supreme Court has repeatedly “instructed that ‘neither antiquity nor contemporaneity with [a] statute is a condition of [a regulation’s] validity.’” *Mayo*, 131 S. Ct. at 712 (alterations in original) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740 (1996)); *see also Smiley*, 517 U.S. at 740 (deferring to a regulation “issued more than 100 years after the enactment” of the statutory provision that the regulation construed). Second, the argument fails to consider that much has changed since 1935, the year the NLRA was enacted. Unionization rates are one example. As pointed out in the NPRM and as confirmed by comments submitted by the Association of Corporate Counsel’s Employment and Labor Law Committee, unionization rates increased during the early years of the Act, peaking at around 35 percent of the workforce in the mid-1950s. But since then, the share of the workforce represented by labor unions has

plummeted to approximately 8 percent. As a result, fewer employees today have direct, everyday access to an important source of information regarding NLRA rights and the Board’s ability to enforce those rights.

As noted above, “[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.” *J. Weingarten, Inc.*, 420 U.S. at 266. It would therefore be an abdication of that responsibility for the Board to decline to adopt this rule simply because of its recent vintage. Accordingly, the Board finds such arguments unpersuasive.

4. Comparison With Other Statutes That Contain Notice-Posting Requirements

Many comments note, as the Board did in the NPRM, that several other labor and employment statutes enacted by Congress contain express notice-posting provisions. *See* 75 FR 80411 (listing such statutes). Though a few such comments, such as those of the International Brotherhood of Teamsters, applaud the Board for “fill[ing] this glaring and indefensible gap,” the bulk of these comments instead argue that the lack of a parallel statutory provision in the NLRA negates the existence of Board authority to issue this rule.

The Board notes that inferences gleaned from side-by-side comparisons to other statutes have diminished force when an agency uses its gap-filling authority under *Chevron*. There are many possible reasons why Congress did not include an express notice-posting provision in the NLRA. “Perhaps that body consciously desired the [agency] to strike the balance at this level * * *; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question * * *.” *Chevron*, 467 U.S. at 865. But, “[f]or judicial purposes, it matters not which of these things occurred.” *Id.* Indeed, the central premise behind *Chevron* and its progeny is that agencies should be allowed reasonable latitude to fill gaps arising from congressional silence or ambiguity. Accordingly, “the contrast between Congress’s mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, *i.e.*, to leave the question to agency discretion.” *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (labeling the *expressio unius est exclusio alterius* canon “an especially feeble helper” in *Chevron* cases).

Arguments contrasting the NLRA with other federal enactments that contain notice-posting requirements might have some persuasive force if there were

evidence that Congress had considered and rejected inserting such a requirement into the Act. However, nothing in the legislative history of the Act so indicates. Indeed, there is not the slightest hint that the omission of a notice-posting requirement was the product of legislative compromise and therefore implies congressional rejection of the idea. *Cf. Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 384–85 (7th Cir. 2010) (en banc) (Posner, J., concurring) (inferring a private right of action from statutory silence in a case where such silence was not the product of “legislative compromise”). For these reasons, the Board rejects the Motor and Equipment Manufacturers Association’s unsupported suggestion that there has been an affirmative “legislative determination not to include a posting requirement by employers that have not violated the Act.”

A number of comments point out that Congress included a general notice-posting provision in the Railway Labor Act (RLA), which predates the NLRA. Given the relative proximity of these two enactments, some comments regard the absence of a notice-posting provision in the NLRA as strong evidence that Congress did not intend for there to be one. For reasons just explained, the Board does not find a side-by-side comparison with the RLA availing. In addition, the Board notes that although the NLRA and the RLA share several common features, the NLRA was not perfectly modeled after the RLA. *See Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 31 n.2 (1957) (“The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act * * *”).

Finally, the Board notes that other federal departments and agencies have not understood Congress’s failure to include an express provision containing a notice-posting requirement in a federal labor or employment statute as a bar to such a regulatory requirement. Like the NLRA, the Fair Labor Standards Act (FLSA), which was passed in 1938, does not contain a provision requiring employers to post a notice of pertinent employee rights. Yet the Department of Labor adopted a notice requirement now codified at 29 CFR 516.4. Furthermore, the Board is unaware of any challenge to the Labor Department’s authority to promulgate or enforce the FLSA notice requirement, which has been in effect for over 60 years. *See* 14 FR 7516 (Dec.

Pilchak attorneys to revise the rule to specify that employers “may post a notice of equal dignity which advises employees of * * * additional rights and realities.” Alternatively, the Pilchak attorneys propose that the Board amend the rule to permit employers to “alter the Poster and include additional rights.” Adopting this suggestion would compromise the integrity of the notice as a communication from the government. It, too, is therefore rejected.

16, 1949), promulgating 29 CFR 516.18, the predecessor to 29 CFR 516.4.

5. The Teamsters 357 Decision

In response to the NPRM, the U.S. Chamber of Commerce submitted a comment that questions “how the proposal can be said to be consistent with” the Supreme Court’s decision in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961). Specifically, the Chamber accuses the Board of ignoring the Court’s admonition in that case warning that “[w]here * * * Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.” *Id.* at 675. The Chamber reads this statement out of context.

To understand why the Board disagrees with the Chamber’s view, further explanation of *Teamsters 357* is necessary. In that case, the Supreme Court rejected the Board’s conclusion that a union had committed an unfair labor practice by operating an exclusive hiring hall pursuant to an agreement that contained a nondiscrimination clause but not three additional clauses that the Board had previously declared in its *Mountain Pacific* decision to be necessary to prevent “‘unlawful encouragement of union membership.’” *Id.* at 671 (quoting *Mountain Pacific Chapter*, 119 NLRB 883, 897 (1958)). The Court first noted that Congress had examined the operation of hiring halls and had decided not to ban them. *Id.* at 673–74. Next, the Court observed that NLRA Section 8(a)(3) “‘does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited.’” *Id.* at 674–75 (emphasis added) (quoting *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 42–43 (1954)). Since the hiring hall agreement at issue in *Teamsters 357* “specifically provide[d] that there will be no discrimination * * * because of the presence or absence of union membership,” the Court determined that the Board was attempting to protect against nondiscriminatory encouragement of union membership. *Id.* at 675. This was impermissible because “[w]here * * * Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.” *Id.* at 676.

Properly understood, *Teamsters 357* does not preclude the Board from issuing the notice posting rule. The union had not committed an unfair labor practice in that case because its

hiring hall agreement did not encourage or discourage union membership by “discrimination.” *See id.* at 674–75. By faulting the union for not including in its agreement clauses that the Board’s *Mountain Pacific* rule had declared necessary to prevent “‘unlawful encouragement of union membership,’” *id.* at 671 (quoting *Mountain Pacific Chapter*, 119 NLRB at 897), the Board had attempted to regulate hiring halls in a manner that was facially inconsistent with the discrimination requirement embedded in NLRA Section 8(a)(3) and (b)(2). Accordingly, the Chamber makes too much of the Court’s statement prohibiting the Board from “establish[ing] a broader, more pervasive regulatory scheme” when “specific discriminatory practices” have already been outlawed. *Id.* at 676. By that, the Court simply meant to remind the Board that it may not administratively amend Section 8(a)(3) and (b)(2) to prohibit nondiscriminatory activity that might be viewed as undesirable because those statutory sections are clearly aimed only at “specific discriminatory practices.” *Id.*⁴⁶

This rulemaking does not involve those provisions of the NLRA that *Teamsters 357* addressed. Accordingly, the Board does not view that case as controlling the outcome of this proceeding.

6. Miscellaneous Matters

The Center on National Labor Policy, Inc., argues that the Board “must be mindful of the Supreme Court’s admonition in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992), that an employer possesses First Amendment rights to its property.” The Board disagrees that the property rights discussed in *Lechmere* emanate from the First Amendment, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) (“The right of employers to exclude union organizers from their private property emanates from state common law * * *”), and to the extent that the Center’s reference to the First Amendment asserts a conflict between these regulations and employers’ right to free speech, that argument is rejected for reasons explained above. After quoting extensively from *Lechmere*, the Center next contends that “if a union has no access to company property to communicate with employees, neither

does the Board without Section 10(c) authority.” The Board rejects this argument because it fails to recognize the important substantive difference between the conduct at issue in *Lechmere*, which involved “‘trespassory organizational activity’” by nonemployees on the employer’s grounds, *id.* at 535 (quoting *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)), and the regulations here which involve nothing more than the employer’s responsibility to post an official notice of legal rights.

The Portland Cement Association (PCA) comments that the Board’s failure to place the three law review articles that the Board cited to the NPRM⁴⁷ in the administrative docket is arbitrary and capricious. Although the Board provided the legal citations for these articles, PCA believes that it should not have to pay an electronic legal reporting service to access the material. The Board has placed these articles in the hard copy docket, but has not uploaded these articles to the electronic docket at <http://www.regulations.gov>, because such an action could violate copyright laws.⁴⁸

Finally, one comment contends that requiring employers to set aside wall space for posting the notices violates the Takings Clause of the Fifth Amendment to the U.S. Constitution. The comment cites no authority for this proposition, which would seem to invalidate the notice-posting requirements under all other Federal and state workplace statutes. Accordingly, the Board rejects this contention.

In conclusion, the Board believe that it has fully demonstrated that it possesses sufficient statutory authority to enact the final rule, and therefore that it is not “in excess of statutory jurisdiction” or “short of statutory right” within the meaning of the Administrative Procedure Act, Section 706(2)(C), 5 U.S.C. 706(2)(C).

C. Factual Support for the Rule

As stated above, the Board found that the notice posting rule is needed because it believes that many employees are unaware of their NLRA rights and therefore cannot effectively exercise those rights. The Board based this finding on several factors: the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the

⁴⁶ To the extent that the Board espoused a contrary view of *Teamsters 357* in a prior rulemaking proceeding, that view is abandoned. *See* Union Dues Regulation, 57 FR 43635, 43637–38 (Sept. 22, 1992), *withdrawn*, 61 FR 11167 (Mar. 19, 1996).

⁴⁷ *See* NPRM, 75 FR 80411 and fn. 3 above.

⁴⁸ The Board has also placed the other non-case materials cited to in this final rule into the hard copy docket.

NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights. 75 FR 80411.

A large number of comments contend that the Board failed to demonstrate the necessity of the notice posting rule. They challenge each of the premises (except the last) underlying the Board's belief that employees are generally unaware of their NLRA rights.

Many comments assert that, contrary to the Board's belief, the right to join a union is widely known and understood by employees. For example:

- I believe the majority of employees know about labor unions and how to form a union, and this poster is unnecessary.⁴⁹
- [I]t is hard to imagine that there are many in the US who do not know that they can try to join a union.
- The fact of the matter is that if a group of employees are upset enough with their current management that they feel they need union representation, they already know what they need to do as a recourse. And if they do not immediately know how to respond, there are plenty of resources for them.⁵⁰
- We, the employees, know the unions exist, * * * If the employees want to know about unions, they should research it themselves. It is not as though the information is not readily available.

Some posit that comparatively few private sector employees are represented by unions not because employees do not know that they can join unions, but because they have consciously rejected union representation for any number of reasons (e.g., they do not believe that unions can help them; they do not want to pay union dues; they deem union representation unnecessary in light of other workplace protection statutes). For example:

- Is it not just as probable that people clearly understand unions, and they have decided they want no part of them?
- Labor unions charge approximately 1.3% of pre-tax earnings for monthly dues. Many workers, especially those who lost their good paying jobs during this recession and have found new jobs at \$10.00-\$11.00 per hour wages, need the dues money themselves, in order to support their families.

—Membership is down because so many of the good things unions fought for a long time ago have been legislated, at either the Federal or State level, and so the need for unions has declined.⁵¹

—[M]ost employees are very aware of their rights to unionize and many employees choose not to do so because of the rights they already have under our federal and state laws.

—In fact, one could say that the NLRA and other employment laws have succeeded to the degree that unions are NOT necessary in today's work environment.⁵²

A few comments question the Board's belief that immigrant workers are unfamiliar with their workplace rights.⁵³ Several comments argue that the NLRA has been in effect for nearly 76 years, which is sufficient time for employees to learn about its provisions.⁵⁴

A number of comments argue that the studies cited in the NPRM are from the late 1980s and early 1990s and are therefore out of date⁵⁵ (and also, some say, poorly supported).⁵⁶ Moreover, those studies, whatever their value when published, predate the wide use of the internet. Now there are many online sources of information concerning unions and union organizing, including the Board's own Web site. According to these comments, it should not be necessary to require employers to post notices of NLRA rights because employees who are interested in learning about unions can quickly and easily find such information online.⁵⁷ One comment, like some others, argues that "If it is so important that employees know their rights under the NLRB it should be the government or union whose responsibility it is to inform them."⁵⁸ Two comments suggest that the Board conduct a mass media informational campaign to that end, and one notes that the Board has in fact recently increased

⁵¹ Comment of Tecton Products.

⁵² Comment of Printing and Imaging Association of Mid-America (Printing and Imaging Ass'n).

⁵³ See, e.g., comment of the Printing and Imaging Ass'n.

⁵⁴ See, e.g., comment of Coalition for a Democratic Workplace.

⁵⁵ See, e.g., comments of Printing Industries of America and the Portland Cement Association.

⁵⁶ See, e.g., comments of Cass County Electric Cooperative and Pilchak Cohen & Tice, P.C.

⁵⁷ As one person states, "The internet has long ago replaced lunch room bulletin board postings as the means by which employees learn of and exercise their rights."

⁵⁸ Such comments appear to misunderstand that by this rule, the Board is indeed seeking to inform employees of the provisions of the NLRA, using the most accessible venues to reach them, their workplaces.

Other comments question why this rule does not mandate notice posting by governmental employers. The NLRA does not cover such employers. See Section 2(2), 29 U.S.C. 152(2).

its public information efforts.⁵⁹ One comment urges the Board to conduct a study to ascertain current employees' level of NLRA knowledge before imposing a notice posting requirement.

In contrast, as discussed in more detail below, numerous comments from individuals, union organizers, attorneys representing unions, and worker assistance organizations agree with the Board that most employees are unfamiliar with their NLRA rights. Immigrant rights organizations state that immigrant workers largely do not know about their rights.

After careful consideration of the comments on both sides of this issue, the Board believes that many employees are unaware of their NLRA rights and that a notice posting requirement is a reasonable means of promoting greater knowledge among employees. To the extent that employees' general level of knowledge is uncertain, the Board believes that the potential benefit of a notice posting requirement outweighs the modest cost to employers. Certainly, the Board has been presented with no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees.

The comments asserting that the right to join a union is widely known cite little, if any, support for that assertion. By contrast, many of the comments contending that employees are unfamiliar with their NLRA rights base their statements on personal experience or on extensive experience representing or otherwise assisting employees. Many individual workers, commenting on the rule, indicate their personal experiences with the lack of NLRA knowledge and concurrent strong support for the rule. For example:

- Even though most of my coworkers and supervisors were highly intelligent people, it is my experience that most workers are almost totally unaware of their rights under the NLRA.
- Knowing that there is a federal agency out there that will protect the rights of working people to organize is essential to the exercise of those rights.
- I had no idea that I had the right to join a union, and was often told by my employer that I could not do so. * * * I think employers should be required to post notices so that all employees may make an informed decision about their rights to join a union.⁶⁰
- Workers have rights and they have the right to know them.⁶¹
- [T]here is a lot of ignorance among young workers and veteran workers alike with regard to knowledge of their right to

⁵⁹ Comment of Fisher & Phillips, LLP.

⁶⁰ Comment of Member, Local 150, Operating Engineers.

⁶¹ Comment of Organizer, IBEW.

⁴⁹ Comment of the Employers Association.

⁵⁰ Comment of Malt-O-Meal Company (Malt-O-Meal).

organize. This is not a cure for employer intimidation, * * * but it is a step in the right direction.

- As an employee at will, I was not aware of my rights to form a union or any rights that I may have had under the NLRA.⁶²
- I worked in the construction materials testing industry for about eight years. During that time I had no idea I had the right to join a union.⁶³
- As a working class citizen, I am well aware of just how rare it is for my fellow workers to know their rights. For that reason, this is a rule that is extremely overdue. * * *.

A sampling of comments from labor attorneys, workers' organizations, and labor organizations is consistent with these employees' comments:

- It is my experience that upwards of 95% of employees have no idea what their rights are with respect to labor unions.⁶⁴
- In fact, I have had many employees over the years tell me that their employers have told them that they do not allow unions at their workplace.⁶⁵
- Workers today do not know what their rights are under the NLRA. As a Union organizer with more than 20 years of experience, without exception, every worker I encounter thinks that it is perfectly legal for their employer to fire them simply for saying the word union, or even to speak with other employees at work about general working conditions. The protections afforded workers to engage in protected concerted activity around workplace issues is unknown to the majority of workers today.⁶⁶
- It is the experience of [Service Employees International Union (SEIU) Local 615] that many employees are woefully unaware of their rights under the NLRA and that that lack of knowledge makes employees vulnerable when they desire to address their wages and working conditions with the employers.⁶⁷
- I have participated in hundreds of organizing campaigns involving thousands of employees. In my experience, most people had no idea what their rights were to organize or join unions.⁶⁸

Some unions also assert that even unionized employees often do not have a clear understanding of the NLRA. One union staff representative writes that "there seems to be a disconnect, most of our membership does not know a thing about NLRA."⁶⁹ Another union steward comments similarly:

I saw how union members were often unaware of their rights unless the union

⁶² Comment of International Staff Representative, Steelworkers.

⁶³ Comment of Member, Local 150, Operating Engineers.

⁶⁴ Comment of Organizer, Local 150, Operating Engineers.

⁶⁵ Comment of Strokoff and Cowden.

⁶⁶ Comment of Organizer, Teamsters, Local 117.

⁶⁷ Comment of SEIU Local 615.

⁶⁸ Comment of Financial Secretary, Local 150, Operating Engineers.

⁶⁹ Comment of Staff Representative, Steelworkers.

specifically did outreach and member education, or unless the employee ran into a problem and came to a steward for assistance. * * *

Notice to employees, however, could provide a starting point for those employees to try to assert rights that they currently have on paper but often do not have in practice.

Several immigrant workers' organizations comment on the difficulty that this population has in understanding their rights and accessing the proper help when needed.⁷⁰ These organizations note that laws in the immigrants' home countries may be quite different from those of the United States, and the high barrier that lack of fluency in English creates in making these persons aware of their rights under the NLRA.⁷¹ These organizations also contend that because guestworkers in particular can work only for the employer that requested their visa, they are extremely vulnerable to labor violations, and that these employers routinely misrepresent the existence of NLRA rights.⁷² The National Day Laborers Organizing Network claims that "most workers are not aware of their right to organize."

One immigrant construction worker, commenting favorably on the proposed rule, explains that she learned English after coming to the United States from Poland: "While working as a testing technician, I had no idea I had the right to join a union." She writes:

I think a government written notice posted in the workplace would be a critical source of information for employees who want to join a union. Especially in this industry where many people like myself are foreign born, there is a language barrier that adds to the difficulty in understanding our legal rights. I take government posted notices seriously and believe other people do as well.⁷³

Significantly, the Board received numerous comments opposing the rule precisely because the commenters believe that the notice will increase the level of knowledge about the NLRA on the part of employees. Specifically, they predict that the rule will lead to increased unionization and create alleged adverse effects on employers and the economy generally. For example, Baker and Daniels LLP comments that as more employees become aware of their NLRA rights, they will file more unfair labor practice

⁷⁰ See e.g., comments of National Immigration Law Center and Latino Justice.

⁷¹ See, e.g., comment of Friends of Farmworkers, Inc.

⁷² Comment of Alliance of Guestworkers for Dignity.

⁷³ Comment of Instructor, Apprenticeship and Skill Improvement Program, Local 150, Operating Engineers.

charges and elect unions to serve as their collective-bargaining representatives. But fear that employees may exercise their statutory rights is not a valid reason for not informing them of their rights.

Moreover, the NLRA protects the right to join a union and to refrain from doing so and the notice so states. In addition, the NLRA confers and protects other rights besides the right to join or refrain from joining unions. Section 7 provides that employees have the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" Such protected concerted activities include concertedly complaining or petitioning to management concerning their terms and conditions of employment;⁷⁴ concertedly petitioning government concerning matters of mutual interest in the workplace;⁷⁵ and concertedly refusing to work under poor working conditions.⁷⁶ Few if any of the comments contending that employees know about their NLRA rights assert that employees are aware of the right to engage in such protected concerted activities in the nonunion setting. By contrast, as shown above, many comments favoring the rule report that nonunion employees are especially unlikely to be aware of their NLRA rights.

Although some comments contend that the articles cited by the Board in support of its belief that employees are largely unaware of the NLRA rights are old and inadequately supported,⁷⁷ they cite no more recent or better supported studies to the contrary. In addition, the percentage of the private sector workforce represented by unions has declined from about 12 percent in 1989, about the time the articles cited in the NPRM were published, to 8 percent presently;⁷⁸ thus, to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is even more of a factor today.⁷⁹

⁷⁴ *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006), enf'd, 243 F. Appx. 771 (4th Cir. 2007) (unpublished).

⁷⁵ *Eastex, Inc. v. NLRB*, above, 437 U.S. at 565–567.

⁷⁶ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

⁷⁷ See comment of Cass County Electric Cooperative. For example, Professor Morris, author of two of the articles cited by the Board (as "see also") listed no authority to support his assertion that employees lack knowledge about the NLRA. See Charles J. Morris, "Renaissance at the NLRB," above at fn. 3; Morris, "NLRB Protection in the Nonunion Workplace," above at fn. 3.

⁷⁸ See DeChiara, "The Right to Know," above at fn. 1; 75 FR 80411 fn. 4.

⁷⁹ The Printing and Imaging Association discussed these declining rates of unionization, and

In support of their contention that NLRA rights are widely known among employees, several comments observe that the Board's processes for holding representation elections and investigating and remedying unfair labor practices are invoked tens of thousands of times a year.⁸⁰ That is true. However, the civilian work force includes some 108 million workers potentially subject to the NLRA.⁸¹ Thus, the number of employees who invoke the Board's processes make up only a small percentage of the covered workforce. Accordingly, the Board does not consider the number of times the Board's processes are invoked to be persuasive evidence that workers generally are aware of their NLRA rights.

Finally, remarks in multiple opposing comments strongly suggest that the commenters themselves do not understand the basic provisions of the NLRA:

- If my employees want to join a union they need to look for a job in a union company.⁸²
- [a]nytime one of our independent tradesmen would like to join the union they are free to apply and be hired by a union contractor.
- If a person so desires to be employed by a union company, they should take their ass to a union company and apply for a union job.
- Belonging to a union is a privilege and a preference—not a right.⁸³
- If they don't like the way I treat them, then go get another job. That is what capitalism is about.⁸⁴

cited Professor Kate Bronfenbrenner's doctoral dissertation, "Seeds of Resurgence: Successful Union Strategies for Winning Certification Elections and First Contracts in the 1980s and Beyond," (available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports&sei-redir=1#search=Kate+Bronfenbrenner,+Uneasy+terrain:+The+impact+of+capital+mobility+on+workers,+wages,+and+union>) to argue that the higher win rates for unions in elections involving both immigrant and older workers argued against the need for the proposed rule.

The Board is not addressing the many debated causes of the declining rates of private sector unionization in the United States. This rule simply accepts those rates as given, and seeks to increase the knowledge of NLRA provisions among those without readily available sources of reliable information on these provisions.

⁸⁰ See, e.g., comment of Desert Terrace Healthcare Center.

⁸¹ See Bureau of Labor Statistics, Economic News Release, Table B-1, "Employees on nonfarm payrolls by industry sector and selected industry detail," May 3, 2011 (seasonally adjusted data for March 2011) http://data.bls.gov/timeseries/LNS11300000?years_option=specific_years&include_graphs=true&to_year=2010&from_year=1948 (last visited June 6, 2011).

⁸² Comment of P & L Fire Protection, Inc.

⁸³ Comment of OKC Tea Party.

⁸⁴ Comment of Montana Records Management, LLP.

—We are not anti-union; but feel as Americans, we must protect our right not to be signatory to a third party in our business.⁸⁵

—If one desires to be a part of a union, he or she is free to apply to those companies that operate with that form of relationship.⁸⁶

—I also believe employees already have such notice by understanding they retain the right to change employers whenever they so choose.⁸⁷

These comments reinforce the Board's belief that, in addition to informing employees of their NLRA rights so that they may better exercise those rights, posting the notice may have the beneficial side effect of informing employers concerning the NLRA's requirements.⁸⁸

As to the contention that information concerning unions is widely available on the internet, including on the Board's Web site, the Board responds that not all employees have ready access to the internet. Moreover, it is reasonable to assume that an employee who has no idea that he or she has a right to join a union, attempt to organize his employer's workforce, or engage in other protected concerted activities, would be less likely to seek such information than one who is aware of such rights and wants to learn more about them.⁸⁹ The Board is pleased that it has received a large number of inquiries at its Web site seeking information concerning NLRA rights, but it is under no illusion that that information will reach more than a small fraction of the workforce in the foreseeable future.

Several comments assert that, in any event, requiring the posting of notices

⁸⁵ Comment of Humphrey & Associates, Inc.

⁸⁶ Comment of Medina Excavating, Inc.

⁸⁷ Comment of Olsen Tool & Plastics, Co.

⁸⁸ And as one union official writes:

Having been active in labor relations for 30 years I can assure you that both employees and employers are confused about their respective rights under the NLRA. Even union officers often do not understand their rights. Members and non-members rarely understand their rights. Often labor management disputes arise because one or both sides are misinformed about their rights. Often the employer takes an action it truly believes is within its rights when it is not.

Comment of Civil Service Employees Association.

⁸⁹ Thus, the many comments that assert that employees can just use Internet search engines to find out about unions (see, e.g., comments of Winseda Corp. Homestead Village, Inc.), misapprehend the breadth of the rights of which the Board seeks to apprise all employees. As stated above, Section 7 is not merely about the right to join or refrain from joining a labor organization, but more broadly protects the right of employees to engage in "concerted activities" for the purpose of "mutual aid or protection." It is this right that is the most misunderstood and simply not subject to an easy Internet search by employees who may have no idea of what terms to use, or even that such a right might be protected at all.

will not be effective in informing employees of their rights, because employees will simply ignore the notices, as the comments contend they ignore other workplace postings. "Posters are an ineffective means of educating workers and are rarely read by employees."⁹⁰ Other comments argue that adding one more notice to the many that are already mandated under other statutes will simply create more "visual clutter" that contributes to employees' disinclination to pay attention to posted notices. As one employer stated, "My bulletin boards are filled with required notifications that nobody reads. In the past 15 years, not one of our 200 employees has ever asked about any of these required postings. I have never seen anyone ever read one of them."⁹¹ Another wrote, "Employers are already required to post so many notices that these notices have lost any semblance of effectiveness as a governmental communication channel."

To these comments, the Board responds that the experiences of the commenters is apparently not universal; other comments cited above contend that employees are more knowledgeable about their rights under statutes requiring the posting of notices summarizing those rights than about their NLRA rights. Moreover, not every employee has to read workplace notices for those notices to be effective. If only one employee of a particular employer reads the Board's notice and conveys what he or she has read to the other employees, that may be enough to pique their interest in learning more about their NLRA rights. In addition, the Board is mandating electronic notice to employees on an internet or intranet site, when the employer customarily communicates with its employees about personnel rules or policies in that way, in order to reach those who read paper notices and those who read electronic postings. As for the comment that argues that the Board can use public service announcements or advertising to reach employees, the Board believes that it makes much more sense to seek to reach directly the persons to whom the Act applies, in the location where they are most likely to hear about their other employment rights, the workplace.⁹²

⁹⁰ Comment of Riverhead Community Mental Health.

⁹¹ Comment of Farmers Cooperative Compress.

⁹² Printing Industries of America uses election data to argue that the Labor Department's notice posting rule for Federal contractors has not been effective because the rate of elections has not increased. It is unclear whether any meaningful conclusion can be drawn from election data for only

Some comments argue that the Board's notice posting rule does not go far enough to effectuate the NLRA. One labor attorney argues that the Board should require annual trainings for supervisors and captive audience meetings where employees are read their rights by supervisors and Board agents and the employees would have to acknowledge receiving those notices.⁹³ The same comment suggests banning captive audience meetings by employers. The comment concludes that the NPRM "doesn't go anywhere near far enough. It is, however, an important and worthwhile advancement."⁹⁴ Another comment also suggests that annual, mandatory training classes for employees would be desirable.⁹⁵ The Board believes that this Rule strikes the proper balance in communicating necessary information about the NLRA to employees.

For all the foregoing reasons, the Board is persuaded that many private sector employees are unaware of their NLRA rights.⁹⁶

III. Summary of Final Rule and Discussion of Related Comments

The Board's rule, which requires employers subject to the NLRA to post notices of employee rights under the NLRA, will be set forth in Chapter 1, Part 104 of Volume 29 of the Code of Federal Regulations (CFR). Subpart A of the rule sets out definitions; prescribes the size, form, and content of the employee notice; and lists the categories of employers that are not covered by the rule. Subpart B sets out standards and

a few months, especially since the number of contractors covered by the Labor Department's rule is only a small fraction of the number of employers subject to the NLRA. In any event, the Board does not believe that that is the proper criterion by which to measure the rule's effectiveness. The purpose of requiring the posting of such notices is to inform employees of their rights so that they may exercise them more effectively, not to obtain any particular result such as the filing of more election petitions.

The same comment also cites a couple of textbooks which it asserts are popularly used in high schools today to argue that labor history is being taught to today's students. The Board is unable to assess the truth of that assertion, but regardless, it is unclear whether students necessarily connect this history to their future rights as employees.

⁹³ Comment of Weinberg, Roger & Rosenfeld.

⁹⁴ *Id.*

⁹⁵ Comment of Staff Representative, Steelworkers.

⁹⁶ Accordingly, the Board finds it unnecessary to conduct a study to determine the extent of employees' knowledge of NLRA rights. The Board further observes that even if only 10 percent of workers were unaware of those rights, that would still mean that more than 10 million workers lacked knowledge of one of their most basic workplace rights. The Board believes that there is no question that at least a similar percentage of employees are unaware of the rights explained in the notice. In the Board's view, that justifies issuing the rule.

procedures related to allegations of noncompliance and enforcement of the rule. The discussion below is organized in the same manner and explains the Board's reasoning in adopting the standards and procedures contained in the regulatory text, including the Board's responses to the comments received.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions From Coverage Definitions

A. The Definitions

For the most part, the definitions proposed in the rule are taken from those appearing in Section 2 of the NLRA, 29 U.S.C. 152. No comments were received concerning those definitions, and they are unchanged in the final rule. A number of comments were received concerning the definition of other terms appearing in the rule. Those comments are addressed below.

B. Requirements for Employee Notice

1. Content Requirements

The notice contains a summary of employee rights established under the NLRA. As explained above, the Board believes that requiring notice of employee rights is necessary to carry out the provisions of the NLRA. Accordingly, § 104.202 of the proposed rule requires employers subject to the NLRA to post and maintain the notice in conspicuous places, including all places where notices to employees are customarily posted, and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material, or otherwise rendered unreadable.

As stated in the NPRM, the Board considered the substantive content and level of detail the notice should contain regarding NLRA rights. In arriving at the content of the notice of employee rights, the Board proposed to adopt the language of the Department of Labor's final rule requiring Federal contractors to post notices of employees' NLRA rights. 29 CFR part 471. In the NPRM, the Board explained that it tentatively agreed with the Department of Labor that neither quoting the statement of employee rights contained in Section 7 of the NLRA nor briefly summarizing those rights in the notice would be likely to effectively inform employees of their rights. Rather, the language of the notice should include a more detailed description of employee rights derived from Board and court decisions implementing those rights. The Board also stated that it saw merit in the Department of Labor's judgment that including in the notice examples, again

derived from Board and court decisions, of conduct that violates the NLRA will assist employees in understanding their rights. 75 FR 80412.

Prior to issuing the NPRM, the Board carefully reviewed the content of the notice required under the Department of Labor's final rule, which was modified in response to comments from numerous sources, and tentatively concluded that that notice explains employee rights accurately and effectively without going into excessive or confusing detail. The Board therefore found it unnecessary, for purposes of the proposed rulemaking, to modify the language of the notice in the Department of Labor's final rule. Moreover, the Board reasoned that because the notice of employee rights would be the same under the Board's proposed rule as under the Department of Labor's rule, Federal contractors that have posted the Department of Labor's required notice would have complied with the Board's rule and, so long as that notice is posted, would not have to post a second notice. *Id.*

The proposed notice contained examples of general circumstances that constitute violations of employee rights under the NLRA. Thus, the Board proposed a notice that provided employees with more than a rudimentary overview of their rights under the NLRA, in a user-friendly format, while simultaneously not overwhelming employees with information that is unnecessary and distracting in the limited format of a notice. As explained below, the Board also tentatively agreed with the Department of Labor that it is unnecessary for the notice to include specifically the right of employees who are not union members and who are covered by a contractual union-security clause to refuse to pay union dues and fees for any purpose other than collective bargaining, contract administration, or grievance adjustment. See *Communications Workers v. Beck*, 487 U.S. 735 (1988). *Id.* at 80412–80413.

The Board specifically invited comment on the statement of employee rights proposed for inclusion in the required notice to employees. In particular, the Board requested comment on whether the notice contains sufficient information of employee rights under the NLRA; whether it effectively conveys that information to employees; and whether it achieves the desired balance between providing an overview of employee rights under the Act and limiting unnecessary and distracting information. *Id.* at 80413.

The proposed Appendix to Subpart A included Board contact information and basic enforcement procedures to enable employees to learn more about their NLRA rights and how to enforce them. Thus, the required notice confirmed that unlawful conduct will not be permitted, provided information about the Board and about filing a charge with the Board, and stated that the Board will prosecute violators of the NLRA. The notice also indicated that there is a 6-month statute of limitations for filing charges with the Board alleging violations and provided Board contact information. The Board invited suggested additions or deletions to these provisions that would improve the content of the notice of employee rights. *Id.*

The content of the proposed notice received more comments than any other single topic in the proposed rule. But of the thousands of comments that address the content of the notice, the majority are either very general, or identical or nearly identical form letters or “postcard” comments sent in response to comment initiatives by various interest groups, including those representing employers, unions, and employee rights organizations. Many comments from both individuals and organizations offer general support for the content of the proposed notice, stating that employee awareness of basic legal rights will promote a fair and just workplace, improve employee morale, and foster workforce stability, among other benefits.⁹⁷ More specifically, one comment asserts that the proposed notice “contains an accurate, understandable and balanced presentation of rights.”⁹⁸ The United Transportation Union contends that the “notice presents an understandable, concise and extremely informative recitation of workers’ rights, without getting bogged down in extraneous language, incomprehensible legalese or innumerable caveats and exceptions.”

Other comments were less supportive of the content of the proposed notice and the notice-posting requirement in general. A significant number of comments, including those from many individuals, employers, and employer industry and interest groups, argue that the content of the notice is not balanced, and appears to promote unionization instead of employee freedom of association. In particular, many comments state that Section 7 of the

NLRA includes the right to refrain from union activity, but claim that this right is given little attention in comparison to other rights in the proposed notice. Several comments also argue that the proposed notice excludes rights associated with an anti-union position, including the right to seek decertification of a bargaining representative, the right to abstain from union membership in “right-to-work” states, and rights associated with the Supreme Court’s decision in *Communications Workers v. Beck*.⁹⁹ Comments also suggest that the notice should include a warning to employees that unionizing will result in a loss of the right to negotiate directly with their employer.¹⁰⁰ Many of these comments argue that a neutral government position on unionization would be more inclusive of anti-union rights.¹⁰¹

A number of comments address the issue of complexity, and argue that the Board’s attempt to summarize the law is flawed because the Board’s decisional law is too complex to condense into a single workplace notice.¹⁰² Some of the comments addressing this issue note that NLRA law has been developed over 75 years, and involves interpretations by both the NLRB and the Federal courts, sometimes with conflicting results. The Chamber of Commerce cites the “NLRB’s Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board” (Basic Guide to the NLRA) (1997), available at <http://www.nlr.gov/publications/brochures>, to make their point about legal complexity. In the Foreword to the Basic Guide to the NLRA, the Board’s General Counsel states that “[a]ny effort to state basic principles of law in a simple way is a challenging and unenviable task. This is especially true about labor law, a relatively complex field of law.” The thrust of these comments about legal complexity was that the NLRA is complex, dynamic, and nuanced, and any attempt to summarize it in a workplace notice will result in an oversimplification of the law and lead to confusion, misunderstanding, inconsistencies, and some say, heightened labor-management antagonism. Moreover, some comments express concern that Board member turnover could result in changes to the

law, which may require frequent updates to the notice.¹⁰³

Many comments suggest that the required notice should include only the specific rights contained in Section 7 of the NLRA or, at most, the rights and obligations stated in employee advisories on the NLRB’s Web site. The comments favoring a more general notice suggest that the detailed list of rights far exceeds the “short and plain” description of rights that the Board has found sufficient to “clearly and effectively inform employees of their rights under the Act” in unfair labor practice cases.¹⁰⁴ See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004). A comment from Fisher & Phillips LLP argues that, under the Board’s current remedial practices, only an employer that egregiously violates the Act on numerous occasions is required to post such an inclusive list of rights.

Finally, a number of comments suggest that the notice should include a list of employer rights, namely the right to distribute anti-union literature and the right to discuss the company’s position regarding unions.

In addition to the general comments about the proposed notice, many comments offer suggestions for specific revisions to individual provisions within the five sections of the proposed notice: the introduction, the statement of affirmative rights, the examples of unlawful conduct, the collective-bargaining provision, and the coverage information. The following discussion presents the comments related to individual provisions of the notice, followed by the Board’s decisions regarding the content of the final notice made in response to those comments.

a. Comments Regarding the Introduction

The introduction to the notice of rights in the proposed rule stated:

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRB are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

¹⁰³ See comment of Capital Associated Industries, Inc. and National Association of Manufacturers.

¹⁰⁴ See *e.g.* comments of COLLE and Coalition for a Democratic Workplace.

⁹⁷ See comments of the National Immigration Law Center, Service Employees International Union, and Weinberg, Roger & Rosenfeld.

⁹⁸ Comment of David Fusco, a labor and employment attorney.

⁹⁹ See comments of Pilchak, Cohen & Tice, American Trucking Association, and Electrical and Mechanical Systems Inc.

¹⁰⁰ See, *e.g.* comment of the Heritage Foundation.

¹⁰¹ See, *e.g.*, comment of the National Right to Work Committee.

¹⁰² See, *e.g.*, comment of COLLE, Retail Industry Leaders Association.

75 FR 80418–80419 (footnote omitted).

The Board received a few suggestions for changes to the introduction of the notice. The first comment suggests including language stating that employees are required to contact their “executive manager” or “administrative team” before contacting the NLRB and suggests that the NLRB refuse to process employees’ complaints until the employees first raise the issue with his or her “management team.” The second comment, from COLLE, urges the Board to add language in the introduction alerting employees that they also have the right to refrain from engaging in union activity. The comment suggests that by not including the right to refrain from union activity in the introduction, the Board is showing a bias toward union organizing. The comment argues that a more neutral notice would include both the right to engage and not engage in union activity at the beginning of the document, rather than wait to first mention the right to refrain in the affirmative rights section.

The Board does not agree with the proposal that employees be required to contact management officials as a prerequisite to contacting the Board. Such a procedural requirement is not contemplated in the NLRA and could discourage employees from exercising or vindicating their rights.

The Board agrees, however, that the introduction should include both the rights to engage in union and other concerted activity and the right to refrain from doing so. The Board believes that adding the right to refrain to the introduction will aid in the Board’s approach to present a balanced and neutral statement of rights. Accordingly, the first sentence in the introduction to the notice in the final rule will state:

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity.

b. Comments Regarding Affirmative Statement of Rights

The proposed notice contains the following statement of affirmative rights: Under the NLRA, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through representatives of employees’ own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your terms and conditions of employment or union organizing with your co-workers or a union.

Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

Strike and picket, depending on the purpose or means of the strike or the picketing.

Choose not to do any of these activities, including joining or remaining a member of a union.

75 FR 80419.

The majority of comments addressing the affirmative rights section were general and did not specifically address the language of the individual provisions. Generally, labor organizations and employee advocate groups favor the Board’s language. A comment from the United Food and Commercial Workers International Union asserts that the approach “achieves an appropriate balance between providing sufficiently clear information about employee’s basic statutory rights and limiting unnecessary and confusing information about peripheral rights.” On the other hand, comments from employer groups do not favor the Board’s language. More specifically, employer groups argue that the notice is biased toward union organizing. Generally, the comments argue that the right to refrain from engaging in union activity should have a more prominent place on the notice, rather than being the last of the rights listed on the poster. Many of these comments contend that the notice should include the right not to engage in specific union-related activities.

Other comments about the notice’s statement of affirmative rights are directed at individual provisions of the notice. A discussion of those comments is set out in more detail below.

i. The Right To Organize and the Right To Form, Join and Assist a Union

A few comments generally state that the notice should include the consequences of exercising the right to organize, join or form a union.¹⁰⁵ For example, several comments argue that employees should be informed that if they join a union they give up the right to deal directly with their employers. Another comment argues that employees should be informed of the cost of organizing a union, including the cost of dues and the potential for the company to shut down because of increased labor costs associated with a unionized workforce. Other comments

suggest including language informing employees that they can be fired for not paying their union dues.

The Board rejects those suggestions. The notice is intended to inform employees of the rights that they have under the NLRA and does not include the benefits or consequences of exercising any of the enumerated rights. Adding the consequences of one right would require revising the entire notice to include potential consequences—both positive and negative—of all the protected rights. For example, the notice would need to include the consequences of refraining from joining a union, such as not being permitted to vote on contract ratifications or attend union membership meetings. The necessary additions to the notice would create a notice that is not a concise list of rights, but more likely a pamphlet-sized list of rights and explanations. In addition, the consequences of unionization are unique to each unionized workplace, so it would be impossible to include a list of general consequences that could apply uniformly to all unionized workplaces. If employees have questions about the implications of any of their rights, they can contact an NLRB regional office.

Assisted Living Federation of America (ALFA) suggests that the affirmative rights section should be revised to reflect the anti-union position. For example, rather than the current provision that states that employees have a right to “[o]rganize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment,” the comment suggests the following provision: “you have the right to organize with other employees in opposition to a particular union or unions.” And “you have the right to: refuse to form, join, or assist a union, including the right to refuse to sign a union card, attend a union meeting or supply a union with information concerning you, your co-worker or your job,” rather than “[you have the right to] [f]orm, join or assist a union.” The Board disagrees. The Board’s proposed notice language reflects the language of the NLRA itself, which specifically grants affirmative rights, including nearly all of those listed in the notice. Also, the notice, like the NLRA, states that employees have the right to refrain from engaging in all of the listed activities. The Board therefore sees no need to recast the notice to further emphasize the right to oppose unions.

ii. The Right To Bargain Collectively

Two comments suggest that the collective-bargaining provision is

¹⁰⁵ See, e.g., comment of Pilchak Cohen & Tice.

misleading and vague. The first comment, from COLLE, argues that the provision is misleading because it fails to acknowledge that an employer does not have an obligation under the NLRA to consent to the establishment of a collective-bargaining agreement, but instead only has the statutory duty to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. 158(d). The comment also argues that the failure to reach an agreement is not per se unlawful, and the finding of an unfair labor practice depends on whether the parties engaged in good-faith bargaining. This comment suggests that the notice should instead note that the NLRA requires parties to bargain in good faith but does not compel agreement or the making of concessions, and that, in some instances, a bargaining impasse will result, permitting the parties to exercise their economic weapons, such as strikes or lockouts. The second comment, made generally by more than a few organizations and individuals, suggests that the notice add a statement indicating that employers and unions have an obligation to bargain in good faith.

The Board finds it unnecessary to add the suggested amplifications. For one thing, the notice does state that employers and unions have a duty to bargain in good faith, “in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment.” In the Board’s view, the statement that the parties must make a “genuine effort” to reach agreement necessarily implies that they are not, in the end, required to reach one. The Board deems the notice language to be adequate on this point. Finally, for the reasons already discussed, the Board rejects the contention that the notice should discuss the implications or consequences of unsuccessful bargaining.

iii. The Right To Discuss With Co-Workers or Union

A comment from the National Immigration Law Center suggests that the use of the phrase “terms and conditions of employment” is unclear especially to employees who are unaware of their rights under the NLRA. The comment recommends that, in order to clarify, the Board add the phrase “including wages and benefits.” The suggested language would read, “you have the right to: discuss your terms and conditions of employment, including wages and benefits, or union

organizing with your co-workers or a union.”

The Board agrees that adding the suggested language would clarify the provision. The list of affirmative rights uses the terms “wages, hours, and other terms and conditions of employment” to describe what unions may negotiate. The notice then uses the terms “wages, benefits, hours, and other working conditions” to describe the right to bargain collectively for a contract. Those statements make it clear that “terms and conditions of employment” includes wages and benefits. But then immediately following those two statements, the notice states that employees may discuss “terms and conditions of employment,” but does not include any clarifying language. In order, to create a more uniform notice and clarify the extent to which employees may discuss their terms and conditions of employment the final notice will read, “Under the NLRA, you have a right to: Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.”

iv. The Right To Strike and Picket

The notice’s reference to the right to strike and picket received a few comments from law firms and other organizations representing employers’ interests. The comments suggest that the provision is flawed because of the absence of further limitations, exceptions, and distinctions.¹⁰⁶ Generally, the comments argue that not all strikes and pickets are protected. COLLE argues that the notice should inform employees of the limitations of strikes encompassed by “depending on the purpose or means of the strike or pickets”—for example, whether the strike is for recognition or bargaining, whether the strike has a secondary purpose, whether picketing involves a reserved gate, whether the strike is a sit-down or minority strike, whether the conduct is a slowdown and not a full withholding of work, whether the strike is partial or intermittent, whether the strike involves violence, and whether the strike is an unfair labor practice strike or an economic strike. ALFA argues that employees should be informed that if the employer is a healthcare institution, “employees do not have the right to participate in a union-initiated strike or picket unless the union has provided the employer and federal and state mediation agencies with the required 10 day notice.”

¹⁰⁶ See comments of ALFA, Carrollton Health and Rehabilitation Center, and COLLE.

The Board disagrees. By necessity, an 11x17-inch notice cannot contain an exhaustive list of limitations on and exceptions to the rights to strike and picket, as suggested by employers. However, because exercising the right to strike can significantly affect the livelihood of employees, the Board considers it important to alert employees that there are some limitations to exercising this right. The Board is satisfied that the general caveat, “depending on the purpose or means of the strike or the picketing,” together with the instruction to contact the NLRB with specific questions about the application of rights in certain situations, provides sufficient guidance to employees about the exercise of their rights while still staying within the constraints set by a necessarily brief employee notice.

v. The Right To Refrain From Union or Other Protected Concerted Activity

All the comments that discuss the right to refrain from engaging in union activity criticize what they contend to be its lack of prominence. ALFA accuses the Board of “burying” the provision by placing it last, below the other rights to engage in union and other concerted activity. The U.S. Chamber of Commerce suggests that the notice include “or not” after each of the enumerated rights. For example, “you have the right to: form join or assist a union, or not.” (Emphasis added.) Other suggested revisions to amplify the prominence of the provision include stating that employees have the right to refrain from protected, concerted activities and/or union activities; stating that employees’ right to refrain includes the right to actively oppose unionization, to not sign union authorization cards, to request a secret ballot election, to not be a member of a union or pay dues or fees (addressed further below), or to decertify a union (also addressed below); and stating that employees have the right to be fairly represented even if not a member of the union. One employer suggests that if the notice retains its current emphasis favoring union activity and disfavoring the freedom to refrain from such activity, employers will need to post their own notices that emphasize and elaborate on the right to refrain.

The Board received at least four comments that argue that the notice, as written, may make employees believe that the employer is encouraging unionization. Two of those comments suggest that an employer is protected from compelled speech by Section 8(c) of the NLRA. (The Board has already rejected the latter argument; see section

II, subsection B, “Statutory Authority,” above.)

The contention that the right to refrain from engaging in union activity is “buried” in the list of other affirmative rights or that the Board is biased in favor of unionization because of the choice of placement is without merit. The list of rights in the proposed notice is patterned after the list of rights in Section 7 of the NLRA, 29 U.S.C. 157. Section 7 lists the right to refrain last, after stating several other affirmative rights before it. In addition, the Board’s remedial notices list the right to refrain last. See *Ishikawa Gasket America, Inc.*, above. So does the Board’s Notice of Election. In addition, the notice required by this rule states that it is illegal for an employer to take adverse action against an employee “because [the employee] choose[s] not to engage in any such [union-related] activity.” The Board has revised the introduction of the notice to include the right to refrain—this addition further highlights an employee’s right to refrain from union activity. Finally, the Board believes that people understand a right as different from an obligation and thus will, for example, understand that the right to organize a union includes the right not to do so. Accordingly, the Board concludes that the notice sufficiently addresses the right to refrain among the list of statutory rights. In addressing the numerous comments questioning the Board’s neutrality, the Board points out that in Section 1 of the NLRA, Congress declared that it is the policy of the United States to mitigate or eliminate obstructions to the free flow of commerce “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. 151. Thus, by its own terms, the NLRA encourages collective bargaining and the exercise of the other affirmative rights guaranteed by the statute. In doing so, however, the NLRA seeks to ensure employee choice both to participate in union or other protected concerted activity and to refrain from doing so.

Turning to the issues of whether the notice creates the impression that the employer is encouraging unionization and whether an employer can be compelled to post the notice which contains information the employer would otherwise not share with employees, the Board disagrees with both arguments. First, the notice clearly

states that it is from the government. Second, in light of the other workplace notice employees are accustomed to seeing, employees will understand that the notice is a communication to workers from the government, not from the employer. Finally, as discussed above, NLRA Section 8(c) protects employers’ right to express any “views, argument, or opinion” “if such expression contains no threat of reprisal or force or promise of benefit.” The rule does not affect this right. Therefore, if an employer is concerned that employees will get the wrong impression, it may legally express its opinion regarding unionization as long as it does so in a noncoercive manner.

Critics of the notice contend that the notice should contain a number of additional rights and also explanations of when and how an employee may opt out of paying union dues. Thus, most employer groups argue that the notice should contain a statement regarding the right to decertify a union. A number of those comments state that the notice should provide detailed guidance on the process for decertifying a union. Others suggest that the notice should contain instructions for deauthorizing a union security clause. A majority of employers and individuals who filed comments on the content of the notice urge the Board to include a notice of employee rights under *Communications Workers v. Beck*. Baker & McKenzie suggests adding a provision informing employees that for religious purposes an employee may opt out of paying dues to a union.¹⁰⁷ A few comments also suggest that the notice add any rights that employees may have in “right-to-work” states. As indicated previously, numerous comments suggest the inclusion of other rights of employees who do not desire union representation. Baker & McKenzie suggests a list of 26 additional affirmative rights, most of which only affect employees in a unionized setting and are derived from the Labor-Management Reporting and Disclosure Act, the Labor-Management Relations Act, or other Federal labor statutes enforced by the Department of Labor. The proposed list also includes

¹⁰⁷ NLRA Section 19 provides that “Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee’s employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation[.]” 29 U.S.C. 169.

some rights covered by the NLRA such as “the right to sign or refuse to sign an authorization card,” “the right to discuss the advantages and disadvantages of union representation or membership with the employer,” and “the right to receive information from the employer regarding the advantages and disadvantages of union representation.”

The Board has determined that the inclusion of these additional items is unnecessary. As discussed above, the NLRA itself contains only a general statement that employees have the right not to participate in union and/or other protected concerted activities. Section 19 does specifically set forth the right of certain religious objectors to pay the equivalent of union dues to a tax-exempt charity; however, this right is implicated only when an employer and union have entered into a union-security arrangement. Because the notice does not mention or explain such arrangements, the Board finds no reason to list this narrow exception to union-security requirements. In sum, the Board is not persuaded that the notice needs to expand further on the right to refrain by including a list of specific ways in which employees can elect not to participate or opt out of paying union dues. Employees who desire more information regarding the right not to participate can contact the Board.

The Board does not believe that further explication of this point is necessary. However, because so many comments argue that the notice should include the right to decertify a union and rights under *Communication Workers v. Beck*, the Board has decided to explain specifically why it disagrees with each contention.

Concerning the right to decertify, the notice states that employees have the right not to engage in union activity, “including joining or remaining a member of a union.” Moreover, the notice does not mention the right to seek Board certification of a union. Indeed, contrary to the numerous comments suggesting that the proposed notice is a “roadmap” for union organizing, the notice does not even mention the right to petition for a union representation election, possibly leading to union certification; rather, it merely states that employees have the right to “organize a union” and “form, join or assist a union.” The notice does not give any further instructions on how an employee can exercise those rights. Similarly, the notice states that employees may choose not to remain a member of a union without further instructions on how to exercise that right. To include instructions for

exercising one right and not the other would upset the balanced recitation of rights. If employees have questions concerning how they can exercise their rights, the notice encourages them to contact the Board.

The Board has also determined that the addition of *Beck* rights in the final notice is unnecessary. Those rights apply only to employees who are represented by unions under collective-bargaining agreements containing union-security provisions. As stated in the NPRM, unions that seek to obligate employees to pay dues and fees under those provisions are required to inform those employees of their *Beck* rights. See *California Saw & Knife Works*, above, 320 NLRB at 233. See 75 FR at 80412–80413. The Board was presented with no evidence during this rulemaking that suggests that unions are not generally complying with their notice obligations. In addition, the Notice of Election, which is posted days before employees vote on whether to be represented by a union, contains an explanation of *Beck* rights. Moreover, as the Board stated in the NPRM, only about 8 percent of all private sector employees are represented by unions, and by no means are all of them subject to union-security clauses. Accordingly, the number of employees to whom *Beck* applies is significantly smaller than the number of employees in the private sector covered by the NLRA. *Id.* at 80413. Indeed, in the “right-to-work” states, where union-security clauses are prohibited, no employees are covered by union security clauses, with the possible exception of employees who work in a Federal enclave where state laws do not apply. Accordingly, because *Beck* does not apply to the overwhelming majority of employees in today’s private sector workplace, and because unions already are obliged to inform the employees to whom it does apply of their *Beck* rights, the Board is not including *Beck* notification in the final notice.

The Board also disagrees with the comment from Baker & McKenzie contending that an exhaustive list of additional rights should be included in the notice. In addition to the reasons discussed above, the Board finds that it would not be appropriate to include those rights, most of which are rights of union members vis-à-vis their unions. For example, the comment suggests including the “right for each union member to insist that his/her dues and initiation fees not be increased * * * except by a majority vote by secret ballot * * *,” the “right of each employee in a bargaining unit to receive a copy of the collective bargaining

agreement,” and the “right to nominate candidates, to vote in elections of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon business properly before the meeting.” Those rights are not found in the NLRA, but instead arise from other Federal labor laws not administered by the NLRB. See Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 et seq (LMRDA). The Board finds that it would be inappropriate to include those additional rights in a notice informing employees of their rights under the NLRA.

vi. Other Comments

The Board has also considered, but rejected, the contention that the notice contain simply a “short and plain” description of rights such as that used in remedial notices. See *Ishikawa Gasket America, Inc.*, above. The two notices have different purposes: one looks back; the other, forward. As explained in the NPRM, the principal purpose of a remedial notice is to inform employees of unlawful conduct that has taken place and what is being done to remedy that conduct. Accordingly, although a remedial notice contains only a brief summary of NLRA rights, it also contains examples of unlawful actions that have been committed. To the extent that such a notice generally increases employees’ awareness of their rights, the unlawful conduct detailed adds to that awareness. The proposed notice, by contrast, is a notice intended to make employees aware of their NLRA rights generally. It normally will not be posted against a background of already-committed unfair labor practices; it therefore needs to contain a summary both of NLRA rights and examples of unlawful conduct in order to inform employees effectively of the extent of their NLRA rights and of the availability of remedies for violations of those rights. Moreover, as the Board explained in the NPRM, the general notice of rights posted in the pre-election notice is sufficient because at least one union along with the employer is on the scene to enlighten employees of their rights under the NLRA. 75 FR 80412 fn.19.

The fundamental rights described in the notice are well established and have been unchanged for much of the Board’s history. Accordingly, the Board does not share the concern expressed in some comments that a new notice will have to be posted each time the composition of the Board changes.

Finally, the Board rejects the contention that the notice should

address certain rights of employers. The notice is intended to inform employees of their rights, not those of their employers.

For all the foregoing reasons, the Board finds it unnecessary to modify the section of the notice summarizing employees’ NLRA rights.

c. The Examples of Unlawful Employer Conduct in the Notice

The proposed notice contained the following examples of unlawful conduct:

Under the NLRA, it is illegal for your employer to:

Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Question you about your union support or activities in a manner that discourages you from engaging in that activity.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

Spy on or videotape peaceful union activities and gatherings or pretend to do so. 75 FR 80419.

The Board received limited comments on six of the seven examples of unlawful employer conduct. As a general matter, some comments contend that the number of examples of employer misconduct is disproportionate compared to the examples of union misconduct.¹⁰⁸ Most of the comments refer to the number of paragraphs devoted to illegal employer conduct (7) and the number of paragraphs devoted to illegal union conduct (5). Several comments indicate that when one compares the employer misconduct listed in Section 8(a) of the NLRA with union misconduct listed in Section 8(b), no such imbalance appears in the text of the statute. Several comments provide additional examples of union misconduct that they say should be included.

As with the notice’s statement of affirmative rights, some of the

¹⁰⁸ See, e.g., comments of COLLE, Baker & McKenzie, National Association of Manufacturers, and American Trucking Association.

individual provisions in this section of the notice received numerous comments and suggestions for improvement. The vast majority of the comments about the specific provisions are from representatives of employers. Those comments generally contend that the provisions are overgeneralizations and do not articulate the legal standard for evaluating allegations of unlawful conduct or indicate factual scenarios in which certain employer conduct may be lawful.

After reviewing all of the comments, the Board has decided to revise one of the examples of unlawful employer conduct contained in the NPRM. The Board concludes that the other provisions, as proposed, are accurate and informative and, as with the notice as a whole, strike an appropriate balance between being simultaneously instructive and succinct.

Furthermore, the Board sees no reason to add or subtract from the employer or union illegal activity to make the two sections contain an equal number of paragraphs. The comment that argues that no imbalance exists in the statute is correct, but the majority of violations under Section 8(b) concern union conduct *vis-à-vis* employers, not conduct that impairs employees' rights. The notice of rights is intended to summarize employer and union violations against employees; accordingly, there is no need to alter the list to include unlawful union activity against employers.

i. No-Solicitation and No-Distribution Rules

The Board received a few comments that were critical of the proposed notice language stating that an employer cannot lawfully prohibit employees from "soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas." The Service Employees International Union comments that "solicitation" has a narrow meaning and involves asking someone to join the union by signing an authorization card, which is subject to the restrictions suggested in the notice. The comment submits that the notice should state that an employer cannot prohibit employees from "talking" about a union. The comment suggests that "talking" is both more accurate and is easier for employees to understand than "soliciting."

The remaining comments criticize the provision for failing to note any limitations on employees' rights to solicit and distribute, such as the limited rights of off-duty employees, and limitations in retail and health care

establishments. One comment, in particular, suggests the notice should advise healthcare employees that they do not enjoy a protected right to solicit in immediate patient care areas or where their activity might disturb patients. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978). The comment proposes to include a qualification that a hospital or other health care employer may prohibit all solicitation in immediate patient care areas or outside those areas when necessary to avoid disrupting health care operations or disturbing patients. Another comment suggests that the law in this area is so complex that no meaningful but succinct provision can be constructed, and therefore recommends deleting it entirely.

The Board disagrees with those comments. The Board appreciates that under case law, employees' right to engage in solicitation and distribution of literature is qualified in certain settings and accordingly that employers may, in some situations, legally prohibit solicitation or distribution of literature even during employees' nonworking time. Given the variety of circumstances in which the right to solicit and distribute may be limited, however, the Board has determined that limitations on the size and format of the notice preclude the inclusion of factual situations in which an employer may lawfully limit such activity. As stated above, employees may contact the NLRB with specific questions about the lawfulness of their employers' rules governing solicitation and literature distribution.

Turning to the suggestion that the notice should be modified to remove the reference to union solicitation in favor of a reference only to the right to engage in union talk, the Board agrees in part. The Board distinguishes between soliciting for a union, which generally means encouraging a co-worker to participate in supporting a union, and union talk, which generally refers to discussions about the advantages and disadvantages of unionization. *Scripps Memorial Hosp.*, 347 NLRB 52 (2006). The right to talk about terms and conditions of employment, which would necessarily include union talk, is encompassed more specifically by the "discussion" provision in the affirmative rights section of the notice. That provision indicates that employees have the right to "discuss your terms and conditions of employment or union organizing with your co-workers or a union." In order to maintain consistency and clarity throughout the notice, the Board agrees that some change is necessary to the solicitation

provision. Accordingly, the final notice will state that it is illegal for an employer to "prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms."

ii. Questioning Employees About Union Activity

The Board received one comment concerning this provision, suggesting that it was confusing. The Board believes the existing language is sufficiently clear.

iii. Taking Adverse Action Against Employees for Engaging in Union-Related Activity

The Board did not receive any specific comments regarding this provision.

iv. Threats To Close

A few comments from employer groups criticize the perceived overgeneralization of this provision. Those comments note that, as with unlawful interrogation, a threat to close is evaluated under a totality of circumstances, and that an employer is permitted to state the effects of unionization on the company so long as the statement is based on demonstrably probable consequences of unionization.

The Board agrees that the law in this general area is complex and that predictions of plant closure based on demonstrably probable consequences of unionization may be lawful. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). However, the example in the proposed notice is not such a prediction; rather, the notice states that it is unlawful for an employer to "threaten to close your workplace if workers choose a union to represent them." Such a statement, which clearly indicates that the employer will close the plant in retaliation against the employees for choosing union representation, is unlawful. *Id.* at 618-619. Thus, the Board finds it unnecessary to modify or delete this provision of the notice.

v. Promising Benefits

The Board received one comment addressing this provision. The comment argues that the provision is "troubling" because it may be interpreted by a reader to mean "anytime their employer seeks to make such improvements it discourages union support because improved wages and benefits may reduce employee's interest in a union." The Board does not think such an

interpretation would be reasonable, because it is contrary to the plain language of the notice. The notice states that promises or grants of benefits “to discourage or encourage union support” are unlawful. It would make little sense to use such language if the Board had meant that any promises or grants of benefits were unlawful, rather than only those with the unlawful stated purposes. And stating that such promises or grants to * * * encourage union support are unlawful necessarily implies that not all promises and grants of benefits discourage union support.

vi. Prohibitions on Union Insignia

A few comments suggest that the provision fails to illuminate the conditions under which “special circumstances” may exist, including in hotels or retail establishments where the insignia may interfere with the employer’s public image, or when the insignia is profane or vulgar. Another comment indicates that the provision is overly broad because it does not reflect that a violation depends on the work environment and the content of the insignia. All the comments addressing this provision suggest either adding more detail to the provision to narrow its meaning, or striking the provision entirely.

Again, the Board disagrees. Employees have a statutorily protected right to wear union insignia unless the employer is able to demonstrate “special circumstances” that justify a prohibition. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). For reasons of format, the notice cannot accommodate those comments suggesting that this provision specify cases in which the Board has found “special circumstances,” such as where insignia might interfere with production or safety; where it conveys a message that is obscene or disparages a company’s product or service; where it interferes with an employer’s attempts to have its employees project a specific image to customers; where it hinders production; where it causes disciplinary problems in the plant; where it is in an immediate patient care areas; or where it would have any other consequences that would constitute special circumstances under settled precedent. *NLRB v. Mead Corp.*, 73 F.3d 74, 79 (6th Cir. 1996), enfg. *Escanaba Paper Co.*, 314 NLRB 732 (1994).

Given the lengthy list of potential special circumstances, the addition of one or two examples of special circumstances might mislead or confuse employees into thinking that the right to wear union insignia in all other circumstances was absolute. And

including an entire list of special circumstances, concerning both the wearing of union insignia and other matters (e.g., striking and picketing, soliciting and distributing union literature), would make it impossible to summarize NLRA rights on an 11x17 inch poster. In any event, the Board finds that the general caveat that special circumstances may defeat the application of the general rule, coupled with the advice to employees to contact the NLRB with specific questions about particular issues, achieves the balance required for an employee notice of rights about wearing union insignia in the workplace.

vii. Spying or Videotaping

Aside from the few comments that suggest the provision be stricken, only one comment specifically addresses the content of this provision. The comment states that the language is confusing because a “supervisor might believe it would be permissible to photograph or tape record a union meeting. Another might say that their video camera doesn’t use tape so it’s okay to use.” The Board has determined that no change is necessary. In the Board’s view, it is unlikely that a reasonable supervisor would construe this notice language (which also says that it is unlawful to “spy on” employees’ peaceful union activities) as indicating that it is unlawful to videotape, but lawful to tape record or photograph, such activities. Supervisors are free to contact the Board if they are unsure whether a contemplated response to union activity might be unlawful.

viii. Other Suggested Additions to Illegal Employer Conduct

The Heritage Foundation suggests that the Board add language to the notice informing employees that if they choose to be represented by a union, their employer may not give them raises or bonuses for good performance without first bargaining with the union. The comment suggests that the Board add the following provision “if a union represents you and your co-workers, give you a pay raise or a bonus, or reduce or dock your pay, without negotiating with the union.” The Board rejects this suggestion for the same reason it rejects other comments contending that the notice should include the consequences of unionization in the summary of NLRA rights, above.

The National Immigration Law Center suggests that the Board add the following to the notice poster:

Under the NLRA, it is illegal for your employer to: Report you or threaten to report

you to Immigration and Customs Enforcement (ICE) or to other law enforcement authorities in order to intimidate or retaliate against you because you join or support a union, or because you engage in concerted activity for mutual aid and protection.

The Board finds it unnecessary to add this statement. The notice states that it is unlawful for an employer to “fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection (emphasis added) [.]” Reporting or threatening to report an employee in the manner described in the comment would be a form of adverse action or threat thereof, and the Board believes that it would be understood as such.

d. Examples of Illegal Union Activity

The proposed notice contained the following examples of unlawful union conduct:

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

Threaten you that you will lose your job unless you support the union.

Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

Take other adverse action against you based on whether you have joined or support the union.

75 FR 80419.

There were only a few comments addressing specific changes to the language in this section of the notice. ALFA criticizes the provision that states that a union may not “threaten you that you will lose your job unless you support the union,” because the proposed language “fails to capture Section 8(b)(1)(A)’s broader prohibition against restraint and coercion.” The comment suggests revising the language to state that a union may not “[r]estrain or coerce you in the exercise of your right to refrain from joining a union by threatening to inflict bodily harm or following you to your home and refusing to leave unless you sign a union card.” That comment also suggests adding a provision stating that it is unlawful for a union to “promise to waive your union initiation fee if you agree to sign a union card before a vote is taken.”

Another comment argues that the illegal union conduct portion of the notice fails to fully inform employees of their rights as union members.¹⁰⁹ In contrast, another comment states a different position—that the list of illegal union conduct “ostensibly relates only to restraint or coercion by a union in a unionized environment.”¹¹⁰ The comment further states that the Board should have included examples of “union restraint or coercion in an organizing setting” but gives no specific examples.

ALFA suggests three changes to the unlawful union activity section. First, rather than say that the union may not “threaten you that you will lose your job,” a more comprehensive statement would be “threaten, harass, or coerce you in order to gain your support for the union.” The Board agrees, except as regards “harass,” which is sometimes used to characterize almost any sort of union solicitation. Accordingly, the statement will be modified to read “threaten or coerce you in order to gain your support for the union.” Second, the comment suggests changing “cause or attempt to cause an employer to discriminate against you” to “discriminate or attempt to discriminate against you because you don’t support a union.” The Board disagrees, because the suggested change would shift the focus of the provision away from the sort of conduct contemplated in the rule. See NLRA Section 8(b)(2), 29 U.S.C. 158(b)(2). Third, the comment suggests changing “take other adverse action against you based on whether you have joined or support the union” to “take adverse action against you because you have not joined or do not support the union.” The Board agrees and will modify this provision of the notice accordingly.

Baker & McKenzie urges that a variety of other examples of unlawful union conduct be added to the notice, including requiring nonmembers to pay a fee to receive contract benefits, disciplining members for engaging in activity adverse to a union-represented grievant, disciplining members for refusing to engage in unprotected activity, engaging in careless grievance handling, failing to notify employees of their *Beck* rights, requiring employees to agree to dues checkoff instead of direct payment, discriminatorily applying hiring hall rules, and conditioning continued employment on the payment of a fine or dues in “right-to-work” states.

As with the examples of unlawful employer activity, the Board concludes that the provisions concerning unlawful union activity, as proposed, are accurate and informative, and, as with the notice as a whole, strike an appropriate balance between being simultaneously instructive and succinct. Moreover, the Board finds it unnecessary to include additional examples of unlawful conduct so that the lists of employer and union activity are the same length because the notice describes the central forms of unlawful conduct engaged in by each type of entity. Still less is it necessary to add a host of additional examples of unlawful union conduct, with the result that the list of such conduct would be much longer than the list of unlawful employer conduct. In the Board’s view, the list of unlawful union conduct in the proposed notice fairly informs employees of the types of conduct that a union is prohibited from engaging in without providing unnecessary or confusing examples. Employees may contact the NLRB if they believe a union has violated the NLRA.

e. Collective-Bargaining Provision

The collective-bargaining provision of the NPRM states that “if you and your co-workers select a union to act as your collective bargaining representatives, your employer and the union are required to bargain in good faith and in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.” 75 FR 80419.

The Board received only a few comments on this provision of the notice. Notably, COLLE requests the inclusion of a limitation on the provision that employees have the right to bargain collectively, in order to clarify that the employer’s obligation is only to bargain in good faith and not necessarily to reach an agreement. A second comment suggests that the notice inform employees that they have the right to “sue a union for unfairly representing the employee in bargaining, contract administration, or a discrimination matter.”

The Board has decided that no changes are necessary to the duty to bargain paragraph. The Board is satisfied that the proposed collective-bargaining provision provides sufficient guidance to employees about the exercise of these rights while still staying within the constraints set by a necessarily brief employee notice. As to the first comment, the notice states that an employer and union have a duty to

“bargain in good faith and in a genuine effort to reach a written, binding agreement.” As discussed above, by referring to a “genuine effort” to reach agreement, the notice necessarily implies that the parties are not obliged to actually reach one. The duty to bargain in good faith has many components. See *NLRB v. Katz*, 369 U.S. 736 (1962). And the suggestion that employers do not have to agree to certain proposals, although correct, does not account for the line of cases that suggest that an important ingredient in good faith bargaining is a willingness to compromise. See *Phelps Dodge*, 337 NLRB 455 (2002).

Turning to the suggestion that the notice include language informing employees of their right to “sue” the union if it fails to represent them fairly, the Board has concluded that the notice sufficiently apprises employees of their right to fair representation and of their right to file unfair labor practice charges with the Board should a union fail to fulfill that duty. The rights that employees have to sue unions directly in court without coming to the Board are beyond the scope of this rulemaking.

f. Coverage Provision

In regard to coverage under the NLRA, the proposed notice states:

The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered). 75 FR 80419.

A comment from the National Immigration Law Center suggests adding the following language: “The NLRA protects the above-enumerated rights of all employees, irrespective of their immigration status. That protection extends to employees without work authorization, though certain remedies in those circumstances may be limited. Employers cannot threaten you or intimidate you on the basis of your immigration status to prevent you from joining or supporting a union, or engaging in concerted activity for mutual aid and protection.”

The Board has decided not to amend the coverage provision in the final notice. Although the Board understands that many immigrant employees may be unsure whether they are covered by the NLRA, the notice does not include a list of covered employees. Including specific coverage of immigrants, but not other classes of employees, may cause

¹⁰⁹ See comment of National Association of Manufacturers.

¹¹⁰ See comment of ALFA.

confusion for many employees. Currently, the language in the notice tracks statutory language and provides only the list of employees excluded from coverage. As a result, those employees not listed under the exclusions will reasonably believe they are covered employees under the statute. Any employees who are unsure of their status should contact a regional office of the NLRB.

The final notice as modified is set forth in the Appendix to Subpart A of this rule.

2. Posting Issues

The Board proposed that the notice to employees shall be at least 11 inches by 17 inches in size, and in such colors and type size and style as the Board shall prescribe. The proposed rule further provides that employers that choose to print the notice after downloading it from the Board's Web site must print in color, and the printed notice shall be at least 11 inches by 17 inches in size.

Proposed § 104.202(d) requires all covered employers to post the employee notice physically "in conspicuous places, including all places where notices to employees are customarily posted." Employers must take steps to ensure that the notice is not altered, defaced, or covered with other material. Proposed § 104.202(e) states that the Board will print the notice poster and provide copies to employers on request. It also states that employers may download copies of the poster from the Board's Web site, <http://www.nlrb.gov>, for their use. It further provides that employers may reproduce exact duplicates of the poster supplied by the Board, and that they may also use commercial poster services to provide the employee notice consolidated onto one poster with other Federally mandated labor and employment notices, as long as consolidation does not alter the size, color, or content of the poster provided by the Board. Finally, employers that have significant numbers of employees who are not proficient in English will be required to post notices of employee rights in the language or languages spoken by significant numbers of those employees. The Board will make available posters containing the necessary translations.

In addition to requiring physical posting of paper notices, proposed § 104.202(f) requires that notices be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the employer customarily communicates with its employees by

such means.¹¹¹ An employer that customarily posts notices to its employees on an intranet or internet site must display the required employee notice on such a site prominently—*i.e.*, no less prominently than other notices to employees. The Board proposed to give employers two options to satisfy this requirement. An employer may either download the notice itself and post it in the manner described above, or post, in the same manner, a link to the Board's Web site that contains the full text of the required employee notice. In the latter case, the proposed rule states that the link must contain the prescribed introductory language from the poster, which appears in Appendix to Subpart A, below. An employer that customarily communicates with its employees by e-mail will satisfy the electronic posting requirement by sending its employees an e-mail message containing the link described above.

The proposed rule provides that, where a significant number of an employer's employees are not proficient in English, the employer must provide the required electronic notice in the language the employees speak. This requirement can be met either by downloading and posting, as required in § 104.202(f), the translated version of the notice supplied by the Board, or by prominently displaying, as required in § 104.202(f), a link to the Board's Web site that contains the full text of the poster in the language the employees speak. The Board will provide translations of that link. 75 FR 80417.

Section 104.203 of the proposed rule provides that Federal contractors may comply with the requirements of the rule by posting the notices to employees required under the Department of Labor's notice-posting rule, 29 CFR part 471. *Id.*

The Board solicited comments on its proposed requirements for both physical and electronic notice posting. In addition, the Board solicited comments on whether it should prescribe standards regarding the size, clarity, location, and brightness of the electronic link, including how to prescribe electronic postings that are at least as large, clear, and conspicuous as the employer's other postings.

The Board received numerous comments concerning the technical requirements for posting the notices of employee rights. Those comments address the locations where notices would be physically posted, physical characteristics of the posters,

¹¹¹ See *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 6 (2010).

requirements for posting in languages other than English, details of the requirement for electronic posting of notices by employers that customarily communicate with their employees electronically, and "safe harbor" provisions for Federal contractors that are already posting the Department of Labor's notice of NLRA rights.

a. Location of Posting

Section 104.202(d) of the proposed rule requires that the notice be posted "in conspicuous places, including all places where notices to employees are customarily posted." Some employers and their representatives, including law firm Baker & McKenzie, comment that the proposed rule does not define "customarily." The Board responds that the term is used in its normal meaning of "ordinarily" or "usually," as it has been used in the Board's remedial orders for decades.¹¹² This standard is consistent with the posting requirements in the regulations and statutes of other agencies.¹¹³ Baker & McKenzie's comment contends that the quoted phrase should read instead "where other legally-required notices to employees are customarily posted." The Board disagrees. As under the Department of Labor's notice posting requirement,¹¹⁴ the Board's final rule clarifies that the notice must be posted wherever notices to employees regarding personnel rules and policies are customarily posted and are readily seen by employees, not simply where other legally mandated notices are posted.

A number of comments from employers¹¹⁵ and individuals take the position that it is time to move away from paper posters and to encourage employees to inform themselves of their rights through the Internet. Many comments object that the posting requirement will add to already cluttered bulletin boards or necessitate additional bulletin boards.¹¹⁶ The Board responds to these comments above in section II, subsection C, Factual Support for the Rule. The Council of Smaller

¹¹² See, e.g., *The Golub Corporation*, 159 NLRB 355, 369 (1966).

¹¹³ See, e.g., 29 CFR 1903.2 (Occupational Safety and Health Act); 29 CFR 1601.30 (Title VII of the Civil Rights Act of 1964); 42 U.S.C. 2000e-10(a) (Americans with Disabilities Act); 29 U.S.C. 2619(a) (Family and Medical Leave Act).

¹¹⁴ 75 FR 28386.

¹¹⁵ See, e.g., comments of Buffalo Wild Wings; Associated Milk Producers, Inc.; Smitty's, Inc.; National Grocers Association; and Sorensen/Wille, Inc.

¹¹⁶ See, e.g., comments of Dr. Pepper Snapple Group; Georgia Caremaster Medical Services; Homestead Village, Inc.; Exodus Designs & Surfaces; Bonnie Dedmore State Farm.

Enterprises further maintains that the requirement to ensure that the notice is conspicuous and not altered or defaced imposes an unnecessary burden on employers. Caremaster Medical Services' comment asks whether periodic inspections of the notices will be conducted and, if so, by whom. Specifically, this comment expresses concern that employers will be forced to permit union officials to enter their facilities to inspect the notices. The rule does not provide for such inspections or alter current standards regarding union access to employers' premises. Rather, the Board contemplates that an employer's failure to comply with the rule will be brought to the attention of the employer or the Board by employees or union representatives who are lawfully on the premises.

The International Union of Operating Engineers comments that the rule needs to apply to the marine construction industry, in which employees work at remote sites and do not necessarily see a posting in the office. Another comment similarly states that the rule is not practical for small employers with dispersed employees, e.g., trucking or insurance companies.¹¹⁷ Similarly, one comment contends that the requirement is burdensome for construction employers, whose employees report to various worksites.¹¹⁸ The Board recognizes that certain work situations, such as those mentioned in the comments, present special challenges with regard to physical posting. However, the Board concludes that these employers must nonetheless post the required notice at their work premises in accordance with the proposed rule. Electronic posting will also aid the employers in providing the notice to their employees in the manner in which they customarily communicate with them.

TLC Companies contends that professional employer organizations (PEOs) such as itself should be exempt from the rule's requirements. It explains that PEOs are "co-employers" of a client employer's employees, providing payroll and other administrative services. However, it asserts that PEOs have no control over the client employer's worksite. Accordingly, TLC Companies is concerned that a PEO could be found liable for its client's failure to post the notice. The Board contemplates that employers will be required to physically post a notice only on their own premises or at worksites where the employer has the ability to

post a notice or cause a notice to be posted directed to its own employees.

Retail Industry Leaders Association asks whether the rule would apply to overseas employees of American employers. The answer to that question is generally "no"; the Board's jurisdiction does not extend to American employees engaged in permanent employment abroad in locations over which the United States has no legislative control. *See Computer Sciences Raytheon*, 318 NLRB 966 (1995). Employers of employees who are working abroad only temporarily are not required to post the notice in foreign workplaces.

b. Size and Form Requirements

Many comments from organizations and individuals object to the 11x17-inch size prescribed by the proposed rule.¹¹⁹ They argue that most employers do not have the capacity to make 11x17-inch color copies and will have to use commercial copy services, which some contend are expensive. A human resources official also asserts that other required notices are smaller, and that the larger poster will be more eye-catching, implying that NLRA rights are more important. Other comments support the proposed 11x17-inch size, stating that the notice should stand out and be in large print, with one comment specifying that the title should be larger.¹²⁰ The AFL-CIO argues that employers should not be permitted to download the notice from the Board's Web site if their limited printing capacity would make it less eye-catching.

A few comments contend that the prescribed size will make it difficult to include in consolidated posters of various statutory rights, as the proposed rule permits.¹²¹ One comment urges the Board to follow the "3' rule," according to which a notice is large enough if it can be read from a distance of 3 feet,¹²² and another suggests only a legibility requirement.¹²³ One comment states that minor deviations, such as 1/4 inch, should not be deemed violations.¹²⁴ Another comment expresses a concern that a large, prominent poster could cause a few unhappy employees to begin activity that could result in divisiveness in a small facility.¹²⁵

¹¹⁹ See, e.g., comment of Associated General Contractors (AGC) of Iowa.

¹²⁰ See, e.g., comments of AFL-CIO and three Georgetown University Law Center students.

¹²¹ See, e.g., comment of Sinnissippi Centers.

¹²² AGC of Iowa.

¹²³ Sinnissippi Centers.

¹²⁴ National Council of Agricultural Employers.

¹²⁵ Mercy Center Nursing Unit Inc.

The Board has decided to retain the 11x17-inch poster size. As the NPRM states, the Board will furnish paper copies of the notice, at no charge, to employers that ask for them. Employers that prefer to download and print the notice from the Board's Web site will have two formats available: a one-page 11x17-inch version and a two-page 8 1/2x11-inch version, which must be printed in landscape format and taped together to form the 11x17-inch poster. In response to the comments objecting to the added expense of obtaining color copies through outside sources, the Board has revised the rule to delete the requirement that reproductions of the notice be in color, provided that the reproductions otherwise conform to the Board-provided notice. Accordingly, the Board concludes that obtaining copies of the notice will not be difficult or expensive for employers.

The Board finds no merit to the other objections to the 11x17-inch poster size. Contrary to some comments, the Board does not believe that employees would think that NLRA rights are more important than other statutory rights, merely because the notice of NLRA rights is somewhat larger than notices prescribed under some other statutes. It would seem that, upon learning of all of their rights in the workplace, employees will determine from their understanding of the rights themselves, rather than the size of the various posters, which rights (if any) are more important to them than others. In the Board's view, adopting a subjective "3' rule" or a "legibility standard" could lead to disagreements over whether a particular poster was "legible" or could be read at a distance of 3 feet. In addition, if, as some comments contend (without citing specifics), the size of the Board's notice will pose a problem for manufacturers of consolidated posters to include it with posters detailing other workplace rights, that would seem to be a problem best left to those manufacturers to solve.

c. Language Issues

The proposed rule requires that, "[w]here a significant portion of an employer's workforce is not proficient in English, the employer must provide the notice in the language the employees speak." This is the same standard applied in the Department of Labor's notice of NLRA rights for federal contractors (29 CFR 471.2(d)) and in the notice required under the Family and Medical Leave Act (29 CFR 825.300(4)). Many comments support the requirement and availability of translated notices, particularly as an essential way of informing immigrant

¹¹⁷ Comment of TLC Companies.

¹¹⁸ Comment of NAI Electrical Contractors.

employees about their rights.¹²⁶ But several comments complain that the rule does not define “significant.”¹²⁷ Baker & McKenzie proposes that the standard be 40 percent specifically of the employer’s production and maintenance workforce, while the National Immigration Law Center proposes a 5 percent standard. Another comment urges that translated notices be required whenever any of the employees are not proficient in English.¹²⁸ The U.S. Chamber of Commerce asserts that a safe harbor is needed for employers when a notice in a particular language is not yet available from the Board. Moreover, a few comments contend that the Board should also provide Braille notices for vision-impaired employees, as well as audio versions for illiterate employees, and versions of the notice that are adaptable to assistive technologies.¹²⁹ One individual proposes that the rule mandate that employers read the notice to employees when they are hired and to all employees annually.

Having carefully considered the comments, the Board has decided to define “significant” in terms of foreign-language speakers as 20 percent or more of an employer’s workforce. Thus, if as many as 20 percent of an employer’s employees are not proficient in English but speak the same foreign language, the employer must post the notice in that language, both physically and electronically (if the employer is otherwise required to post the notice electronically). If an employer’s workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer’s option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If such an employer is also required to post the notice electronically, it must do so in each of those languages. If some of an employer’s employees speak a language not spoken by employees constituting at least 20 percent of the employer’s workforce, the employer is encouraged, but not required, either to provide the

notice to those employees in their respective language or languages or to direct them to the Board’s Web site, <http://www.nlr.gov>, where they can obtain copies of the notice in their respective languages. The Board has also decided to add to the notice instructions for obtaining foreign-language translations of the notice.

Employers will be required to request foreign-language notices from the Board or obtain them from the Board’s Web site in the same manner as the English-language notice. If an employer requests from the Board a notice in a particular language in which the notice is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.

With respect to employees who are vision-impaired or those who are illiterate, employers may consult the Board’s Regional Office on a case-by-case basis for guidance on appropriate methods of providing the required notice, including by audio recording.

d. Electronic Posting

Many employer comments oppose the requirement for electronic notice. The Coalition for a Democratic Workplace points out that other agencies do not require both electronic and physical posting and asserts that only one method is necessary. For example, the Coalition notes that the Family and Medical Leave Act notice obligation is satisfied by electronic posting alone, and other statutes do not mention electronic posting. The National Council of Agricultural Employers urges the Board to require electronic posting only if the employer posts other statutory or regulatory notices in that fashion. Another proposes that employers be permitted to choose either physical or electronic posting. The National Association of Manufacturers remarks that the proposed rule breaks new ground for using an employer’s email system to communicate information about “union membership.” The U.S. Chamber of Commerce suggests that this aspect of the rule would chill employers’ use of new technologies. On the other hand, the AFL–CIO and several other commenters¹³⁰ support electronic as well as physical posting; the Center for American Progress Action Fund, among others, points out that electronic communications at work are standard now.

After carefully considering these comments, the Board concludes that electronic posting will substantially

assist in providing the prescribed notice to employees. As some comments state, electronic communication is now a routine practice in many workplaces and the source of much information from employers to their employees. However, the Board has clarified the final rule to mandate only that, if an employer customarily communicates personnel rules or policies to its employees in that manner, it must also do so with respect to the notice of employee rights under the NLRA. The concern that the rule will discourage employers from using new technologies is apparently not widely shared and, in the Board’s view, is implausible. Although the Board recognizes that some other statutes and regulations do not require electronic notice, it notes that they generally predated the routine use of electronic communications in the workplace. Having only recently begun ordering electronic posting of remedial notices,¹³¹ the Board has limited experience in this area, and employers are encouraged to contact the local Regional Office with questions about this provision. The Board does not agree that employers should be permitted to choose whether to provide physical or electronic notice, because some employers could select the less effective of these alternatives, thus undermining the purpose of the rule. Finally, the rights stated in the notice are not accurately described as pertaining solely to union membership, and the notice is not intended to promote union membership or union representation. Rather, the notice addresses a broad range of employee legal rights under the NLRA, which involve protected concerted activity as well as union activity in both organized and unorganized workplaces, and also the right to refrain from any such activity.

Many employer comments note that the proposed rule also does not define “customarily” as it pertains to electronic posting in § 104.202(f), *i.e.*, the type and degree of communication that triggers the requirement.¹³² Numerous employers also participated in a postcard campaign objecting, among other things, that employers use a wide variety of technology to communicate with employees and that the rule could require them to use all methods to convey the notice.¹³³ For

¹²⁶ See, *e.g.*, comments of National Immigration Law Center, Legal Aid Society—Employment Law Center, and La Raza Centro Legal; Filipino Advocates for Justice.

¹²⁷ See, *e.g.*, comments of COLLE; Food Marketing Institute (FMI).

¹²⁸ Georgetown law students.

¹²⁹ See, *e.g.*, Baker & McKenzie; Heritage Foundation; Georgetown law students.

¹³¹ *J. Picini Flooring*, 356 NLRB No. 9 (2010).

¹³² See, *e.g.*, comments of International Foodservice Distributors Association (IFDA); Associated Builders and Contractors; Los Angeles County Business Federation; National Roofing Contractors Association.

¹³³ See, *e.g.*, comments of American Home Furnishings Alliance; Seawright Custom Precast;

example, they ask whether an employer that occasionally uses text messaging or Twitter to communicate with employees would have to use those technologies and, if so, how they would be able to comply with the rule, in view of the length restrictions of these media. The U.S. Chamber of Commerce raises the same issue regarding faxing, voice mail, and instant messaging. The National Roofing Contractors Association notes that some employers use email to communicate with certain employees, while other employees have no access to email during their work day. As to email communication itself, an individual observes that many employees change jobs every 3 to 4 years, and an email reaches only those in the workforce at a specific time. The same comment notes that the proposed rule does not state when or how often email notice should be provided. Three Georgetown law students recommend that the rule mandate email as well as intranet notice to employees when it goes into effect and written notice to new employees within a week of their starting employment.

The Board responds that, as discussed above regarding the location of posting, “customarily” is used in its normal meaning. This provision of the rule would not apply to an employer that only occasionally uses electronic means to communicate with employees. However, in view of the numerous comments expressing concern over the proposed rule’s email posting requirements, the Board has decided not to require employers to provide the notice to employees by means of email and the other forms of electronic communication listed in the previous paragraph. In the Board’s judgment, the potential for confusion and the prospect of requiring repeated notifications in order to reach new employees outweigh the benefits that could be derived at the margin from such notifications. All employers subject to the rule will be required to post the notice physically in their facilities; and employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the Board’s notice on those sites as well. Moreover, those notices (unlike the Board’s election and remedial notices) must remain posted; thus, it is reasonable to expect that even though some employees may not see the notices immediately, more and more will see them and learn about their NLRA rights as time goes by. Accordingly, the only electronic

postings required under the final rule will be those on internet or intranet sites.

Many comments address the characteristics of electronic posting, as prescribed in § 104.202(f). In the NPRM, the Board proposed not to prescribe the size, clarity, location, or brightness of an electronic notice or link to the notice, but rather require that it be at least as prominent as other electronic notices to employees, as the Department of Labor’s rule requires. No comments suggest more specific requirements; the Michigan Health & Hospital Association argues that such requirements would result in inadvertent noncompliance. The Board has decided to adopt the Department of Labor’s approach, as proposed in the NPRM.

Baker & McKenzie urges that the title of the link in the proposed rule be changed to “Employee Rights under the National Labor Relations Act” rather than “Important Notice about Employees Rights to Organize and Bargain Collectively with Their Employers.” The Board agrees and has revised the rule accordingly.

A comment from Vigilant states that a link to the Board’s Web site, which is one means of electronic posting, should not be required to include the introductory language of the notice. The Board agrees, noting that the Department of Labor takes this approach, and will not require that electronic links to the Board’s Web site include the introductory language.

For the foregoing reasons, the Board has decided to retain the posting requirements as proposed in the NPRM, modified as indicated above.

e. Compliance With the Department of Labor’s Rule

Several comments opposing the proposed rule urge that, if the rule becomes final, the Board should retain the “safe harbor” provided for Federal contractors that comply with the Department of Labor’s notice posting rule.¹³⁴ However, the U.S. Chamber of Commerce states that some employers post the Department of Labor’s notice at facilities where it is not required or where Federal contract work is performed only sporadically. It questions whether such employers must replace the Department of Labor’s notice with the Board’s when no contract work is being performed, or whether they can comply with the Board’s rule by leaving the Department of Labor’s notice in place. The Chamber proposes that

employers be allowed to choose to maintain the Department of Labor’s notice, although another comment asserts that employees might think that the notice is no longer applicable because of the lack of a current contract. Another comment raises the possibility that either the Board or the Department of Labor could decide to change its notice and emphasized that they need to be identical in order to provide the safe harbor. The Board responds that a Federal contractor that complies with the Department of Labor’s notice-posting rule will be deemed in compliance with the Board’s requirement.¹³⁵

3. Exceptions

The rule applies only to employers that are subject to the NLRA. Under NLRA Section 2(2), “employer” excludes the United States government, any wholly owned government corporation, any Federal Reserve Bank, any State or political subdivision, and any person subject to the Railway Labor Act, 45 U.S.C. 151 *et seq.* 29 U.S.C. 152(2). Thus, under the proposed rule, those excluded entities are not required to post the notice of employee rights. The proposed rule also does not apply to entities that employ only individuals who are not considered “employees” under the NLRA. *See* Subpart A, below; 29 U.S.C. 152(3). Finally, the proposed rule does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.¹³⁶ The Board proposed that all employers covered under the NLRA would be subject to the notice posting rule. 75 FR 80413.

The Coalition for a Democratic Workplace argues that the final rule cannot be applied to religiously-affiliated employers. The Coalition argues that assertion of jurisdiction would “substantially burden [such employers’] exercise of religion in violation of both the First Amendment and the Religious Freedom Restoration Act.” Similarly, Seyfarth Shaw contends that religiously-affiliated healthcare

¹³⁵ A few comments ask whether the Board’s rule would preempt the Department of Labor’s rule. Because the answer to that question would not affect the validity of the Board’s rule, the Board finds it unnecessary to take a position on that issue in this proceeding.

¹³⁶ The proposed rule excludes small businesses whose impact on interstate commerce is de minimis or so slight that they do not meet the Board’s discretionary jurisdiction requirements. *See* generally An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board’s Web site, <http://www.nlr.gov>, and cases cited therein.

institutions should be excluded from coverage if they are nonprofit and hold themselves out to the public as being religious.

The Board examines jurisdictional issues on a case-by-case basis, and the Board's jurisdiction jurisprudence is highly complex. The Board has asserted jurisdiction over some religiously-affiliated employers in the past, but has declined to assert jurisdiction over other religiously-affiliated employers. *See, e.g., Ecclesiastical Maintenance Service*, 320 NLRB 70 (1995), and *St. Edmund's High School*, 337 NLRB 1260 (2002). In *Ukiah Valley Medical Center*, the Board found that neither the First Amendment nor the Religious Restoration Act precludes the Board from asserting jurisdiction over a religiously-affiliated employer. 332 NLRB 602 (2000). If an employer is unsure whether the Board has jurisdiction over its operations, it may contact the Board's regional office.

In its comment, the United States Postal Service points out that it has different statutory rules from those covering other private sector employees. Labor relations in the Postal Service are governed by Chapter 12 of the Postal Reorganization Act of 1970, 39 U.S.C. 1201 *et seq.* Section 1209(a) of the Postal Reorganization Act generally makes the NLRA applicable to all employee-management relations "to the extent not inconsistent with the provisions of this title." As raised by the comment, there are indeed several areas in which the Postal Reorganization Act is inconsistent with the NLRA. The principal differences are that an agency shop is prohibited (*id.* section 1209(a)) and that postal employees may not strike. *Id.* Section 410(b)(1)(incorporating 5 U.S.C. 7311).

In light of these differences, the Board agrees that a postal worker-specific notice is necessary. The Board, however, does not wish to create a notice without the benefit of specific public comment on this issue. Accordingly, the Board will exclude the United States Postal Service from coverage under the final rule; the Board may, at a later date, request comments on a postal worker-specific notice.

Subpart B—Enforcement and Complaint Procedures

Subpart B of the rule contains procedures for enforcement of the employee notice-posting requirement. In crafting Subpart B, the Board was mindful of the need to identify an effective remedy for noncompliance with the notice-posting requirement. The Board gave careful consideration to several alternative approaches to enforcing the rule's notice-posting

requirements. Those alternatives, not all of which are mutually exclusive, were (1) Finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; (3) considering the willful failure to post the notices as evidence of unlawful motive in unfair labor practice cases; (4) voluntary compliance. 75 FR 80413–80414.

As explained in the NPRM, the Board considered but tentatively rejected relying solely on voluntary compliance. This option logically would appear to be the least conducive to an effective enforcement of the notice-posting requirement, and the Board's limited experience with voluntary posting of notices of employee rights seems to confirm this. When an election petition is filed, the Board's Regional Office sends the employer Form NLRB–5492, Notice to Employees, together with a leaflet containing significant "Rights of Employees." See the Board's Casehandling Manual, Part Two—Representation Proceedings, Section 11008.5, found on the Board's Web site, <http://www.nlr.gov>. The Regional Office also asks employers to post the notice of employee rights in the workplace; however, the Board's experience is that the notices are seldom posted. *Id.* at 80414. Moreover, because the notice is voluntary and there is no enforcement scheme, there is no remedy to fix the problem when the notice is not posted. The Board has found nothing in the comments to the NPRM that would give it reason to believe that voluntary compliance would be any more effective under the present notice rule. Therefore, the Board has decided not to rely on voluntary compliance. Instead the final rule provides that failing to post the notice may be found to be an unfair labor practice and may also, in appropriate circumstances, be grounds for tolling the statute of limitations. In addition, a knowing and willful failure to post employee notices may be found to be evidence of unlawful motive in an unfair labor practice case. (As the Board also explained in the NPRM, it did not consider imposing monetary fines for noncompliance, because the Board lacks the statutory authority to impose "penalties or fines." See, *e.g., Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–12 (1940).) These provisions have two purposes: to ensure that any violations of the notice-posting requirement that occur may be remedied where necessary, and to describe how violations of the notice-posting

requirement may affect other Board proceedings.¹³⁷

The Board received several hundred comments regarding the proposed means of enforcing the notice posting requirement. Those that favor implementing the rule also favor the proposed enforcement mechanisms.¹³⁸ Those opposing the rule generally oppose all three enforcement mechanisms.

A. Noncompliance as an Unfair Labor Practice

The rule requires employers to inform employees of their NLRA rights because the Board believes that employees must know their rights in order to exercise them effectively. Accordingly, the Board may find that an employer that fails or refuses to post the required notice of employee rights violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1) by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7 (29 U.S.C. 157)."

As it explained in the NPRM, the Board expects that most employers that fail to post the required notice will do so simply because they are unaware of the rule, and that when it is called to their attention, they will comply without the need for formal administrative action or litigation. When that is not the case, the Board's customary procedures for investigating and adjudicating alleged unfair labor practices may be invoked. See NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.¹³⁹ When the Board finds a violation, it will customarily order the employer to cease and desist and to post the notice of

¹³⁷ The tolling and animus provisions are not remedies in the usual sense of the term; however, these provisions inform the public of the impact that violations of the notice posting obligation may have in other NLRB proceedings. As described below, these impacts are not a "punishment" for noncompliance. To the contrary, the tolling provision is intended to ensure that noncompliance with the notice posting requirement does not prejudice innocent employees. And the animus provision is intended to inform the public that knowing and willful violations of the rule may support an inference of animus toward NLRA rights.

¹³⁸ See, *e.g.*, Harkin and Miller, National Employment Law Project, Public Justice Center, Inc.

¹³⁹ The Board's General Counsel has unreviewable discretion as to whether to issue a complaint in an unfair labor practice proceeding. See, *e.g., Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The General Counsel has exercised that discretion to refuse to proceed with meritorious charges when it would not serve the purposes of the Act. See General Counsel memoranda 02–08 and 95–15. This discretion includes dismissing any charge filed against an employer that is not covered by the Board's jurisdictional requirements.

employee rights as well as a remedial notice.¹⁴⁰ 75 FR 80414.

The comments opposing this proposal make three principal arguments. First, only Congress, not the Board, has the authority to “create a new unfair labor practice.”¹⁴¹ Second, even if the Board possesses such authority, it has not identified the Section 7 rights that would be interfered with by an employer’s failure to post the notice.¹⁴² Third, “interfer[ing] with, restrain[ing], or coerc[ing]” employees within the meaning of NLRA Section 8(a)(1) necessarily involves action, not failure to act; therefore, failure to post the notice cannot violate Section 8(a)(1).¹⁴³ The Board finds no merit in any of these contentions.

To begin with, it is incorrect to say that the Board lacks the authority to find that failure to post the notice violates Section 8(a)(1) without Congressional approval. It is true, as the Society for Human Resource Management states, that “Section 10(a) of the Act specifically limits the NLRB’s powers to preventing only the unfair labor practices listed in Section 8 of the Act. Section 8 is silent regarding any notice posting requirement (emphasis in original).” However, as the Supreme Court remarked long ago,

The [NLRA] did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a “rigid scheme of remedies” is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation.

Republic Aviation Corporation v. NLRB, 324 U.S. 793, 798 (1945) (citation omitted). Accordingly, since its creation, the Board in interpreting Section 8(a)(1) has found numerous actions as to which “Section 8 is silent”—e.g., coercively interrogating employees about their protected concerted activities, engaging in

surveillance of employees’ union activities, threatening employees with retaliation for engaging in protected activities—to violate Section 8(a)(1) by “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7” of the NLRA. Section 8 is equally silent concerning unions’ duty to inform employees of their rights under *NLRB v. General Motors*, above, and *Communications Workers v. Beck*, above, before attempting to obligate them pursuant to a union-security clause, yet the Board finds that a union’s failure to provide that notice restrains and coerces employees in violation of Section 8(b)(1)(A). *California Saw & Knife Works*, above, 320 NLRB at 233, 259, 261.¹⁴⁴

Because, as described in detail above, notice posting is necessary to ensure effective exercise of Section 7 rights, a refusal to post the required notice is at least an interference with employees’ exercise of those rights. For these reasons, in finding that an employer’s failure to post the required notice interferes with, restrains, or coerces employees in the exercise of their NLRA rights, in violation of Section 8(a)(1), the Board is acting consistently with its settled practice. Some comments claim that the Board has not identified any specific Section 7 right to justify this remedy. But such specificity is not needed, because all Section 7 rights are implicated by an employer’s failure to post the required notice. As previously stated, there is a strong nexus between knowledge of Section 7 rights and their free exercise. It therefore follows that an employer’s failure to post this notice, which informs employees of their Section 7 rights, reasonably tends to interfere with the exercise of such rights.

Finally, although most violations of the NLRA involve actions rather than failures to act, there are instances in which a failure to act may be found to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Thus, a union’s failure to provide the required notices under *NLRB v. General Motors*, above, and

Communications Workers v. Beck, above, violates Section 8(b)(1)(A) of the NLRA. *California Saw & Knife Works*, above, 320 NLRB at 233, 259, 261. An employer that fails or refuses to execute an agreed-to collective-bargaining agreement on request of the union violates Section 8(d), 8(a)(5) and, derivatively, Section 8(a)(1). An employer that fails to provide relevant information requested by the union that represents the employer’s employees violates Section 8(a)(5) and (1). See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

The NLRA’s recognition that a failure to perform a legal duty may constitute unlawful interference, coercion or restraint is not unique. Courts have expressly held that the failure to post notice required by regulation can be an “interference” with employee Family and Medical Leave Act rights. In a provision that “largely mimics th[e] language of § 8(a)(1) of the NLRA,” *Bachelder v. Am. W. Airlines*, 259 F. 3d 1112, 1123 (9th Cir. 2001), the FMLA states that “[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.” 29 U.S.C. 2615(a)(1). In interpreting this language, the Department of Labor’s regulations specifically state that failure to post the required notice of FMLA rights “may constitute an interference with, restraint, or denial of the exercise of an employee’s FMLA rights” under section 2615(a)(1). 29 CFR 825.300(e). Courts have agreed, finding that the failure to provide FMLA notices is an “adverse action” against the employee that supports a prima facie case of interference. *Greenwell v. Charles Machine Works, Inc.*, (W.D. Ok. April 15, 2011); *Smith v. Westchester County*, (S.D.N.Y. February 14, 2011). Accordingly, the Board finds no impediment to declaring that an employer’s failure to post the required notice will violate Section 8(a)(1).¹⁴⁵

As it explained in the NPRM, however, the Board expects that, in practice, few violations will be found for failures to post the notice. The Board anticipates that most employers that fail to post the notice will do so because they are unaware of the rule, and that when they learn about the rule, they will post the notice without the need for formal administrative action or litigation. 75 FR 80414. To that end, § 104.212(a) of the rule states that if an

¹⁴⁰ Consistent with precedent, it will be unlawful for an employer to threaten or retaliate against an employee for filing charges or testifying in a Board proceeding involving an alleged violation of the notice-posting requirement. NLRA Sections 8(a)(1), 8(a)(4), 29 U.S.C. 158(a)(1), (4); *Romar Refuse Removal*, 314 NLRB 658 (1994).

¹⁴¹ See, e.g., comments of FMI, Assisted Living Federation of America (ALFA).

¹⁴² See, e.g., comment of U. S. Chamber of Commerce.

¹⁴³ See, e.g., comments of Employment and Labor Law Committee, Association of Corporate Counsel (“ACC”); California Chamber of Commerce (California Chamber); and National Council of Agricultural Employers (NCAE).

¹⁴⁴ See Harkin and Miller. Although the Board suggested in a footnote in *California Saw* that there was no obligation to inform employees of their Section 7 rights, 320 NLRB at 232 n. 42, this dicta merely indicated that no such obligation had yet been recognized in that particular context. To the extent it could be read as denying that such an obligation may exist, it is the considered view of the Board that this reading must be rejected. Similarly, the statement in *U.S. Postal Service*, 241 N.L.R.B. 141, 152 (1979), regarding affirmative notice obligations is limited to *Weingarten* rights, and, in any event, does not suggest that notice of NLRA rights may never be required.

¹⁴⁵ ALFA contends that failure to post a Board-required notice is not an unfair labor practice, but the authorities cited do not support that proposition.

unfair labor practice charge is filed alleging failure to post the notice, “the Regional Director will make reasonable efforts to persuade the respondent employer to post the * * * notice expeditiously,” and that “[i]f the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.” 75 FR 80419.

Numerous comments assert that finding the failure to post the notice to be an unfair labor practice is too harsh a remedy, especially for small employers that are more likely to be excusably unaware of the rule.¹⁴⁶ As just stated, in practice it should almost never be necessary for proceedings to reach that point. For the few employers that may ultimately be found to have violated Section 8(a)(1) by failing to post the notice of employee rights, the only certain consequences will be an order to cease and desist and that the notice and a remedial notice be posted; those remedies do not strike the Board as severe.

Michigan Health & Hospital Association urges that an employer be allowed to correct an initial failure to post the notice without further consequences; Fireside Distributors, Inc. agrees and asks that technical violations of the rule not be subject to a finding of a violation. The Heritage Foundation backs the same approach for inadvertent failures to post. The Board disagrees. To repeat, the Board anticipates that most employers that inadvertently fail to post the notice will do so on being informed of the posting requirement, and that in those circumstances further proceedings will rarely be required. However, the Board believes that this matter is best handled through the General Counsel’s traditional exercise of prosecutorial discretion in accordance with the directions given here.

California Chamber and NCAE contend that the Board should specify the “reasonable efforts” a Regional Director will make to persuade an employer to post the notice when a charge alleging a failure to post has been filed. They propose that the rule be amended to state that the Board will send the employer at least two mailed letters, with the notice enclosed, requesting that the employer post the notice within a specified period of time, preferably 30 days. They also assert that the Board must specify the circumstances in which additional proceedings will be appropriate. The Heritage Foundation urges that § 104.212(a) be modified to state that if

an employer promptly posts the notice, “there will be no further administrative proceedings, unless the Board has information giving the Board reason to believe that the preceding failure to do so was intentional.” The Board rejects these suggestions because they would create unnecessary obstacles to effective enforcement of the notice requirement. That requirement is straightforward, and compliance should be a simple matter. The Board believes that the General Counsel should have discretion to address particular cases of non-compliance efficiently and appropriately, depending upon the circumstances.

B. Tolling the Section 10(b) Statute of Limitations

NLRA Section 10(b) provides in part that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board[.]” 29 U.S.C. 160(b). However, as the Board stated in the NPRM, the 6-month filing period does not begin to run until the charging party has actual or constructive notice of the allegedly unlawful conduct. See, e.g., *John Morrell & Co.*, 304 NLRB 896, 899 (1991), review denied 998 F.2d 7 (D.C. Cir. 1993) (table). 75 FR 80414. This makes intuitive sense, because it would be unfair to expect charges to be filed before the charging party could reasonably have known that the law was violated. Similar concerns for fairness justify tolling the statute of limitations where an employee, although aware of the conduct in question, is excusably unaware that the conduct is unlawful because mandatory notice was not given to the employee. The Board found that widespread ignorance of NLRA rights justified requiring notice to be posted. The Board cited the observation of the U.S. Court of Appeals for the Third Circuit in a case involving the failure to post the notice required under the ADEA, that “[t]he [ADEA] posting requirement was undoubtedly created because Congress recognized that the very persons protected by the Act might be unaware of its existence.” *Bonham v. Dresser Industries*, 569 F.2d 187, 193 (1977), cert. denied 439 U.S. 821 (1978). Accordingly, the Board proposed that tolling the 10(b) period for filing unfair labor practice charges might be appropriate where the required notice has not been posted. 75 FR 80414. For the reasons discussed below, the Board adheres to that view.

Section 10(b) is a statute of limitations, and statutes of limitations are presumed to include equitable tolling whenever the statute is silent or

ambiguous on the issue. *Irwin v. Dep’t Veterans Affairs*, 498 U.S. 89, 94–96 (1990); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392–98 (1982); see *Young v. United States*, 535 U.S. 43, 49 (2002) (“It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.” (quotations and citations omitted)); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (“The running of such statutes is traditionally subject to equitable tolling.”); *Honda v. Clark*, 386 U.S. 484, 501 (1967); *Glus v. Brooklyn E.D. Terminal*, 359 U.S. 231, 232–33 (1959) (equitable tolling of statutes of limitations is “[d]eeply rooted in our jurisprudence”); *Holmberg v. Armbricht*, 327 U.S. 392, 396–97 (1946) (equitable tolling is “read into every federal statute of limitation”).

In *Zipes*, the Supreme Court held that the timeliness provision of Title VII’s charge-filing requirement was “subject to waiver, estoppel and equitable tolling.” 455 U.S. at 392–98. The Supreme Court expressly analogized to the NLRA, and stated that Section 10(b) was not jurisdictional: “[T]he time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board.” *Id.* at n.11. *Zipes* strongly supports the proposed rule. The analogy between Title VII and the NLRA is well established, and neither the holding of *Zipes* regarding Title VII nor *Zipes*’ characterization of 10(b) has ever been called into doubt.

Notices of employment rights are intended, in part, to advise employees of the kinds of conduct that may violate their rights so that they may seek appropriate remedies when violations occur. Failure to post required notices deprives employees of both the knowledge of their rights and of the availability of avenues of redress. Accordingly, a substantial majority of the courts of appeals—including the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits—have adopted the doctrine that the failure to post required employment law notices may result in equitable tolling of the statute of limitations. *Mercado v. Ritz-Carlton San Juan Hotel*, 410 F.3d 41, 47–48, 95 FEP Cases 1464 (1st Cir. 2005) (Title VII); *Bonham v. Dresser Industries*, above, 569 F.2d at 193 (ADEA); *Hammer v. Cardio Medical Products, Inc.*, 131 Fed. Appx. 829, 831–832 (3d Cir. 2005) (Title VII and ADEA);

¹⁴⁶ See, e.g., comments of St Mar Enterprises, Inc. and National Federation of Independent Business.

Vance v. Whirlpool Corp., 716 F.2d 1010 (4th Cir. 1983) (describing notice posting tolling as “the prevailing view of the courts”); *Elliot v. Group Med. & Surgical Serv.*, 714 F.2d 556, 563–64 (5th Cir. 1983); *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1096 (6th Cir. 1996), cert. denied 519 U.S. 963 (1996); *Posey v. Skyline Corp.*, 702 F.2d 102 (7th Cir. 1983); *Schroeder v. Copley Newspaper*, 879 F.2d 266 (7th Cir. 1989); *Kephart v. Inst. Gas Tech.*, 581 F.2d 1287, 1289 (7th Cir. 1978); *Beshears v. Asbill*, 930 F.2d 1348 (8th Cir. 1991); *McClinton v. Alabama By-Prosds. Corp.*, 743 F.2d 1483 (11th Cir. 1984); see also *Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 439 (D. N.J. 2001); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) (FLSA).¹⁴⁷ (But see *Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 347 (10th Cir. 1982) (“the simple failure to post [Title VII and ADEA] notices, without intent to actively mislead the plaintiff respecting the cause of action, does not extend the time within which a claimant must file his or her discrimination charge.”))

After careful consideration, the Board is persuaded that the prevailing judicial view should apply in the NLRA context as well.¹⁴⁸ As an equitable concept, equitable tolling is a matter of fairness. The Board has determined that many employees are unaware of their NLRA rights and has devised a minimally burdensome means of attempting to rectify that situation—requiring employers to post workplace notices informing employees of those rights. To bar an employee who is excusably unaware of the NLRA from seeking a remedy for a violation of NLRA rights because he or she failed to file an unfair labor practice charge within the 10(b) period, when the employer did not post the required notice, would unfairly deprive the employee of the protection of the Act because of the employer’s failure to comply with its legal responsibilities. To deny equitable tolling in such circumstances “would grant to the employee a right to be informed without redress for violation.” *Bonham v. Dresser Industries*, above, 569 F.2d at 193.¹⁴⁹

¹⁴⁷ See comments of Harkin and Miller, AFL–CIO, and Service Employees International Union (SEIU).

¹⁴⁸ The Board has broad discretion to interpret 10(b), including equitable tolling, in accordance with its experience administering the Act. *Lodge 64, IAM v. NLRB*, 949 F.2d 441, 444 (D.C. Cir. 1991) (deferring to the Board’s interpretation of 10(b) equitable exceptions).

¹⁴⁹ Under the final rule, the Board could also find the failure to post the notice to be an unfair labor practice, and could, if appropriate, consider a willful failure to post to be evidence of unlawful motive in an unfair labor practice case. However,

The Board received many comments opposing this proposed rule provision. Several comments assert that, when a charging party is unaware of the facts supporting the finding of an unfair labor practice, the Board tolls the 10(b) period only when the charged party has fraudulently concealed those facts from the charging party.¹⁵⁰ That is not so. The Board has long held, with court approval, that the 10(b) period begins to run only when the charging party has notice that the NLRA has been violated. The party asserting the 10(b) defense has the burden to show such notice; it may do so by showing that the charging party had either actual or constructive knowledge of the alleged unfair labor practice prior to the 10(b) period. See, e.g., *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.2d 628, 634 (9th Cir. 2007); *University Moving & Storage Co.*, 350 NLRB 6, 7, 18 (2007); *John Morrell & Co.*, above, 304 NLRB at 899; *Pullman Building Company*, 251 NLRB 1048 (1980), enfd. 691 F.2d 507 (9th Cir. 1982) (table); *Burgess Construction*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1978), cert. denied 440 U.S. 940 (1979). Knowledge may be imputed if the charging party would have discovered the unlawful conduct by exercising reasonable or due diligence. *Broadway Volkswagen*, above, 342 NLRB at 1246. Certainly, the Board has found it appropriate to toll the 10(b) period when the charging party was excusably unaware of the pertinent facts because the charged party had fraudulently concealed them; see, e.g., *Burgess Construction*, above, 227 NLRB at 766; but tolling is not limited to such circumstances. *Pullman Building Company*, above, 251 NLRB at 1048.

To the extent that the comments argue that the Board should not engage in equitable tolling of the 10(b) period when an employer has merely failed to post the notice but not engaged in fraudulent concealment,¹⁵¹ the Board disagrees. Fraudulent concealment concerns a different kind of equitable doctrine, and is not directly relevant to the notice posting equitable tolling doctrine hereby adopted. See *Mercado*, above, 410 F.3d at 46–47 n.8 (employer misconduct and equitable tolling

in the absence of equitable tolling of the 10(b) period, such “redress” would not aid an employee who was excusably unaware of his or her NLRA rights, failed to file a timely charge, and thus was denied any remedy for violation of those rights. Cf. *Kanakis Co.*, 293 NLRB 435, 436 fn. 10 (1989) (possibility of criminal sanctions against employer would be little comfort to charging party if deprived of recourse to Board’s remedial processes).

¹⁵⁰ See, e.g., comments of FMI, COLLE.

¹⁵¹ See, e.g., comments of FMI, COLLE.

doctrine form “two distinct lines of cases apply[ing] two distinct standards to two distinct bases for equitable tolling”).

Some comments argue that because Section 10(b) contains a limited exception to the 6-month filing period for employees in the military, it is improper for the Board to toll the 10(b) period under other circumstances.¹⁵² The Board rejects this argument as foreclosed by the Supreme Court’s holding in *Zipes*, above, and by the long line of Board and court decisions finding tolling of the 10(b) period appropriate. In any event, the exception in Section 10(b) for persons in the military provides that if the aggrieved person “was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.” This provision does not toll the six-month period during armed service; rather, it states that the six-month period begins at discharge. See *Holland v. Florida*, 130 S.Ct. 2549, 2561 (2010) (rejecting argument that explicit exceptions to time limits in nonjurisdictional statute of limitations precluded equitable tolling).¹⁵³

A number of comments contend that tolling the 10(b) period is contrary to the salutary purpose of statutes of limitations in general, and 10(b) in particular, which is “to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.”¹⁵⁴ *Black’s Law Dictionary*, 9th Edition, at 1546. The Board recognizes that with the passage of time evidence can be lost and witnesses die, move away, or their memories fade; it therefore will not lightly find that the 10(b) period should be tolled. However, like the courts whose decisions are cited above, the Board also recognizes that equitable tolling is a fundamental part of the statute of limitations, and that inequity results from barring an individual from seeking relief from a violation of his or her NLRA rights where the individual excusably was unaware of these rights. After all, the purpose of a statute of limitations is to “require diligent

¹⁵² See, e.g., comments of California Chamber and NCAE.

¹⁵³ *American Bus Association v. Slater*, 231 F. 3d 1 (D.C. Cir. 2000), cited by California Chamber and NCAE, did not concern equitable tolling and is therefore inapposite. The court there also found that Congress had expressly limited the sanctions available under the Americans with Disabilities Act to those enumerated in that statute; such is not the case under the NLRA.

¹⁵⁴ See, e.g., comments of FMI, COLLE, and U.S. Chamber of Commerce.

prosecution of known claims,” not claims that are unknown to the injured party. As to concerns that the statute of limitations could be tolled for years, “perhaps indefinitely,”¹⁵⁵ the Board responds that such a potential also exists under other statutes, as well as under the NLRA when a charging party is unaware of the facts giving rise to an alleged unfair labor practice. However, at this point, concerns about the unfairness of lengthy tolling periods are entirely speculative. Tolling is an equitable matter, and one factor to be considered in deciding whether equitable tolling is appropriate is whether it would prejudice the respondent. *Mercado*, above, 410 F.3d at 48. Accordingly, if a lengthy tolling of the 10(b) period would prejudice an employer in a given case, the Board could properly consider that factor in determining whether tolling was appropriate in that case.¹⁵⁶

Several comments argue against tolling the 10(b) period because “ignorance of the law is no excuse.”¹⁵⁷ This argument is amply refuted by the court decisions cited above, in which limitations periods under other workplace statutes were tolled because employers failed to post required notices. Most notably, the Fifth Circuit has emphasized that the failure to post a required notice “vitiates the normal assumption that an employee is aware of his rights.” *Elliot v. Group Med. & Surgical Serv.*, 714 F.2d 556, 563–64 (5th Cir. 1983). In any event, the maxim relied on is generally understood to have arisen in order to prevent individuals (usually in criminal cases) from deliberately failing to ascertain whether actions they contemplate taking would be lawful, and then pleading ignorance when accused of lawbreaking.¹⁵⁸ In the Board’s view, this reasoning loses much of its force when applied to individuals, such as charging parties in unfair labor practice cases, who are not accused of any wrongdoing but who claim to have been injured by the unlawful actions of other parties.

The Board emphasizes, however, that failure to post the required notice will not automatically warrant a tolling remedy. If an employer proves that an

employee had actual or constructive knowledge of the conduct alleged to be unlawful, as well as actual or constructive knowledge that the conduct violated the NLRA, and yet failed to timely file an unfair labor practice charge, the Board will not toll the 10(b) period merely because of the employer’s failure to post the notice. *Cf. John Morrell & Co.*, above, 304 NLRB at 899.

The Board asked for comments concerning whether unions filing unfair labor practice charges should be deemed to have constructive knowledge of the unlawful character of the conduct at issue. All of the comments that addressed this issue answered in the affirmative.¹⁵⁹ Unlike most employees, unions routinely deal with issues arising under the NLRA and are therefore more familiar with the Act’s provisions. Accordingly, the tolling provisions in the final rule apply only to charges filed by employees, not those filed by unions. (The Board still could toll the 10(b) period if a charging party union did not discover the facts underlying the charge within six months, if the employees reporting those events failed to alert the union within that time because they were excusably unaware of their NLRA rights.)

Several comments contend that failure to post the required notice should not toll the 10(b) period if an employee who files an unfair labor practice charge is either a union member or is represented by a union. Taft Stettinius & Hollister LLP asserts that the burden should be placed equally on unions to ensure that their organizers and members are aware of employee rights under the NLRA. California Chamber and NCAE observe that knowledge of a filing time limit is generally imputed to an individual who is represented by an attorney, *see, e.g., Mercado v. Ritz-Carlton San Juan Hotel*, above, 410 F.3d at 47–48; they urge that an employee who is represented by a union should be treated similarly. Conversely, three Georgetown University law students oppose the idea that union-represented employees should be deemed to have constructive knowledge of NLRA rights. They reason that some workplaces may have unrepresented as well as represented employees, and that imputing knowledge to the latter group would provide an incentive not to post the notice, thus depriving the former group of needed information. The students

also suggest that some employees, though represented, may have little contact with their unions and rely on workplace notices instead of unions for relevant information.

The Board finds some merit in both sets of contentions. On the one hand, it is reasonable to assume that employees who are represented by unions are more likely to be aware of their NLRA rights than unrepresented employees. And, although being represented by a union is not the same as being represented by legal counsel, it is reasonable to assume that union officials are sufficiently conversant with the NLRA to be able to give employees effective advice as to their NLRA rights. On the other hand, some employees, though represented by unions, may in fact have little contact with their bargaining representatives for one reason or other and may, in fact, be filing charges against their representative. Thus, the Board does not find it appropriate under all circumstances to impute knowledge of NLRA rights to charge-filing employees who are union members or are represented by unions. Rather, the Board will consider evidence concerning the union’s representational presence and activity in determining whether it is appropriate to toll the 10(b) period.

C. Failure To Post as Evidence of Unlawful Motive

The Board suggested that it could consider an employer’s knowing failure to post the notice as evidence of unlawful motive in an unfair labor practice proceeding in which motive is an issue. 75 FR 80414–80415. A number of comments assert that the Board cannot properly take that step.¹⁶⁰ To the contrary, the Board has often considered other unlawful conduct as evidence of antiunion animus in cases in which unlawful motive was an element of an unfair labor practice.¹⁶¹ *See, e.g., Leiser Construction, LLC*, 349 NLRB 413, 417–419 (2007) (threats, coercive statements, interrogations evidence of unlawfully motivated failure to hire), *enfd.* 281 Fed. Appx. 781 (10th Cir. 2008) (unpublished); *Shearer’s Foods*, 340 NLRB 1093, 1094 (2003) (plant closing threat evidence of unlawfully motivated discharge); *Ferguson-Williams, Inc.*, 322 NLRB 695, 703, 707 (1996) (threats, interrogations, creation of impression of surveillance, evidence of unlawfully motivated discharge); *Champion Rivet Co.*, 314 NLRB 1097, 1098 (1994) (circulating unlawful antiunion petition,

¹⁵⁵ See comments of Fisher & Phillips LLC and National Grocers Association.

¹⁵⁶ As to ACC’s concern that the rule could potentially subject employers to unfair labor practice charges based on conduct as far back as 1935, the Board stresses that tolling will be available only in the case of unlawful conduct that occurs after the rule takes effect.

¹⁵⁷ *See, e.g.*, comments of Coalition for a Democratic Workplace and COLLE.

¹⁵⁸ Moreover, even in criminal law, the principle is not absolute. *See, e.g., Lambert v. California*, 355 U.S. 225 (1957).

¹⁵⁹ *See, e.g.*, comments of U.S. Chamber of Commerce, American Trucking Associations, Taft Stettinius & Hollister LLP.

¹⁶⁰ *See, e.g.*, comments of COLLE and California Chamber.

¹⁶¹ *See* comment of AFL–CIO.

refusal to recognize and bargain with union, evidence of unlawfully motivated failure to hire). Thus, it is proper for the Board to consider a knowing and willful failure to post the notice as evidence of unlawful motive.

However, the Board has noticed that it employed somewhat inconsistent language in the NPRM regarding the consideration of failure to post the notice as evidence of antiunion animus. Thus, the caption of paragraph 104.214(b) reads: “*Knowing* noncompliance as evidence of unlawful motive.” However, the paragraph itself states that “If an employer has actual or constructive knowledge of the requirement to post the notice and fails or refuses to do so, the Board may consider such a *willful* refusal as evidence of unlawful motive in a case in which motive is an issue.” (Emphasis added in both cases.) 75 FR at 80420. In the preamble to the NPRM, the Board referred only to *knowing* noncompliance as evidence of unlawful motive. 75 FR at 80414–80415. On reflection, the Board wishes to clarify this provision to state that, to be considered as evidence of unlawful motive, an employer’s failure to post the notice must be both knowing and willful—*i.e.*, the employer must have actual (as opposed to constructive) knowledge of the rule and yet refuse, on no cognizable basis, to post the notice. The Board is revising the language of the rule accordingly.

The comment that prompted these revisions urges that there should be no adverse consequences for the employer that does not post the notice because it has a good-faith (but, implicitly, erroneous) belief that it is not covered by the NLRA.¹⁶² The Board rejects this contention as it pertains to finding the failure to post to be an unfair labor practice or grounds for tolling the 10(b) period. Failure to post the notice interferes with employees’ NLRA rights regardless of the reason for the failure; good faith, though commendable, is irrelevant.¹⁶³ Additionally, tolling is

¹⁶² One example could be an employer that believes that it is subject to the Railway Labor Act and not to the NLRA.

¹⁶³ This is so in other areas of NLRA law. For example, an employer who coercively interrogates or disciplines an individual concerning his or her union activities violates the NLRA if the individual is a statutory employee, even though the employer may have honestly believed that the individual was a statutory supervisor and not protected by the NLRA. Also, absent compelling economic circumstances, an employer that is testing the Board’s certification of a newly-selected union in the court of appeals makes unilateral changes in unit employees’ terms and conditions of employment at its peril; if the court affirms the certification, the unilateral changes violate NLRA Section 8(a)(5) even if the employer believed in good faith that the certification was inappropriate.

concerned with fairness to the employee, and these fairness concerns are unaffected by the employer’s good or bad faith; as previously noted, notice posting tolling is fundamentally different from tolling based upon employer misconduct. However, an employer that fails to post the notice only because it honestly but erroneously believes that it is not subject to the NLRB’s jurisdiction does not thereby indicate that it is hostile to employees’ NLRA rights, but only that it believes that those rights do not apply in the employer’s workplace. In such a case, the employer’s good faith normally should preclude finding the failure to post to be willful or evidence of antiunion animus.

ACC contends that even though the rule states that only a “willful” failure to post the notice may be considered evidence of unlawful motive, in practice the Board will always infer at least constructive notice from the publication of the rule in the **Federal Register** and the maxim that “ignorance of the law is no excuse.”¹⁶⁴ The Board rejects this contention. The quoted maxim means only that an employer’s actual lack of knowledge of the rule would not excuse its failure to post the notice. It would, however, undercut any suggestion that the failure to post was willful and therefore indicative of unlawful motive.

Contrary to numerous comments,¹⁶⁵ finding a willful failure to post the notice as evidence of animus is not the same as adopting a “presumption of animus” or “presumption of unlawful motive.” There is no such presumption. The Board’s general counsel would have the burden of proving that a failure to post was willful. In any event, a willful failure to post would not be conclusive proof of unlawful motive, but merely evidence that could be considered, along with other evidence, in determining whether the general counsel had demonstrated unlawful motive.¹⁶⁶ Likewise, contrary to the contentions of ALFA and AHCA, the Board will not assume that any failure

Mike O’Connor Chevrolet, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

¹⁶⁴ See also comment of American Health Care Association (AHCA).

¹⁶⁵ See, e.g., comments of FMI and COLLE.

¹⁶⁶ The Georgetown law students ask whether, if failure to post the notice may be found to be an unfair labor practice and also may be considered evidence of antiunion animus, such a failure could “satisfy an element of its own violation.” The answer is no, because the failure to post, whether knowing or inadvertent, would be an unfair labor practice regardless of motive; knowing and willful failure to post would be relevant only in cases such as those alleging unlawful discipline, discharge, or refusal to hire, in which motive is an element of the violation.

to post the notice is intentional and meant to prevent employees of learning their rights.

D. Other Comments

The Board received many comments asserting that if the proposed enforcement scheme for failure to post the required notice is adopted, union adherents will tear down the notices in order to harass employers and, particularly, to vitiate 10(b).¹⁶⁷ These comments express the concern that tolling the 10(b) period will lead to a flood of unfair labor practice charges, and that, to avoid that eventuality, employers will have to incur significant costs of policing the postings and/or installing expensive tamper-proof bulletin boards.¹⁶⁸ In the absence of experience with such postings, the Board deems these concerns speculative at this time. If particular employers experience such difficulties, the Board will deal with them on a case-by-case basis. However, as explained above, tolling is an equitable matter, and if an employer has posted the notice and taken reasonable steps to insure that it remains posted, it is unlikely that the Board would find tolling appropriate.

California Chamber and NCAE ask the Board to specify the “additional remedies” that may be imposed in the event of a notice posting violation. 104.213(a). The Board has broad discretion in crafting remedies for violations of the NLRA. *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953). The remedies imposed in a given case depend on the nature of the violations and the particular facts in the case. The Board declines to speculate as to every possible remedy that might be imposed in every imaginable set of circumstances.

Several comments protest that employers could be fined for failing to post the notice; several others contend that the Board should levy fines instead of imposing the proposed remedies. The

¹⁶⁷ See, e.g., comments of Lemon Grove Care & Rehabilitation, numerous “postcard” comments.

¹⁶⁸ One comment asserts that because of the potential for tolling the 10(b) period, “businesses * * * will have to keep records forever[.]” The Board finds no merit in this contention. Employers that are aware of the rule can avoid keeping records “forever” simply by posting the notice. Employers that are not aware of the requirement to post the notice would also be unaware of the possibility of tolling the 10(b) period in the event of a failure to post, and thus would discern no reason to—and probably would not—keep records “forever.” Prejudice to the employer because of long-lost records would be considered by the Board in determining whether tolling is appropriate in the particular case.

Another comment complains that “the requirement of proof on the employer to ‘certify’ that this posting is up each day is burdensome[.]” There is no such requirement.

Board rejects both contentions because, as explained in the NPRM, the Board does not have the authority to impose fines. 75 FR 80414, citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–12 (1940). Another comment argues that the Board should not provide remedies for failing to post the notice because such remedies are not provided under other statutes. In fact, both remedies and sanctions are imposed under some statutes; see, e.g., 29 CFR 1601.30 (fine of \$110 per offense for failing to post notice under Title VII); 29 CFR 825.300(a)(1) (same sanction for failing to post notice under FMLA); cases cited above for tolling of limitation periods for failing to post notices under several statutes.

One comment contends that the proposed remedies were proposed solely as means of deterring failures to post the notices, and are therefore inappropriate; several other comments assert that the proposed remedies are punitive.¹⁶⁹ Although the Board disagrees, there is language in the NPRM that may have inadvertently suggested that the enforcement mechanisms were proposed solely for deterrent purposes. The Board wishes to correct any such misimpression. As stated above, in explaining why it was proposing those mechanisms, the Board stated in its NPRM that it was “mindful of the need to identify effective incentives for compliance.” 75 FR 80413. Later, referring to tolling the 10(b) period and considering a willful failure to post the notice as evidence of unlawful motive, the Board said that it “proposes the following options intended to induce compliance with the notice-posting requirement.” *Id.* at 80414. However, the Board made those statements while explaining why it had determined not to rely entirely on employers’ voluntary compliance with the rule. (The Board had had little success in persuading employers to voluntarily post notices of employee rights during the critical period leading up to a representation election.) *Id.* By noting that the proposed enforcement scheme would have some deterrent effect in that context, the Board did not mean to imply that it was proposing those measures solely for deterrence purposes. For the reasons discussed at length above, the Board has found that finding a failure to post the notices to violate Section 8(a)(1) and, in appropriate circumstances, to warrant tolling the 10(b) period and/or inferring unlawful motive in an unfair labor practice case are legitimate remedial

measures supported by extensive Board and court precedent.

In addition, in a number of places the NPRM used the term “sanctions” in a very loose sense to refer to aspects of the proposed enforcement scheme, inadvertently suggesting that this scheme was punitive. The term “sanctions” was an inapt choice of descriptor for the enforcement scheme: the classic 8(a)(1) remedial order has long been upheld as nonpunitive; equitable tolling is concerned with fairness to employees, not punishment of misconduct, and is fully consistent with current Board doctrine; and the animus provision is little more than the common-sense extension of well-established evidentiary principles that apply to many other NLRA violations, and is also not designed to punish employers. That they may also furnish incentives for employers to comply with the notice-posting rule does not detract from their legitimacy; if it were otherwise, the Board could never impose any remedy for violations of the NLRA if the remedy had a deterrent effect. In any event, the Board hereby disavows any suggestion from statements in the NPRM that the remedial measures were proposed solely as penalties.

Contrary to the tenor of numerous comments opposing this rule,¹⁷⁰ the Board is not issuing the rule in order to entrap unwary employers and make operations more difficult for them because of inadvertent or technical violations. It is doing so in order that employees may come to understand their NLRA rights through exposure to notices posted in their workplaces explaining those rights. Accordingly, the important thing is that the notices be posted. As explained above, an employer that fails to post the notice because it is unaware of the rule, but promptly posts the notice when the rule is brought to its attention, will nearly always avoid any further proceedings. Similarly, an employer that posts the notice but fails initially to comply with one of the technical posting requirements will almost always avoid further problems by correcting the error when it is called to the employer’s attention. And if an employer is unsure of what the rule requires in a particular setting, it can seek and receive guidance from the Board.

The Service Employees International Union and the United Food and Commercial Workers propose that, in

addition to the proposed enforcement scheme, the rule state that an employer’s knowing failure to post the notice of employee rights during the critical period before a representation election shall be grounds for setting the election aside on the filing of proper objections. The Board finds that this is unnecessary, because the Board’s notice of election, which must be posted by an employer three working days before an election takes place, contains a summary of employee NLRA rights and a list of several kinds of unfair labor practices, and failure to post that notice already constitutes grounds for setting an election aside.¹⁷¹ In any event, during a union organizing campaign, the union can instruct members of its in-plant organizing committee to verify whether the notice required under this rule has been posted; if it has not, the union can so inform the employer and, if need be, the Board’s regional office.

Subpart C—Ancillary Matters

Several technical issues unrelated to those discussed in the two previous subparts are set out in this subpart.

IV. Dissenting View of Member Brian E. Hayes

“Agencies may play the sorcerer’s apprentice but not the sorcerer himself.”¹⁷²

Today, my colleagues conjure up a new unfair labor practice based on a new statutory obligation. They impose on as many as six million private employers the obligation to post a notice of employee rights and selected illustrative unfair labor practices. The obligation to post is deemed enforceable through Section 8(a)(1)’s proscription of interference with employees’ Section 7 rights, and the failure to post is further penalized by equitable tolling of Section 10(b)’s limitations period and the possible inference of discriminatory motivation for adverse employment actions taken in the absence of posting. While the need for a more informed constituency might be a desirable goal, it is attainable only with Congressional imprimatur. The Board’s rulemaking authority, broad as it is, does not encompass the authority to promulgate a rule of this kind. Even if it did, the action taken here is arbitrary and capricious, and therefore invalid, because it is not based on substantial evidence and it lacks a reasoned analysis.

¹⁷⁰ For example, “This seems to be yet another trap for the employers. Another avenue to subject them to law suits and interrogations, and uneconomic activities and ungodly expenditures.”

¹⁷¹ See Section 103.20 of the Board’s Rules and Regulations.

¹⁷² *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

¹⁶⁹ See, e.g., comments of FMI, ALFA, AHCA.

No Statutory Authority for the Proposed Rule

The majority concedes that the “National Labor Relations Act does not directly address an employer’s obligation to post a notice of its employees’ rights arising under the Act or the consequences an employer may face for failing to do so.” In fact, the NLRA¹⁷³ makes no mention of any such putative obligation. The majority further acknowledges that the NLRA “is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights.” Despite the obvious import of these admissions, the majority concludes that the Board’s plenary authority under Section 6 of the Act to make rules “necessary to carry out the provisions of the Act” permits promulgation of the rule they advocate. I disagree.

Congress did not give specific statutory authority to the Board to require the posting of a general rights notice when it passed the Wagner Act in 1935. Just one year earlier, however, Congress amended the Railway Labor Act (“RLA”) to include an express notice-posting requirement. 45 U.S.C. 152 Eighth; Pub. L. No. 73–442, 48 Stat. 1185, 1188 (1934). As the Supreme Court noted, the RLA served as the model for the National Labor Relations Act. *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937); *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 524–525 (1941).

That Congress did not include an express notice-posting requirement when passing the Wagner Act the following year strongly implies, if not compels, the conclusion that Congress did not intend for the Board to have regulatory authority to require such a notice. Nothing in the legislative history hints of any concern by Congress about the need for employers to notify employees generally of their rights under the new enacting statute. Since 1935, despite extensive revisions in the Taft-Hartley Act amendments of 1947 and the Landrum-Griffin Act amendments of 1959, Congress has never added such authority.

On the other hand, when Congress has subsequently desired to include a general rights notice-posting requirement, it has done so expressly in other federal labor and employment

laws. See Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e–10, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 627, The Occupational Safety and Health Act, 29 U.S.C. 657(c), the Americans with Disabilities Act (ADA), 42 U.S.C. 12115, the Family and Medical Leave Act (FMLA), 29 U.S.C. 2619(a), and the Uniformed Service Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4334(a).

The majority points out that the Department of Labor (DOL) promulgated a notice-posting rule under the Fair Labor Standards Act (FLSA), although that statute does not contain a specific statutory provision on workplace postings. However, the FLSA, unlike the NLRA, imposes a data-collection and recordkeeping requirement on employers. 29 U.S.C. 211(c). DOL’s Wage and Hour Administrator promulgated the notice-posting regulation in 1949 in reliance on this requirement. It appears that the propriety of the FLSA rule has never been challenged, perhaps because, unlike the rule promulgated herein, there are no citations or penalties assessed for the failure to post. This is a significant point of distinction that warrants further discussion.

It must be constantly borne in mind that the rule promulgated today makes the failure to post the required notice a violation of the Act. The majority misleadingly seeks to decouple obligation from violation in its analysis by discussing the latter in the context of enforcement of the assertedly lawful notice-posting rule. That is nonsense. Making noncompliance an unfair labor practice is integral to the rule and, consequently, integral to an analysis of whether the notice-posting requirement is a permissible exercise of the Board’s rulemaking authority. Of the aforementioned agencies that have notice-posting requirements, none of them makes the failure to post unlawful, absent additional specific statutory authorization. Only the RLA, Title VII, FMLA, and the Occupational Safety Act (OSHA) have such authorizing language. ADA, the ADEA, the FLSA, and the USERRA do not. Consequently, an employer’s failure to post a notice under those statutes is not subject to sanction as unlawful.

Thus, both before and after the Wagner Act, Congress has consistently manifested by express statutory language its intent to impose a general notice-posting duty on employers with respect to the rights of employees under various federal labor laws. Only one administrative agency promulgated a notice-posting requirement in the

absence of such language in its enabling statute. No agency has made the failure to comply with a notice-posting requirement unlawful absent express statutory authorization, until today.

The explicit inclusion of notice-posting provisions and permissible sanctions by Congress in other labor legislation undercuts the majority’s claim that this notice-posting rule is not a “major policy decision properly made by Congress alone.” Strangely, the majority does not merely contend that this pattern in comparable labor legislation fails to prove that Congress did not intend that the Board should have the rulemaking authority under Section 6 to mandate the notice posting at issue here. They conversely contend that it proves Congress must have intended to confer such authority on the Board!¹⁷⁴

Perhaps cognizant of the weakness of this position, the majority attempts to downplay the import of Congressional silence on the Board’s authority to mandate notice posting and to enforce that mandate through unfair labor practice sanctions. They cite *Cheney R.R. Co. v. ICC*, 902 F. 2d 66, 68–69 (D.C. Cir. 1990), for the proposition that the maxim “expressio unius est exclusio alterius,” which holds that the special mention of one thing indicates an intent for another thing not be included elsewhere, may not always be a useful tool for interpreting the intent of Congress. Obviously, the usefulness of this tool depends on the context of a particular statute. *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (applying the maxim). In my view, the absence of an express notice provision in the NLRA, and the failure to amend the Act to include one when Congress expressly included notice posting provisions in other labor statutes, shows that it did not intend to authorize the Board to promulgate this rule.¹⁷⁵

Arguing to the contrary, the majority asserts that the notice-posting rule is

¹⁷⁴ Of course, this reasoning would seem to dictate that the failure of the Board to inform its own employees of their general rights under the Federal Labor Relations Act is an unfair labor practice, even though that statute imposes no such express requirement. To date, I am not aware that this agency, or any other, views itself as subject to such an enforceable obligation.

¹⁷⁵ The majority contends that the fact that the rule comes 76 years after the NLRA was enacted is not a “condition of validity.” *Mayo Foundation for Medical Education and Research v. United States*, 131 S.Ct. 704, 713–14 (2011) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740 (1996) (“neither antiquity nor contemporaneity with the statute is a condition of validity.”)). I have no problem with that proposition, but if the Board lacks statutory authority to promulgate a rule, it is of no matter that it attempts to do so in year 1 or year 76 of its existence.

¹⁷³ Throughout this dissent, I will refer generally to the statute we administer as the NLRA, unless the discussion focuses on a specific historical version, such as the Wagner Act.

entitled to deference under the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, where Congress has not “directly addressed the precise question at issue,” *id.* at 842–843, that rulemaking authority may be used in order “to fill any gap left, implicitly or explicitly, by Congress.” *Id.* at 843.

Even assuming that the absence of an explicit posting requirement in the NLRA is not interpreted as clear expression of Congressional intent, the majority fails to persuade that Congress delegated authority in Section 6 of the NLRA for the Board to fill a putative statutory gap by promulgating a rule that an employer commits an unfair labor practice by failing to affirmatively notify its employees of their rights under the NLRA. As the Supreme Court has explained, “the ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of ‘gap-filling’ authority.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

There is no doubt that there are many gaps and ambiguities in the NLRA that Congress intended for the Board to address, using its labor expertise, either through adjudication or rulemaking. However, the existence of ambiguity in a statute is not enough per se to warrant deference to the agency’s interpretation of its authority in every respect. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity. *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005); *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“MPAA”) (“agency’s interpretation of [a] statute is not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue.”).

Thus, even when an administrative agency seeks to address what it believes is a serious interpretive problem, the Supreme Court has said that the agency “may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125(2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517(1988)). Further, the statute at issue must be considered as a “symmetrical and coherent regulatory scheme.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). In our case, the exercise of rulemaking authority under Section 6 is not self-effectuating; it must be shown

to relate reasonably to some other provision as part of the overall statutory scheme contemplated by Congress.¹⁷⁶

Nothing in the text or the regulatory structure of the NLRA suggests that the Board has the authority to promulgate the notice-posting rule at issue in order to address a gap in the statutory scheme for resolving questions concerning representation through Section 9, or in preventing, through Sections 8 and 10, specifically enumerated unfair labor practices that adversely affect employees’ Section 7 rights. On the contrary, it is well-established that the Board lacks independent authority to initiate or to solicit the initiation of representation and unfair labor practice proceedings, and Section 10(a) limits the Board’s powers to preventing only the unfair labor practices listed in Section 8 of the Act. Yet the majority asserts that it may exceed these limitations by requiring employers to post a notice of employee rights and illustrative unfair labor practices at all times, regardless of whether a petition had been filed or an employer has been found to have committed an unfair labor practice.

The majority’s reliance on a combination of Section 7, 8, and 10 warrants special mention. They reason that an employer interferes with Section 7 rights in general, and thereby violates Section 8(a)(1), by failing to give continuous notice to employees of those rights. It may be a truism that an employee must be aware of his rights in order to exercise them, but it does not follow that it is the employer under our statutory scheme who must provide enlightenment or else incur liability for violating those rights. The new unfair labor practice created by the rule bears no reasonable relation to any unfair labor practice in the NLRA’s pre-existing enforcement scheme developed over seven decades.¹⁷⁷ It certainly bears

¹⁷⁶ See, e.g., *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, (1973) Unlike here, the Federal Reserve Board easily met this standard in *Mourning* when issuing a disclosure regulation under the Truth in Lending Act, even though that Act did not explicitly require lenders to make such disclosures. In sustaining the regulation, the Court found the regulation to be within the Federal Reserve’s rulemaking authority and, in light of the legislative history, the disclosure requirement was not contrary to the statute. “The crucial distinction, * * * [was that] the disclosure requirement was in fact enforced through the statute’s pre-existing remedial scheme and in a manner consistent with it.” *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002).

¹⁷⁷ The Senate report on the Wagner bill stressed that unfair labor practices were “strictly limited to those enumerated in section 8. This is made clear by paragraph 8 of section 2, which provides that ‘The term ‘unfair labor practice’ means unfair labor practice listed in Section 8,” and by Section 10(a) empowering the Board to prevent any unfair labor

no relation to the few examples the majority can muster in Board precedent. The only instance with even a passing resemblance to the rights notice-posting requirement here is the requirement that a union give notice of *Beck*¹⁷⁸ and *General Motors*¹⁷⁹ rights. However, the failure to give such a notice is not per se unlawful. It becomes an unfair labor practice only when a union, without giving notice, takes the affirmative action of seeking to obligate an employee to pay fees and dues under a union-security clause.¹⁸⁰ Beyond that, a union has no general obligation to give employees notice of their *Beck* and *General Motors* rights; much less does it violate the NLRA by failing to do so. By contrast, the rule promulgated today imposes a continuing obligation on employers to post notice of employees’ general rights and, even absent any affirmative act involving those rights, makes the failure to maintain such notice unlawful.¹⁸¹

Unlike my colleagues, I find that the Supreme Court’s opinion in *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961), speaks directly to this point. In that case, the Board found a hiring hall agreement unlawfully discriminatory per se because, even though it included an express anti-discrimination

practice “listed in Section 8.” Thus, “[n]either the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.” S. Rep. No. 573, 74th Cong., 1st Sess. 17 (1935) at 8–9 reprinted in *Legislative History of the National Labor Relations Act of 1935, Vol. II* at 2307–2308 (1985).

¹⁷⁸ *Communications Workers v. Beck*, 487 U.S. 735 (1988).

¹⁷⁹ *NLRB v. General Motors*, 373 U.S. 734 (1963).

¹⁸⁰ *California Saw & Knife Works*, 320 NLRB 224, 233 (1995).

¹⁸¹ None of the FMLA cases cited by the majority support finding that a failure to post a general notice of employee rights under the NLRA is unlawful. In *Bachelder*, the Ninth Circuit actually found “unavailing” the employer’s argument that it had satisfied all its specific FMLA notice obligations because it had complied with the FMLA’s general posting rule. *Id.* at 1127, fn. 5. Rather, the court found that because the employer failed to “notify” an employee which of the four FMLA’s “leave year” calculation methods it had chosen, the employer “interfered” with that employee’s rights and, therefore, improperly used the employee’s FMLA covered absences as a “negative factor” when taking the affirmative adverse action of discharging her.

Similarly, in neither *Greenwell v. Charles Machine Works, Inc.*, 2011 WL 1458565 (W.D.Okla., 2011); *Smith v. Westchester County*, 769 F. Supp 2d 448 (S.D.N.Y. 2011), was the FMLA general posting requirement at issue. *Smith* did not involve a notice issue and *Greenwell* involved the employer’s failure to comply with a different notification obligation under the FMLA.

In any event, as previously stated, FMLA expressly provides that employers give notice to employees of rights thereunder and expressly provides for sanctions if notice is not given. The NLRA does neither.

provision, it did not include two additional provisions that the Board declared were necessary to prevent “unlawful encouragement of union membership.” The Court disagreed, stating

Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet, where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *National Labor Relations Board v. Drivers, etc. Local Union*, 362 U.S. 274, 284–290, 80 S.Ct. 706, 712–715, 4 L.Ed.2d 710. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.¹⁸²

Congress in Section 8(a)(1) aimed its sanctions only at employer actions that interfere with the exercise of Section 7 rights. By this rulemaking, my colleagues go farther and establish a broader, more pervasive regulatory scheme that targets employer inaction, or silence, as unlawful interference. As *Local 357* instructs, they lack the authority to do this.¹⁸³

American Hospital Association v. NLRB, 499 U.S. 606 (1991) (*AHA*), upon which the majority heavily relies, illustrates a valid exercise of authority under Section 6. In *AHA*, the Supreme Court unanimously upheld the Board’s health care unit rule, finding that Section 6’s general grant of rulemaking authority “was unquestionably sufficient to authorize the rule *at issue in this case* unless limited by some other provision in the Act.” *Id.* at 609–10 (emphasis added). The Court further found that the rule was clearly consistent with authority under Section 9(b) to make appropriate bargaining unit determinations. It specifically rejected the argument that language in 9(b) directing the Board to decide the appropriate bargaining unit “in each case” limited its authority to define appropriate units by rulemaking.

Congress expressly authorized the Board in Section 9(b) to determine appropriate bargaining units and the Board exercised its rulemaking authority to promulgate a rule “necessary to carry out” Section 9(b). In contrast, as previously stated, there is no reasonable basis for finding that a rule making it unlawful for employers to fail to post and maintain a notice of employee rights and selected illustrative

unfair labor practices is necessary to carry out any substantive section of the NLRA. Nevertheless, the majority construes *AHA* as an endorsement of deference to the exercise of Section 6 rulemaking authority whenever Congress did not expressly limit this authority. This is patently incorrect. “To suggest, as the [majority] effectively does, that *Chevron* deference is required any time a statute does not expressly negate the existence of a claimed administrative power * * *, is both flatly unfaithful to the principles of administrative law * * * and refuted by precedent.” *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C.Cir.1994) (citation omitted). Were courts “to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” *Id.*

In sum, the majority’s notice rule does not address a gap that Congress delegated authority to the Board to fill, whether by rulemaking or adjudication. The Supreme Court has made clear that “[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked.” *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 419, 432–433 (1960). The Supreme Court also has made clear: “[Congress] does not * * * hide elephants in mouseholes.” *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001).

My colleagues’ action here is markedly like the Federal Trade Commission (FTC) regulation rejected as ultra vires by the court of appeals in *Am. Bar Ass’n v. FTC*, *supra*. The FTC issued a ruling that attorneys engaged in certain practices were financial institutions subject to the privacy provision of the Gramm-Leach-Bliley Act (GLBA). Upon review of the detailed statutory scheme at issue, the court found it “difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation [of a subject] * * * and never mentioned [it] in the statute.” 430 F.3d at 469. The court further opined that to find the FTC’s interpretation to be “deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its

presence.” *Id.* No such conclusion was possible in that case. No such conclusion is possible here. Quite simply, the Board lacks statutory authority to promulgate a rule that imposes a new obligation on employers and creates a new unfair labor practice to enforce it.

The Rule Is Arbitrary and Capricious

Even if the Board arguably has rulemaking authority in this area, deference is unwarranted under *Chevron* and the Administrative Procedure Act if the rule promulgated is “arbitrary or capricious in substance, or manifestly contrary to the statute.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Also see *AHA*, 499 U.S. at 618–20 (applying arbitrary and capricious standard in its consideration of the Board’s rule on acute care hospital bargaining units). “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfg. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). See also *Business Roundtable et al. v. S.E.C.*,— F.3d—, 2011 WL 2936808 (D.C. Cir., July 22, 2011) (finding SEC acted arbitrarily and capriciously by relying on insufficient empirical data supporting its rule and by completely discounting contrary studies).

In *AHA*, the Board’s health care bargaining units rule was supported by “the extensive record developed during the rulemaking proceedings, as well as its experience in the adjudication of health care cases during the 13-year period between the enactment of the health care amendments and its notice of proposed rulemaking.” *AHA*, 499 U.S. at 618. The Supreme Court upheld the validity of the rule finding it “based on substantial evidence and supported by a ‘reasoned analysis.’” *Id.* at 619 (citing *Motor Vehicle Mfrs. Ass.*, 463 U.S. at 57).

By contrast, the majority’s articulation of the need to mandate that employers violate Section 8(a)(1) unless they post a notice of employee rights is not based

¹⁸² 365 U.S. at 676.

¹⁸³ My colleagues attempt to distinguish *Local 357* as limited to an interpretation of Sec. 8(a)(3) and 8(b)(2)’s prohibition of discriminatory practices. That may have been the issue before the Court, but I do not view the quoted rationale as so limited.

on substantial evidence, nor does it provide a satisfactory explanation for the choice they have made. They contend that a mandatory notice posting rule enforceable through Section 8(a)(1) is needed because they believe that most employees are unaware of their NLRA rights and therefore cannot effectively exercise those rights. This belief is based on: (1) Some studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; (2) an influx of immigrants in the labor force who are presumably also uninformed about labor law; (3) the current low and declining percentage of union-represented employees in the private sector, which presumably means that unions are less likely to be a source of information about employee rights; and (4) the absence of any general legal requirement that employers or anyone else inform employees about their NLRA rights. 75 FR 80411.

Neither the Notice of Proposed Rulemaking nor today's notice summarizing comments in response to that notice come anywhere close to providing a substantial factual basis supporting the belief that most employees are unaware of their NLRA rights. As for the lack of high school education on this subject, we have only a few localized studies cited in a 1995 journal article by a union attorney.¹⁸⁴ With respect to the assumption that immigrants entering the work force, we have even less, only anecdotal accounts. For that matter, beyond the cited journal article, almost all supposed factual support for the premise that employees are generally unaware of their rights comes in comments received from individuals, union organizers, attorneys representing unions, and immigrant rights and worker assistance organizations agreeing, based on professed personal experience, that most employees (obviously not including most of the employee commenters) are unfamiliar with their NLRA rights. There are, as well, anecdotal accounts and comments from employers, employer associations and

management attorneys to the opposite effect that the employees know about their rights under the Act, but my colleagues find these less persuasive.

In any event, the partisan opinions and perceptions, although worthy of consideration, ultimately fail as substantial evidence supporting the Board majority's initial premise for proposing the rule. There remains the Board's conclusion that the decline in union density provides the missing factual support. The majority explains that there was less need for a posting of information about NLRA rights when the union density was higher because "friends and family who belonged to unions" would be a source of information. This is nothing more than supposition. There is no empirical evidence of a correlation between union density and access to information about employee rights, just as there are no broad-based studies supporting the suppositions about a lack of information stemming from high school curricula or the influx of immigrants in the work force.

At bottom, the inadequacy of the record to support my colleagues' factual premise is of no matter to them. In response to comments contending that the articles and studies they cite are old and inadequately supported, they glibly respond that the commenters "cite no more recent or better supported studies to the contrary," as if opponents of the proposed rule bear that burden. Of course, it is the agency's responsibility to make factual findings that support its decision and those findings must be supported by substantial evidence that must examine the relevant data and articulate a satisfactory explanation for its action. *Burlington Truck Lines*, 371 U.S. at 167.

Even more telling is the majority's footnote observation that there is no real need to conduct a study of the extent of employees' knowledge of NLRA rights because the notice posting rule would be justified even if only 10 percent of the workforce lacked such knowledge. This statement betrays the entire factual premise upon which the rulemaking initiative was purportedly founded and reveals a predisposition to issue the rule regardless of the facts. This is patently "arbitrary and capricious."

Even assuming, if we must, that there is some factual basis for a concern that employees lack sufficient information about their NLRA rights, the majority also fails to provide a rational explanation for why that concern dictates their choice made to address that concern. Why, for instance, was a noncompulsory information system, primarily reliant on personal union

communications, sufficient when the Wagner Act was passed, but not now? The union density levels for 1935 and today are roughly the same.¹⁸⁵ Why at a time when the Board champions its new Web site and the Acting General Counsel continues to encourage the regional outreach programs initiated by his predecessor, do my colleagues so readily dismiss the Board's role in providing information about rights under the statute we administer? For that matter, why are the numerous employee, labor organizer, and worker advocacy groups whose comments profess awareness of these rights unable to communicate this information to those who they know lack such awareness? Is the problem one of access or message? Would a reversal of the union density trend or an increase in petition and charge filings be the only reliable indicators of increased awareness?

I would think that a reasoned explanation for the choice of a sweeping rule making it unlawful for employers to fail to post and maintain notice of employee rights would at least include some discussion of these questions and attempt to marshal more than a fragmented and inconclusive factual record to support their choice. The majority fails to do so. Their rule is patently arbitrary and capricious.

Executive Order 13496

The majority mentions in passing Executive Order 13496¹⁸⁶ and the DOL implementing regulation¹⁸⁷ mandating that Federal contractors post a notice to employees of NLRA rights that is in most respects identical to the notice at issue here. Their consideration of this administrative action should have led them to the understanding that they lack the authority to do what the President and DOL clearly could do to advance essentially the same policy choice.

The authority to require that contractors agree to post an NLRA employee rights notice as part of doing business with the Federal government comes both from the President's authority as chief executive and the specific grant of Congressional authority in the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.* There was no need or attempt to justify the promulgation of the notice-posting rule by relying on evidence that employees lacked knowledge of their rights. Moreover, in

¹⁸⁴ Peter D. DeChiara, "The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act," 32 Harv. J. on Legis. 431, at 436 and fn. 28 (1995).

In the Notice of Proposed Rulemaking, the majority also relied on two articles by Professor Charles J. Morris, a co-petitioner for notice-posting rulemaking: "Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board," 23 Stetson L. Rev. 101, 107 (1993); and "NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct," 137 U. Pa. L. Rev. 1673, 1675–1676 (1989). Professor Morris did not refer to any specific evidence supporting a belief that employees lack knowledge of their rights.

¹⁸⁵ Mayer, Gerald, "Union Membership Trends in the United States" (2004). *Federal Publications*. Paper 174, Appendix A. http://digitalcommons.ilr.cornell.edu/key_workplace/.

¹⁸⁶ 74 FR 6107 (Feb. 4, 2009).

¹⁸⁷ 75 FR 28368 (May 20, 2011).

the notice of a final rule, DOL rejected commenters' contentions that the Executive Order and implementing regulation were preempted by the Board's jurisdiction under the *Garmon* doctrine.¹⁸⁸ Necessarily, this meant that DOL believed that the rule requiring federal contractors to post the employee rights notice did not involve any rights protected by Section 7 of the Act, such as a right to receive such information from their employer, or conduct prohibited by the Act, such as the employer's failure to provide such information.

Not only does my colleagues' rulemaking action today contradict DOL's preemption analysis, but its flaws are manifest in comparison to the DOL's rule and the authority enabling it.

Conclusion¹⁸⁹

Surely, no one can seriously believe that today's rule is primarily intended to inform employees of their Section 7 right to refrain from or to oppose organizational activities, collective bargaining, and union representation. My colleagues seek through promulgation of this rule to reverse the steady downward trend in union density among private sector employees in the non-agricultural American workforce. There is a policy choice which they purport to effectuate with the force of law on several fronts in rulemaking and in case-by-case adjudication. In this instance, their action in declaring that employers violate the law by failing to inform employees of their Section 7 rights is both unauthorized and arbitrary and capricious. Regardless of the arguable merits of their policy choice or the broad scope of *Chevron* deference and the Board's rulemaking authority, I am confident that a reviewing court will soon rescue the Board from itself and restore the law to where it was before the sorcerer's apprentice sent it askew.

V. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, requires agencies promulgating final rules to prepare a final regulatory flexibility analysis and to develop alternatives

¹⁸⁸ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)

¹⁸⁹ Because I find the rule is invalid, I find it unnecessary to comment on the content of the notice or the consequences, other than finding an unfair labor practice, if an employer fails to post the required notice. For the reasons stated in my dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), I also disagree with the rule's requirement that certain employers must also electronically distribute the notice.

wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies "review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, Sec. 1, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking"). However, an agency is not required to prepare a final regulatory flexibility analysis for a final rule if the agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Based on the analysis below, in which the Board has estimated the financial burdens to employers subject to the NLRA associated with complying with the requirements contained in this final rule, the Board has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of this rule is notifying employees of their rights under the NLRA. This goal is achieved through the posting of notices by employers subject to the NLRA of the rights of employees under the NLRA. The Board will make the notices available at no cost to employers; there are no information collection, record keeping, or reporting requirements.

The Board estimates that in order to comply with this rule, each employer subject to the NLRA will spend a total of 2 hours during the first year in which the rule is in effect. This includes 30 minutes for the employer to learn where and how to post the required notices, 30 minutes to acquire the notices from the Board or its Web site, and 60 minutes to post them physically and electronically, depending on where and how the employer customarily posts notices to employees. The Board assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor Statistics data, earned a total hourly wage of about \$32.20 in March 2011, including fringe benefits.¹⁹⁰ The

¹⁹⁰ Source: U.S. Department of Labor, Bureau of Labor Statistics, "Economic News Release," Table B-8, June 3, 2011 (available at <http://www.bls.gov>). (The Board is administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In March, 2011, average hourly wages for professional and

Board then multiplied this figure by 2 hours to estimate the average costs for employers to comply with this rule during the first year in which the rule is in effect. Accordingly, this rule is estimated to impose average costs of \$64.40 per employer subject to the NLRA (2 hours × \$32.20) during the first year.¹⁹¹ These costs will decrease dramatically in subsequent years because the only employers affected will be those that did not previously satisfy their posting requirements or that have since expanded their facilities or established new ones. Because the final rule will not require employers to post the notice by email, instant messaging, text messaging, and the like, the cost of compliance should be, if anything, somewhat less than the Board previously estimated.

According to the United States Census Bureau, there were approximately 6 million businesses with employees in 2007. Of those, the SBA estimates that all but about 18,300 were small businesses with fewer than 500 employees.¹⁹² This rule does not apply to employers that do not meet the Board's jurisdictional requirements, but

business workers were \$23.00. Table B-8. Accordingly, the Board multiplied that number by 1.4 to arrive at its estimate of \$32.20 average hourly earnings, including fringe benefits.) In the NPRM, the Board estimated hourly earnings of \$31.02, based on BLS data from January 2009. 75 FR 80415. The estimate has been updated to reflect increases in hourly earnings since that time. Those increases have been relatively minor, and do not affect the Board's conclusion that the economic impact of the rule will not be significant; see discussion below.

¹⁹¹ The National Roofing Contractors Association asserts (without support) that "federal agencies have a notoriously poor track record in estimating the costs of new regulations on businesses"; it therefore predicts that "the actual cost for many employers could be considerably higher." The Board recognizes that some employers, generally firms with extensive and/or multiple facilities, may incur initial compliance costs in excess of the Board's estimate. For example, a company with multiple locations may require more than 30 minutes to physically post the notices on all of its various bulletin boards. The Board's estimate, however, is an average for all employers; many small employers, especially those with only one facility and/or limited electronic communication with employees, may incur lower compliance costs.

In this regard, however, contrary to numerous comments, such as that of St Mar Enterprises, Inc., the Board does not expect that the rule will be "very burdensome" for businesses with more than one facility. Normally, such firms should have to learn about the rule's requirements and acquire the notices only once, no matter how many facilities are involved. The same should be true for electronic posting: downloading the notice and posting it on an employer's Web site normally should have to be done once for all facilities. Thus, the only additional costs involved for multi-facility firms should be those of physically posting the notices at each facility.

¹⁹² Source: SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics.

the Board does not have the means to calculate the number of small businesses within the Board's jurisdiction. Accordingly, the Board assumes for purposes of this analysis that the great majority of the nearly 6 million small businesses will be affected, and further that this number is a substantial number within the meaning of 5 U.S.C. 601. However, as discussed below, because the economic impact on those employers is minimal, the Board concludes that, under 5 U.S.C. 605, the final rule will not have a significant economic impact on any small employers.

The RFA does not define "significant economic impact." 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' * * * will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." See *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business Administration at 17 (available at <http://www.sba.gov>) (SBA Guide). As to economic impact and whether it is significant, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. *Id.* at 17. More specifically, the criteria to be considered are:

- Whether the rule will lead to *long-term insolvency*, *i.e.*, regulatory costs that significantly reduce profits;
- Whether the rule will lead to *short-term insolvency*, *i.e.*, increasing operating expenses or new debt more than cash reserves and cash flow can support, causing nonmarginal firms to close;
- Whether the rule will have *disproportionate effects*, placing small entities at a significant competitive disadvantage; and
- Whether the rule will result in *inefficiency*, *i.e.*, in social costs to small entities that outweigh the social benefits resulting from the rule. *Id.* at 26.

Applying these standards, the Board concludes that the economic impact of its notice-posting rule on small employers is not significant. The Board has determined that the average cost of complying with the rule in the first year for all employers subject to the NLRA will be \$64.40. It is unlikely in the extreme that this minimal cost would lead to either the short- or long-term insolvency of any business entity, or place small employers at a competitive disadvantage. Since this rule applies only to organizations within the NLRB's jurisdictional standards, the smallest employer subject to the rule must have

an annual inflow or outflow across state lines of at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959). Given that the Board estimates that this rule will cost, on average, \$64.40, the total cost for the smallest affected companies would be an amount equal to less than two-tenths of one percent of that required annual inflow or outflow (.13%). The Board concludes that such a small percentage is highly unlikely to adversely affect a small business.¹⁹³

And, in the Board's judgment, the social benefits of employees' (and employers') becoming familiar with employees' NLRA rights far outweigh the minimal costs to employers of posting notices informing employees of those rights.¹⁹⁴ For all the foregoing reasons, the Board has concluded that the final rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

As discussed in the NPRM, because it assumes that a substantial number of small businesses will be required to comply with the rule, the Board preliminarily considered alternatives that would minimize the impact of the rule, including a tiered approach for small entities with only a few employees. However, as it also explained, the Board rejected those alternatives, concluding that a tiered approach or an exemption for some small entities would substantially undermine the purpose of the rule because so many employers would be exempt under the SBA definitions. Given the very small estimated cost of compliance, it is possible that the burden on a small business of determining whether it fell into a particular tier might exceed the burden of compliance. The Board further pointed out that Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the NLRA to only larger employers. The Board also believes that employees of small employers have no less need of a Board notice than have employees of larger employers. Finally, the Board's jurisdictional standards mean that very small employers will not be covered by the rule in any case. 75 FR 80416. (A summary of the Board's discretionary jurisdictional standards appears in § 104.204, below.) Thus, although

¹⁹³ In reaching this conclusion, the Board believes it is likely that employers that might otherwise be significantly affected even by the low cost of compliance under this rule will not meet the Board's jurisdictional requirements, and consequently those employers will not be subject to this rule.

¹⁹⁴ See further discussion in section II, subsection C, Factual Support for the Rule, above.

several comments urge that small employers be exempted from the rule, the Board remains persuaded, for the reasons set forth in the NPRM, that such an exemption is unwarranted.¹⁹⁵

Some comments contend that, in concluding that the proposed rule will not have a significant impact on small employers, the Board understates the rule's actual prospective costs. One comment, from Baker & Daniels LLP, argues that the Board improperly focuses solely on the cost of complying with the rule—*i.e.*, of printing and posting the notice—and ignored the "actual economic impact of the rule's effect and purpose." According to this comment, it is predictable that, as more employees become aware of their NLRA rights, they will file more unfair labor practice charges and elect unions to serve as their collective-bargaining representatives. The comment further asserts that the Board has ignored the "economic realities of unionization," specifically that union wages are inflationary; that unions make business less flexible, less competitive, and less profitable; and that unions cause job loss and stifle economic recovery from recessions. Accordingly, this comment contends that "the Board's RFA certification is invalid, and [that] the Board must prepare an initial regulatory flexibility analysis." Numerous other comments echo similar concerns, but without reference to the RFA.

The Board disagrees with the comment submitted by Baker & Daniels LLP.¹⁹⁶ Section 605(b) of the RFA states that an agency need not prepare an initial regulatory flexibility analysis if the agency head certifies that *the rule*

¹⁹⁵ Cass County Electric Cooperative says that, after estimating the average cost of compliance, "the NLRB quickly digresses into an attempt to estimate the cost of the proposed rule on only small businesses." The Board responds that in estimating the cost of the rule on small businesses, it was doing what the RFA explicitly requires (and that focusing on small businesses, which comprise more than 99 percent of potentially affected firms, is hardly a "digression"). The comment also asserts that the Board concluded "that the cost of estimating the implementation cost will likely exceed the cost of implementation, and thus is not warranted. At best, this is a poor excuse to justify the rule." This misstates the Board's observation that "Given the very small estimated cost of compliance, it is possible that the burden on a small business of determining whether it fell into a particular tier might exceed the burden of compliance." This observation was one of the reasons why the Board rejected a tiered approach to coverage for small entities, not an "excuse to justify the rule." 75 FR 80416.

¹⁹⁶ In any event, the comment from Baker & Daniels LLP and related comments are difficult to square with the assertions made in numerous other comments that the notice posting is unnecessary because employees are already well aware of their NLRA rights and have made informed decisions not to join unions or seek union representation.

will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b) (emphasis added). The Board understands the “economic impact of * * * the rule” to refer to the costs to affected entities of complying with the rule, not to the economic impact of a series of subsequent decisions made by individual actors in the economy that are neither compelled by, nor the inevitable result of, the rule.¹⁹⁷ Even if more employees opt for union representation after learning about their rights, employers can avoid the adverse effects on business costs, flexibility, and profitability predicted by Baker & Daniels LLP and other commenters by not agreeing to unions’ demands that might produce those effects.¹⁹⁸

The Board finds support for this view in the language of Section 603 of the RFA, which lists the items to be included in an initial regulatory flexibility analysis if one is required. 5 U.S.C. 603. Section 603(a) states only that such analysis “shall describe the impact of the proposed rule on small entities.” 5 U.S.C. 603(a). However, Section 603(b) provides, as relevant here, that “[e]ach initial regulatory flexibility analysis * * * shall contain—* * *

“(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record[.]” 5 U.S.C. 603(b)(4) (emphasis added). The Small Business Administration cites, as examples of “other compliance requirements,”

(a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.¹⁹⁹

Thus, the “impact” on small entities referred to in Section 603(a) refers only

¹⁹⁷ For RFA purposes, the relevant economic impact on small entities is the impact of compliance with the rule. *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985), cited in SBA Guide, above, at 77.

¹⁹⁸ NLRA Section 8(d) expressly states that the obligation to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession[.]” 29 U.S.C. 158(d).

¹⁹⁹ SBA Guide, above, at 34.

to the rule’s projected compliance costs to small entities (none of which would result from posting a workplace notice), not the kinds of speculative and indirect economic impact that Baker & Daniels LLC invokes.²⁰⁰

Associated Builders and Contractors, Inc. (ABC) and Retail Industry Leaders Association (RILA) contend that the Board’s RFA analysis fails to account for the costs of electronic notice posting, especially for employers that communicate with employees via multiple electronic means. Both comments deplore what they consider to be the rule’s vague requirements in this respect. ABC argues that clear guidance is needed, and that the Board should withdraw the electronic notice posting requirements until more information can be gathered. RILA asserts that “[d]eciphering and complying with the Board’s requirements would impose significant legal and administrative costs and inevitably result [in] litigation as parties disagree about when a communication is ‘customarily used,’ and whether and when employees need to be informed through multiple communications.”

Numerous comments assert that employers, especially small employers that lack professional human resources staff, will incur significant legal expenses as they attempt to comply with the rule. For example, Fisher and Phillips, a management law firm, urges that the cost of legal fees should be included in assessing the economic impact of the proposed rule: “[I]t might be considered naïve to assume that a significant percentage of small employers would not seek the advice of counsel, and it would be equally naïve to assume that a significant percentage of those newly-engaged lawyers could be retained for as little as \$31.02/hour.”

Those comments are not persuasive. The choice to retain counsel is not a requirement for complying with the rule. This is not a complicated or nuanced rule. The employer is only required to post a notice provided by the Board in the same manner in which that employer customarily posts notices to its employees. The Board has explained above what the rule’s electronic posting provisions require of employers in general, and it has simplified those provisions by eliminating the requirement that notices be provided by email and many other forms of electronic communication.²⁰¹ It

²⁰⁰ Baker & Daniels LLP cites no authority to support its contention that the RFA is concerned with costs other than the costs of compliance with the rule, and the Board is aware of none.

²⁰¹ Contrary to ABC’s and RILA’s assertions, the Board did estimate the cost of complying with the

rule’s electronic notice posting requirements; its estimated average cost of \$62.04 specifically included such costs. 75 FR 80415. Although ABC faults the Board for failing to issue a preliminary request for information (RFI) concerning the ways employers communicate with employees electronically, the Board did ask for comments concerning its RFA certification in the NPRM, *id.* at 80416. In this regard, ABC states only that “many ABC member companies communicate with employees through email or other electronic means,” which the Board expressly contemplated in the NPRM, *id.* at 80413, and which is also the Board’s practice with respect to communicating with its own employees. If ABC has more specific information it has failed to provide it. In any event, the final rule will not require email or many other types of electronic notice.

should not be necessary for employers, small or large, to add human resources staff, retain counsel, or resort to litigation if they have questions concerning whether the proposed rule applies to them or about the requirements for technical compliance with the rule, including how the electronic posting provisions specifically affect their enterprises.²⁰² Such questions can be directed to the Board’s regional offices, either by telephone, personal visit, email, or regular mail, and will be answered free of charge by representatives of the Board.²⁰³

Cass County Electric Cooperative argues that the Board failed to take into account legal expenses that employers will incur if they fail to “follow the letter of the proposed rule.” The comment urges that the Board should estimate the cost to businesses “should they have to defend themselves against an unfair labor practice for failure to comply with the rule, no matter what the circumstances for that failure might be,” presumably including failures to post the notice by employers that are unaware of the rule and inadvertent failures to comply with technical posting requirements. International Foodservice Distributors Association contends that the Board also should have considered the costs of tolling the statute of limitations when employers fail to post the notice. However, the costs referred to in these comments are costs of not complying with the rule, not compliance costs. As stated above, for RFA purposes, the relevant economic analysis focuses on the costs of complying with the rule.²⁰⁴

²⁰² Association of Corporate Counsel contends that employers will have to modify their policies and procedures manuals as a result of the rule. The Board questions that contention, but even if some employers do take those steps, they would not be a cost of complying with the rule.

²⁰³ Fisher and Phillips also suggest that the Board failed to take into account the effect that the proposed rule would have on the Board’s own case intake and budget. The RFA, however, does not require an estimate of the economic effects of proposed rules on Federal agencies.

²⁰⁴ See fn. 197, above.

Some comments assert that the content of the notice will prompt employee questions, which managers and supervisors will have to answer, and be trained to answer, and that the Board failed to account for the cost of such training and discussions in terms of lost work time.²⁰⁵ Other comments contend that employers will incur costs of opposing an increased number of union organizing campaigns.²⁰⁶ Relatedly, several comments state that employers should be allowed to, and/or will respond to the notice by informing employees of aspects of unionization and collective bargaining that are not covered by the notice; some suggest that employers may post their own notices presenting their point of view.²⁰⁷ (A few comments, by contrast, protest that employers will be prohibited from presenting their side of the issues raised by the posting of notices.) The Board responds that any costs that employers may incur in responding to employee questions, in setting forth the employers' views on unions and collective bargaining, or in opposing union organizing efforts will be incurred entirely at the employers' own volition; they are not a cost of complying with the rule.

As discussed above, many comments express concerns that union supporters will tear down the notices in order to expose employers to 8(a)(1) liability for failing to post the notices. Some of these comments also contend that, as a result, employers will have to spend considerable time monitoring the notices to make sure that they are not torn down, or incur additional costs of installing tamper-proof bulletin boards. One commenter predicts that his employer will have to spend \$20,000 for such bulletin boards at a single facility, or a total of \$100,000 at all of its facilities, and even then will have to spend two hours each month monitoring the postings. For the reasons discussed above, the Board is not convinced at this time that the problem of posters being torn down is anything more than speculative, and accordingly is inclined to discount these predictions substantially. In any event, the rule requires only that employers "take reasonable steps"—not every conceivable step—to ensure that the

notice is not defaced or torn down. The rule does not require, or even suggest, that employers must spend thousands of dollars to install tamper-proof bulletin boards or that employers must constantly monitor the notice.²⁰⁸

One comment contends that most small employers do not have 11 x 17-inch color printers, and therefore will have to have the posters printed commercially at a cost that, alone, assertedly will exceed the Board's estimate of the cost of the rule. The Board understands the concerns of this small employer. The Board points out that it will furnish a reasonable number of copies of the notice free of charge to any requesting employer. Moreover, as explained above, employers may reproduce the notice in black-and-white and may print the notice on two standard-sized, 8.5 x 11-inch pages and tape or bind them together, rather than having them printed commercially.

A number of comments argue that the rule will lead to workplace conflict. For example, the comment of Wiseda Corporation contains the following:

Unnecessary Confusion and Conflict in the Workplace. The labor law terms and industrial union language of the proposed notice (such as hiring hall and concerted activity) present an unclear and adversarial picture to employees. Most non-union employers like us, who wish to remain non-union, encourage cooperative problem solving. In a modern non-union workplace, to require such a poster encouraging strikes and restroom leaflets is disrespectful of the hard work and good intentions of employers, management, and employees. The proposed poster would exist alongside other company notices on problem-solving, respect for others, resolving harassment issues, etc., and would clearly be out of character and inappropriate. (Emphasis in original.)

Another comment puts it more bluntly: "The notice as proposed is more of an invitation to cause employee/employer disputes rather than an explanation of employee rights." The Board's response is that the ill effects predicted in these comments, like the predicted adverse effects of unionization discussed above, are not costs of compliance with the rule, but of employees' learning about their workplace rights. In addition, Congress, not the Board, created the subject rights and did so after finding that vesting employees with these rights would reduce industrial strife.

B. Paperwork Reduction Act (PRA)²⁰⁹

The final rule imposes certain minimal burdens associated with the

²⁰⁸ Contrary to one comment's suggestion, no employer will be "bankrupted" by fines imposed if the notice is torn down. As explained above, the Board does not have the authority to impose fines.

²⁰⁹ 44 U.S.C. 3501 *et seq.*

posting of the employee notice required by § 104.202. As noted in § 104.202(e), the Board will make the notice available, and employers will be permitted to post copies of the notice that are exact duplicates in content, size, format, and type size and style. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. *See* 5 CFR 1320.3(c)(2). Therefore, contrary to several comments, the posting requirement is not subject to the PRA.²¹⁰

The Board received no comments suggesting that the PRA covers the costs to the Federal government of administering the regulations established by the proposed rule. Therefore, the NPRM's discussion of this issue stands.

Accordingly, this rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA (44 U.S.C. 3507 *et seq.*).

C. Congressional Review Act (CRA)²¹¹

This rule is a "major rule" as defined by Section 804(2) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act), because it will have an effect on the economy of more than \$100 million, at least during the year it takes effect. 5 U.S.C. 804(2)(A).²¹² Accordingly, the

²¹⁰ The California Chamber of Commerce and the National Council of Agricultural Employers dispute this conclusion. They assert that the PRA distinguishes between the "agencies" to which it applies and the "Federal government," and therefore that the exemption provided in 5 CFR 1320.3(c)(2) applies only to information supplied by "the actual Federal government," not to information supplied by a Federal agency such as the Board. The flaw in this argument is that there is no such legal entity as "the [actual] Federal government." What is commonly referred to as "the Federal government" is a collection of the three branches of the United States government, including the departments of the executive branch, and the various independent agencies, including the Board. If "the Federal government" can be said to act at all, it can do so only through one or more of those entities—in this instance, the Board—and that is undoubtedly the meaning that the drafters of 5 CFR 1320(c)(2) meant to convey.

²¹¹ 5 U.S.C. 801 *et seq.*

²¹² A rule is a "major rule" for CRA purposes if it will (A) Have an annual effect on the economy of \$100 million or more; (B) cause a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (C) result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804. The notice-posting rule is a "major

²⁰⁵ *See, e.g.*, comments of Cass County Electric Cooperative and Baker & McKenzie. The latter estimates that each private sector employee will spend at least an hour attending meetings concerning the content of the notice, and that the cost to the economy in terms of lost employee work time will be \$3.5 billion.

²⁰⁶ *See, e.g.*, comment of Dr. Pepper Snapple Group.

²⁰⁷ *See, e.g.*, comments of Metro Toyota and Capital Associated Industries, Inc.

effective date of the rule is 75 days after publication in the **Federal Register**.²¹³

List of Subjects in 29 CFR Part 104

Administrative practice and procedure, Employee rights, Labor unions.

Text of Final Rule

Accordingly, a new part 104 is added to 29 CFR chapter 1 to read as follows:

PART 104—NOTIFICATION OF EMPLOYEE RIGHTS; OBLIGATIONS OF EMPLOYERS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

104.201 What definitions apply to this part?

104.202 What employee notice must employers subject to the NLRA post in the workplace?

104.203 Are Federal contractors covered under this part?

104.204 What entities are not subject to this part?

Appendix to Subpart A—Text of Employee Notice

Subpart B—General Enforcement and Complaint Procedures

104.210 How will the Board determine whether an employer is in compliance with this part?

104.211 What are the procedures for filing a charge?

104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?

104.213 What remedies are available to cure a failure to post the employee notice?

104.214 How might other Board proceedings be affected by failure to post the employee notice?

Subpart C—Ancillary Matters

104.220 What other provisions apply to this part?

rule” because, as explained in the discussion of the Regulatory Flexibility Act above, the Board has estimated that the average cost of compliance with the rule will be approximately \$64.40 per affected employer; thus, because there are some 6 million employers that could potentially be affected by the rule, the total cost to the economy of compliance with the rule will be approximately \$386.4 million. As further explained, nearly all of that cost will be incurred during the year in which the rule takes effect; in subsequent years, the only costs of compliance will be those incurred by employers that either open new facilities or expand existing ones, and those that for one reason or another fail to comply with the rule during the first year. The Board therefore expects that the costs of compliance will be far less than \$100 million in the second and subsequent years. The Board is confident that the rule will have none of the effects enumerated in 5 U.S.C. 804(2)(B) and (C) above.

²¹³ The Board finds unpersuasive the suggestions in several comments that the effective date of the rule be postponed to as late as April 15, 2012. The Board finds nothing in the requirements of the rule or in the comments received that would warrant postponing the effective date.

Authority: National Labor Relations Act (NLRA), Section 6, 29 U.S.C. 156; Administrative Procedure Act, 5 U.S.C. 553.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 104.201 What definitions apply to this part?

Employee includes any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. However, it does not include agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act (45 U.S.C. 151 *et seq.*), or by any other person who is not an employer as defined in the NLRA. 29 U.S.C. 152(3).

Employee notice means the notice set forth in the Appendix to Subpart A of this part that employers subject to the NLRA must post pursuant to this part.

Employer includes any person acting as an agent of an employer, directly or indirectly. The term does not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Further, the term “employer” does not include entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. 152(5).

National Labor Relations Board (Board) means the National Labor Relations Board provided for in section 3 of the National Labor Relations Act, 29 U.S.C. 153. 29 U.S.C. 152(10).

Person includes one or more individuals, labor organizations,

partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers. 29 U.S.C. 152(1).

Rules, regulations, and orders, as used in § 104.202, means rules, regulations, and relevant orders issued by the Board pursuant to this part.

Supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. 152(11).

Unfair labor practice means any unfair labor practice listed in section 8 of the National Labor Relations Act, 29 U.S.C. 158. 29 U.S.C. 152(8).

Union means a labor organization as defined above.

§ 104.202 What employee notice must employers subject to the NLRA post in the workplace?

(a) *Posting of employee notice.* All employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part.

(b) *Size and form requirements.* The notice to employees shall be at least 11 inches by 17 inches in size, and in such format, type size, and style as the Board shall prescribe. If an employer chooses to print the notice after downloading it from the Board’s Web site, the printed notice shall be at least 11 inches by 17 inches in size.

(c) *Adaptation of language.* The National Labor Relations Board may find that an Act of Congress, clarification of existing law by the courts or the Board, or other circumstances make modification of the employee notice necessary to achieve the purposes of this part. In such circumstances, the Board will promptly issue rules, regulations, or orders as are needed to ensure that all future employee notices contain appropriate language to achieve the purposes of this part.

(d) *Physical posting of employee notice.* The employee notice must be posted in conspicuous places where they are readily seen by employees, including all places where notices to

employees concerning personnel rules or policies are customarily posted. Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer's option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.

(e) *Obtaining a poster with the employee notice.* A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Board, and may be obtained from the Board's office, 1099 14th Street, NW., Washington, DC 20570, or from any of the Board's regional, subregional, or resident offices. Addresses and telephone numbers of those offices may be found on the Board's Web site at <http://www.nlr.gov>. A copy of the poster in English and in languages other than English may also be downloaded from the Board's Web site at <http://www.nlr.gov>. Employers also may reproduce and use copies of the Board's official poster, provided that the copies duplicate the official poster in size, content, format, and size and style of type. In addition, employers may use commercial services to provide the employee notice poster consolidated onto one poster with other Federally mandated labor and employment notices, so long as the consolidation does not alter the size, content, format, or size and style of type of the poster provided by the Board.

(f) *Electronic posting of employee notice.* (1) In addition to posting the required notice physically, an employer must also post the required notice on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means. An employer that customarily posts notices to employees about personnel rules or policies on an intranet or internet site will satisfy the electronic posting requirement by displaying prominently—*i.e.*, no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board's Web site, or a link to the Board's Web site that contains the poster. The link to the Board's Web site must read, "Employee Rights under the National Labor Relations Act."

(2) Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must provide notice as required in paragraph (f)(1) of this section in the language the employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must provide the notice in each such language. The Board will provide translations of the link to the Board's Web site for any employer that must or wishes to display the link on its Web site. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.

§ 104.203 Are Federal contractors covered under this part?

Yes, Federal contractors are covered. However, contractors may comply with the provisions of this part by posting the notices to employees required under the Department of Labor's notice-posting rule, 29 CFR part 471.

§ 104.204 What entities are not subject to this part?

(a) The following entities are excluded from the definition of "employer" under the National Labor Relations Act and are not subject to the requirements of this part:

- (1) The United States or any wholly owned Government corporation;
- (2) Any Federal Reserve Bank;
- (3) Any State or political subdivision thereof;
- (4) Any person subject to the Railway Labor Act;
- (5) Any labor organization (other than when acting as an employer); or
- (6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) In addition, employers employing exclusively workers who are excluded from the definition of "employee" under § 104.201 are not covered by the requirements of this part.

(c) This part does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

(d)(1) This part does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. The most commonly applicable standards are:

(i) The retail standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of \$500,000 or more.

(ii) The nonretail standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called "outflow") or goods or services purchased by the employer from out of state (called "inflow"). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least \$50,000. Outflow can be either direct—to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.

(2) There are other standards for miscellaneous categories of employers. These standards are based on the employer's gross annual volume of business unless stated otherwise. These standards are listed in the Table to this section.

TABLE TO § 104.204

Employer category	Jurisdictional standard
Amusement industry	\$500,000.
Apartment houses, condominiums, cooperatives	\$500,000.
Architects	Nonretail standard.

TABLE TO § 104.204—Continued

Employer category	Jurisdictional standard
Art museums, cultural centers, libraries	\$1 million.
Bandleaders	Retail/nonretail (depends on customer).
Cemeteries	\$500,000.
Colleges, universities, other private schools	\$1 million.
Communications (radio, TV, cable, telephone, telegraph)	\$100,000.
Credit unions	Either retail or nonretail standard.
Day care centers	\$250,000.
Gaming industry	\$500,000.
Health care institutions:	
Nursing homes, visiting nurses associations	\$100,000.
Hospitals, blood banks, other health care facilities (including doctors' and dentists' offices)	\$250,000.
Hotels and motels	\$500,000.
Instrumentalities of interstate commerce	\$50,000.
Labor organizations (as employers)	Nonretail standard.
Law firms; legal service organizations	\$250,000.
Newspapers (with interstate contacts)	\$200,000.
Nonprofit charitable institutions	Depends on the entity's substantive purpose.
Office buildings; shopping centers	\$100,000.
Private clubs	\$500,000.
Public utilities	\$250,000 or nonretail standard.
Restaurants	\$500,000.
Social services organizations	\$250,000.
Symphony orchestras	\$1 million.
Taxicabs	\$500,000.
Transit systems	\$250,000.

(3) If an employer can be classified under more than one category, the Board will assert jurisdiction if the employer meets the jurisdictional standard of any of those categories.

(4) There are a few employer categories without specific jurisdictional standards:

(i) Enterprises whose operations have a substantial effect on national defense or that receive large amounts of Federal funds

(ii) Enterprises in the District of Columbia

(iii) Financial information organizations and accounting firms

(iv) Professional sports

(v) Stock brokerage firms

(vi) U. S. Postal Service

(5) A more complete discussion of the Board's jurisdictional standards may be found in *An Outline of Law and Procedure in Representation Cases*, Chapter 1, found on the Board's Web site, <http://www.nlr.gov>.

(e) This part does not apply to the United States Postal Service.

Appendix to Subpart A—Text of Employee Notice

“EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union

misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

“Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.

- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

- Strike and picket, depending on the purpose or means of the strike or the picketing.

- Choose not to do any of these activities, including joining or remaining a member of a union.

“Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature

during non-work time, in non-work areas, such as parking lots or break rooms.

- Question you about your union support or activities in a manner that discourages you from engaging in that activity.

- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

- Threaten to close your workplace if workers choose a union to represent them.

- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

“Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

- Take adverse action against you because you have not joined or do not support the union.

“If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union

are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

"Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlr.gov>.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

"*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

"This is an official Government Notice and must not be defaced by anyone."

Subpart B—General Enforcement and Complaint Procedures

§ 104.210 How will the Board determine whether an employer is in compliance with this part?

The Board has determined that employees must be aware of their NLRA rights in order to exercise those rights effectively. Employers subject to this rule are required to post the employee notice to inform employees of their rights. Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).

Normally, the Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a charge sets in motion the Board's procedures for investigating and adjudicating alleged unfair labor

practices, and for remedying conduct that the Board finds to be unlawful. *See* NLRA Sections 10–11, 29 U.S.C. 160–61, and 29 CFR part 102, subpart B.

§ 104.211 What are the procedures for filing a charge?

(a) *Filing charges.* Any person (other than Board personnel) may file a charge with the Board alleging that an employer has failed to post the employee notice as required by this part. A charge should be filed with the Regional Director of the Region in which the alleged failure to post the required notice is occurring.

(b) *Contents of charges.* The charge must be in writing and signed, and must be sworn to before a Board agent, notary public, or other person authorized to administer oaths or take acknowledgements, or contain a declaration by the person signing it, under penalty of perjury, that its contents are true and correct. The charge must include:

(1) The charging party's full name and address;

(2) If the charge is filed by a union, the full name and address of any national or international union of which it is an affiliate or constituent unit;

(3) The full name and address of the employer alleged to have violated this part; and

(4) A clear and concise statement of the facts constituting the alleged unfair labor practice.

§ 104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?

(a) When a charge is filed with the Board under this section, the Regional Director will investigate the allegations of the charge. If it appears that the allegations are true, the Regional Director will make reasonable efforts to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.

(b) If an alleged violation cannot be resolved informally, the Regional Director may issue a formal complaint against the respondent employer, alleging a violation of the notice-posting requirement and scheduling a hearing before an administrative law judge. After a complaint issues, the matter will be adjudicated in keeping with the Board's customary procedures. *See* NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.

§ 104.213 What remedies are available to cure a failure to post the employee notice?

(a) If the Board finds that the respondent employer has failed to post the required employee notices as alleged, the respondent will be ordered to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice. In some instances additional remedies may be appropriately invoked in keeping with the Board's remedial authority.

(b) Any employer that threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement may be found to have committed an unfair labor practice. *See* NLRA Section 8(a)(1) and 8(a)(4), 29 U.S.C. 158(a)(1), (4).

§ 104.214 How might other Board proceedings be affected by failure to post the employee notice?

(a) Tolling of statute of limitations. When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful. *See* NLRA Section 10(b), 29 U.S.C. 160(b).

(b) Noncompliance as evidence of unlawful motive. The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue.

Subpart C—Ancillary Matters

§ 104.220 What other provisions apply to this part?

(a) The regulations in this part do not modify or affect the interpretation of any other NLRB regulations or policy.

(b)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This part creates no right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its

officers, employees, or agents, or any other person.

Signed in Washington, DC, August 22, 2011.

Wilma B. Liebman,
Chairman.

[FR Doc. 2011-21724 Filed 8-25-11; 8:45 am]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Final Frameworks for Early-Season Migratory Bird
Hunting Regulations; Final Rule

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 20**[Docket No. FWS-R9-MB-2011-0014;
91200-1231-9BPP-L2]

RIN 1018-AX34

Migratory Bird Hunting; Final Frameworks for Early-Season Migratory Bird Hunting Regulations**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: This rule prescribes final early-season frameworks from which the States, Puerto Rico, and the Virgin Islands may select season dates, limits, and other options for the 2011–12 migratory bird hunting seasons. Early seasons are those that generally open prior to October 1, and include seasons in Alaska, Hawaii, Puerto Rico, and the Virgin Islands. The effect of this final rule is to facilitate the selection of hunting seasons by the States and Territories to further the annual establishment of the early-season migratory bird hunting regulations.

DATES: This rule takes effect on August 30, 2011.

ADDRESSES: States and Territories should send their season selections to: Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, ms MBSP-4107-ARLSQ, 1849 C Street, NW., Washington, DC 20240. You may inspect comments during normal business hours at the Service's office in room 4107, 4501 N. Fairfax Drive, Arlington, Virginia, or at <http://www.regulations.gov> at Docket No. FWS-R9-MB-2011-0014.

FOR FURTHER INFORMATION CONTACT: Ron W. Kokel, U.S. Fish and Wildlife Service, Department of the Interior, MS MBSP-4107-ARLSQ, 1849 C Street, NW., Washington, DC 20240; (703) 358-1714.

SUPPLEMENTARY INFORMATION:**Regulations Schedule for 2011**

On April 8, 2011, we published in the *Federal Register* (76 FR 19876) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process, and addressed the establishment of seasons, limits, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. Major steps in the 2011–12 regulatory cycle relating to open public meetings and *Federal Register* notifications were

also identified in the April 8 proposed rule. Further, we explained that all sections of subsequent documents outlining hunting frameworks and guidelines were organized under numbered headings. Subsequent documents will refer only to numbered items requiring attention. Therefore, it is important to note that we omit those items requiring no attention, and remaining numbered items might be discontinuous or appear incomplete.

On June 22, 2011, we published in the *Federal Register* (76 FR 36508) a second document providing supplemental proposals for early- and late-season migratory bird hunting regulations. The June 22 supplement also provided information on the 2011–12 regulatory schedule and announced the Service Regulations Committee (SRC) and summer Flyway Council meetings.

On June 22 and 23, 2011, we held open meetings with the Flyway Council Consultants where the participants reviewed information on the current status of migratory shore and upland game birds and developed recommendations for the 2011–12 regulations for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the Virgin Islands, special September waterfowl seasons in designated States, special sea duck seasons in the Atlantic Flyway, and extended falconry seasons. In addition, we reviewed and discussed preliminary information on the status of waterfowl as it relates to the development and selection of the regulatory packages for the 2011–12 regular waterfowl seasons.

On July 26, 2011, we published in the *Federal Register* (76 FR 44730) a third document specifically dealing with the proposed frameworks for early-season regulations. We published the proposed frameworks for late-season regulations (primarily hunting seasons that start after October 1 and most waterfowl seasons not already established) in an August 26, 2011, *Federal Register*.

This document is the fifth in a series of proposed, supplemental, and final rulemaking documents. It establishes final frameworks from which States may select season dates, shooting hours, and daily bag and possession limits for the 2011–12 season. These selections will be published in the *Federal Register* as amendments to §§ 20.101 through 20.107, and § 20.109 of title 50 CFR part 20.

Population Status and Harvest

Information on the status of waterfowl and information on the status and harvest of migratory shore and upland game birds, including detailed

information on methodologies and results, is available at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our Web site at <http://www.fws.gov/migratorybirds/NewsPublicationsReports.html>.

Review of Public Comments

The preliminary proposed rulemaking (April 8 *Federal Register*) opened the public comment period for migratory game bird hunting regulations and announced the proposed regulatory alternatives for the 2011–12 duck hunting season. Comments concerning early-season issues and the proposed alternatives are summarized below and numbered in the order used in the April 8 *Federal Register* document. Only the numbered items pertaining to early-seasons issues and the proposed regulatory alternatives for which we received written comments are included. Consequently, the issues do not follow in consecutive numerical or alphabetical order.

We received recommendations from all four Flyway Councils. Some recommendations supported continuation of last year's frameworks. Due to the comprehensive nature of the annual review of the frameworks performed by the Councils, support for continuation of last year's frameworks is assumed for items for which no recommendations were received. Council recommendations for changes in the frameworks are summarized below.

General

Written Comments: An individual commenter protested the entire migratory bird hunting regulations process, the killing of all migratory birds, and the lack of accepting electronic public comments.

Service Response: Our long-term objectives continue to include providing opportunities to harvest portions of certain migratory game bird populations and to limit harvests to levels compatible with each population's ability to maintain healthy, viable numbers. Having taken into account the zones of temperature and the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory birds, we believe that the hunting seasons provided for herein are compatible with the current status of migratory bird populations and long-term population goals. Additionally, we are obligated to, and do, give serious consideration to all information received as public comment. While there are problems inherent with any type of representative

management of public-trust resources, we believe that the Flyway-Council system of migratory bird management has been a longstanding example of State-Federal cooperative management since its establishment in 1952. However, as always, we continue to seek new ways to streamline and improve the process.

Regarding the comment concerning our acceptance, or lack thereof, of electronic public comments, we do accept electronic comments filed through the official Federal eRulemaking portal (<http://www.regulations.gov>). Public comment methods are identified and listed above under **ADDRESSES**.

1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) General Harvest Strategy; (B) Regulatory Alternatives, including specification of framework dates, season lengths, and bag limits; (C) Zones and Split Seasons; and (D) Special Seasons/Species Management. The categories correspond to previously published issues/discussions, and only those containing substantial recommendations are discussed below.

D. Special Seasons/Species Management

i. Special Teal Seasons

Regarding the regulations for this year, utilizing the criteria developed for the teal season harvest strategy, this year's estimate of 8.9 million blue-winged teal from the traditional survey area indicates that a 16-day September teal season in the Atlantic, Central, and Mississippi Flyways is appropriate for 2011.

ix. Youth Hunt

Council Recommendations: The Atlantic Flyway Council recommended that we remove the criteria for youth hunting days to be 2 consecutive hunting days and allow the 2 days to be taken singularly or consecutively outside any regular duck season on a weekend, holidays, or other non-school days when youth hunters would have the maximum opportunity to participate.

Service Response: We concur with the Atlantic Flyway Council's recommendation to allow States to offer 2 youth hunt days in addition to their regular seasons, with no requirement that the youth hunts be held on consecutive hunting days. Our intent in first establishing this special day of opportunity in 1996 (61 FR 49232, September 18, 1996) was to introduce youth to the concepts of ethical utilization and stewardship of

waterfowl and other natural resources, to encourage youngsters and adults to experience the outdoors together, and to contribute to the long-term conservation of the migratory bird resource. We stated then that we viewed the special youth hunting day as a unique educational opportunity, above and beyond the regular season, which helps ensure high-quality learning experiences for those youth indicating an interest in hunting. We further believed that the youth hunting day would help develop a conservation ethic in our youth and was consistent with the Service's responsibility to foster an appreciation for our nation's valuable wildlife resources. However, there have been few attempts to determine whether youth hunts have achieved their intended purpose. Thus, we request that when the Human Dimensions Working Group is formed, that it be charged with assessing the effectiveness of youth waterfowl hunts as a hunter recruitment tool. Until such an assessment has been conducted, we will not consider any further changes to the criteria for youth hunts.

x. Mallard Management Units

Council Recommendations: The Central Flyway Council recommended changes to the High Plains Mallard Management Unit boundary in Nebraska and Kansas for simplification and clarification of regulations enforcement.

Service Response: We do not support the modification of the boundary of the High Plains Mallard Management Unit in Kansas and Nebraska. While we appreciate the Council's desire for ways to improve enforcement, we note that the boundaries in those two States have been in place since the 1970s and are sufficiently clear for enforcement of waterfowl hunting regulations. Further, we do not believe sufficient biological information is available to warrant changes to the boundary at the scales proposed. However, if the Flyway Council believes the demographics of ducks have changed and may warrant a change in the boundary, we suggest that an assessment of data should be conducted that could inform a change at the Management Unit level.

4. Canada Geese

A. Special Seasons

Council Recommendations: The Atlantic Flyway Council recommended that the 10-day experimental season extension (September 16–25) of the special September Canada goose hunting season in Delaware become operational.

The Central Flyway Council recommended that we increase the daily bag limit framework from five to eight for North Dakota during the special early Canada goose hunting season in September.

The Pacific Flyway Council recommended increasing the daily bag limit in the Pacific Flyway portion of Colorado from three geese to four geese, and increasing the possession limit from six to eight birds during the special September season.

Service Response: We agree with the Atlantic Flyway Council's recommendation that Delaware's September Canada goose season become operational. As the Council notes in their recommendation, resident Canada geese remain overabundant in many areas of the Flyway. The current population exceeds approximately 1 million while the goal in the Atlantic Flyway Resident Canada Goose Management Plan is 650,000 geese. Approval of this season would be consistent with the current management plan. Specifically in Delaware, the resident Canada goose population has continued to increase with a 2010 population index of 10,880 birds, well above the breeding population goal of 1,000 birds. Further, results of the 3-year experimental extension (2008–10) demonstrated that the harvest during this season is comprised of predominately resident geese and meets the current criteria established for Special Canada Goose Seasons. Band recovery data also indicated that no direct recovery of Atlantic Population (AP)-banded geese occurred during the entire 3-year experimental timeframe. We concur that making the season operational would help maximize harvest of resident Canada geese within Delaware, with minimal to no additional impact to migrant geese, while also increasing hunting opportunities.

We also agree with the Central Flyway Council's request to increase the Canada goose daily bag limit in North Dakota. Last year, we increased the daily bag limit in South Dakota, Nebraska, Kansas, and Oklahoma during their special early Canada goose seasons (75 FR 52873, August 30, 2010). The Special Early Canada Goose hunting season is generally designed to reduce or control overabundant resident Canada geese populations. Increasing the daily bag limit from 5 to 8 geese may help North Dakota reduce or control existing high populations of resident Canada geese, which are currently in excess of 325,000 geese (May 2010 estimate) with a population objective of 60,000–100,000.

Regarding the increase in the daily bag limit in Colorado, we agree. As the Pacific Flyway Council notes in their recommendation, the 2010 Rocky Mountain Population (RMP) breeding population index (BPI) was 143,842, a 15 percent increase from the 2009 index of 124,684, but 10 percent below the 3-year average BPI of 160,434. Further, while the 2011 RMP Midwinter Index (MWI) of 124,427 showed a 17 percent decrease from the previous year's index of 149,831, and the 2011 RMP MWI was 7 percent below its running 3-year average of 133,312 geese, this total is still well above the level in the management plan which allows for harvest liberalization (80,000). Further, population index data and estimated harvest effects support increasing the bag and possession limits in Colorado. In the past 3 years, while counts from the spring breeding survey have stayed relatively stable, post-hunting indices collected as part of the mid-winter survey have increased. An increase in the daily bag limit is expected to result in minimal increases in Canada goose harvest rates.

B. Regular Seasons

Council Recommendations: The Mississippi Flyway Council recommended that the framework opening date for all species of geese for the regular goose seasons in Michigan and Wisconsin be September 16, 2011.

Service Response: We concur. Michigan, beginning in 1998, and Wisconsin, beginning in 1989, have opened their regular Canada goose seasons prior to the Flyway-wide framework opening date to address resident goose management concerns in these States. As we have previously stated (73 FR 50678, August 27, 2008), we agree with the objective to increase harvest pressure on resident Canada geese in the Mississippi Flyway and will continue to consider the opening dates in both States as exceptions to the general Flyway opening date, to be reconsidered annually. We note that the most recent resident Canada goose estimate for the Mississippi Flyway was 1.61 million birds in 2010, which was 10 percent higher than the 2009 estimate, and well above the Flyway's population goal of 1.18 to 1.40 million birds.

9. Sandhill Cranes

Council Recommendations: The Mississippi Flyway Council recommended a 3-year experimental 30-day sandhill crane season for the Eastern Population (EP) of sandhill cranes in Kentucky beginning in the 2011–12 season.

The Central and Pacific Flyway Councils recommend using the 2011 Rocky Mountain Population (RMP) sandhill crane harvest allocation of 1,771 birds as proposed in the allocation formula described in the management plan for this population. The Councils also recommended the establishment of two new hunting areas for RMP greater sandhill crane hunting in Montana: the addition of Golden Valley County to an existing RMP sandhill crane hunting unit, and the establishment of a new RMP sandhill crane hunting unit in Broadwater County.

The Pacific Flyway Council recommended not allowing a limited hunt for Lower Colorado River Valley Population (LCRVP) Sandhill Cranes in Arizona during the 2011–12 hunting season. Survey results indicate the 3-year average population estimate is below the 2,500 birds required by the EA and management plan to hunt this population.

Written Comments: The International Crane Foundation (ICF) and several individuals commented that no population modeling had been done for EP sandhill cranes and that the proposed harvest in Kentucky could consume a substantial portion of the productivity of the EP breeding crane population in the Upper Midwest. The ICF presented information on crane reproductive rates from a small study area and cautioned that productivity of EP sandhill cranes may be too low to support a sustainable hunt. The ICF also believed that data on the origin of birds that would be harvested in Kentucky were incomplete. The ICF also provided several comments regarding the development of the EP crane management plan and cautioned that the management plan could allow a 50 percent reduction of the EP crane population. They questioned the appropriateness of the population goal in the management plan and whether it would satisfy the desires of some States that want to expand crane numbers. Several commenters also criticized the adequacy of the annual survey used to monitor the EP sandhill cranes.

The ICF and the Kentucky Resources Council (KRC) commented that the Kentucky proposal did not include details about the degree of public participation that would be sought in the decision regarding if and how to hunt cranes; that sufficient public input had not be solicited to date; and that the Service should defer on the decision to hunt cranes. In addition, several commenters were critical to the degree to which the State of Kentucky provided for public input.

The KRC noted that the new Supplemental Environmental Impact Statement (EIS) for the migratory bird hunting program has not been finalized, and that given the significant scientific uncertainties associated with Kentucky's proposal, and the fact that there is a distinct possibility the sandhill crane hunt might result in the taking of endangered whooping cranes, an EIS should be developed to evaluate a full range of reasonable management alternatives for EP sandhill cranes. The KRC also urged us to include a wider range of management alternatives in the Environmental Assessment including an alternative that advocates a one-year experimental hunt and evaluation, and another alternative to postpone the proposed Kentucky hunt until scientific concerns are addressed.

Several other non-governmental organizations; 337 individuals from Alaska, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kentucky, Massachusetts, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, Washington, and Wisconsin; and several petitions containing signatures from over 3,000 people expressed both general and specific concerns about the scientific uncertainty of the Kentucky proposal, the EP Sandhill Crane Management Plan, and the potential taking of whooping cranes. All expressed opposition to the establishment of a new sandhill crane season in Kentucky.

Service Response: Last year, the Atlantic and Mississippi Flyway Councils adopted a management plan for EP cranes. This year, Kentucky has submitted a crane hunt proposal to both Flyways that follows the hunt plan guidelines and calls for a 30-day season with a maximum harvest of 400 cranes. We support the Kentucky crane hunt proposal. Total anticipated harvest and crippling loss would be less than 1 percent of the current 3-year average population index for EP cranes (51,217 cranes), well below the level of harvest of other crane populations (*e.g.*, MCP harvest is 6.7 percent of the population size, while RMP is 4.9 percent).

We prepared an environmental assessment (EA) on the hunting of EP sandhill cranes as allowed under the management plan. Specifics of the two alternatives we analyzed can be found on our Web site at <http://www.fws.gov/migratorybirds>, or at <http://www.regulations.gov>. Our EA outlines two different approaches for assessing the ability of the EP crane population to withstand the level of harvest contained in the EP management plan: (1) The potential biological removal allowance method; and (2) a simple population

model using fall survey data and annual survival rates. The EA concluded that the anticipated combined level of harvest and crippling loss in Kentucky could be sustained by the proposed hunt. Furthermore, population modeling indicated that any harvest below 2,000 birds would still result in a growing population of EP cranes. At a harvest level of 2,500 birds per year it would take over 30 years for the population to decline to 30,000 cranes. Therefore, we do not believe the proposed limited harvest will negatively impact population growth and that crane numbers will continue to increase in many States. We further note that the harvest of cranes in Kentucky will be controlled by a mandatory tagging and phone reporting system, which will ensure that the harvest objective of 400 birds is not exceeded, and that the season would be closed early if the harvest objective is met before 30 days.

With regard to adding two additional management alternatives to the EA, we note that experimental hunts for migratory bird populations are typically three years in duration to allow adequate data collection for assessment. Thus, the EP crane management plan also allows new experimental hunts to be three years in duration. We believe that the addition of a new alternative that would postpone the hunt until scientific concerns are addressed is no different than the No Action alternative analyzed in the EA. Our EA also addresses many of the scientific concerns raised by commenters and we further note that research continues to be conducted on EP cranes to improve management.

With regard to the adequacy of the Service's annual survey of EP sandhill cranes, we note that the annual count is conducted within a relatively narrow time frame to minimize potential double counting of birds. Although the survey design does not allow estimation of a total population size, the count represents a minimum population estimate and the true population size is undoubtedly higher. The annual survey continues to show a positive trend in the population; a result which is corroborated by trends indicated by the Breeding Bird Survey and Christmas Bird Count. Regarding the origin of cranes harvested in Kentucky, we note that EP cranes are managed as one population and that no monitoring at the sub-population level is required, or necessary, by the EP management plan. Thus, we believe that we have fulfilled our National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) obligation with the preparation of an EA.

With regard to the potential taking of endangered whooping cranes, we point out that whooping cranes that migrate through Kentucky are part of the experimental nonessential population of whooping cranes (NEP). In 2001, the Service announced its intent to reintroduce whooping cranes (*Grus americana*) into historic habitat in the eastern United States with the intent to establish a migratory flock that would summer and breed in Wisconsin, and winter in west-central Florida (66 FR 14107, March 9, 2001). We designated this reintroduced population as an NEP according to section 10(j) of the Endangered Species Act of 1973 (Act; 16 U.S.C. 1531 *et seq.*), as amended. Mississippi and Atlantic Flyway States within the NEP area maintain their management prerogatives regarding the whooping crane (66 FR 33910, June 26, 2001). They are not directed by the reintroduction program to take any specific actions to provide any special protective measures, nor are they prevented from imposing restrictions under State law, such as protective designations, and area closures. However, the season dates contained in the Kentucky proposal were chosen such that they would begin approximately 3 weeks after whooping cranes have normally migrated through the State, hereby reducing the likelihood that sandhill crane hunters would encounter whooping cranes. Kentucky has also opted to delay legal shooting hours until sunrise to ensure bird identification under any weather conditions and Kentucky will require all hunters to pass an online identification test prior to being issued any permit to hunt sandhill cranes.

Lastly, comments regarding the adequacy of the public input process provided by the Kentucky Department of Fish and Wildlife Resources (KDFWR) to establish State hunting regulations and to comply with any State-mandated administrative processes are not subject to our oversight or instruction. We have no control or authority over how KDFWR conducts their public participation process. We do, however, note that all Kentucky citizens have had the opportunity to comment on our proposed rule and draft EA on the EP sandhill crane harvest.

We also agree with the Central and Pacific Flyway Councils' recommendations on the RMP sandhill crane harvest allocation of 1,771 birds for the 2011–12 season, as outlined in the RMP sandhill crane management plan's harvest allocation formula. The objective for the RMP sandhill crane is to manage for a stable population index

of 17,000–21,000 cranes determined by an average of the three most recent, reliable September (fall pre-migration) surveys. Additionally, the RMP sandhill crane management plan allows for the regulated harvest of cranes when the population index exceeds 15,000 cranes. In 2010, 21,064 cranes were counted in the September survey and the most recent 3-year average for the RMP sandhill crane fall index is 20,847 birds. Both of the new hunt areas in Montana are allowed under the management plan.

Regarding the proposal to discontinue the limited hunt for LCRVP cranes in Arizona this year, we agree. In 2007, the Pacific Flyway Council recommended, and we approved, the establishment of a limited hunt for the LCRVP sandhill cranes in Arizona (72 FR 49622, August 28, 2007). However, due to problems that year with the population inventory on which the LCRVP hunt plan is based, the Arizona Game and Fish Department chose to not conduct the hunt in 2007, and sought approval from the Service again in 2008, to begin conducting the hunt. We subsequently again approved the limited hunt (73 FR 50678, August 27, 2008). Then, due to complications encountered with the proposed initiation of this new season occurring during litigation regarding opening new hunting seasons on Federal National Wildlife Refuges, the experimental limited hunt season was not opened in 2008. Thus, in 2009, the State of Arizona requested that 2009–12 be designated as the new experimental period and designated an area under State control where the experimental hunt would be conducted. Last year, Arizona did implement the planned limited hunt; however, no cranes were harvested.

This year, the LCRVP survey results indicate that the 3-year average of LCRVP cranes is below the population objective of 2,500. Thus, while we continue to support the 3-year experimental framework for this hunt, conditional on successful monitoring being conducted as called for in the Flyway hunt plan for this population, we concur with the Pacific Flyway Council that the hunt should not be held this year.

14. Woodcock

Council Recommendations: The Atlantic Flyway Council recommended adoption of the "moderate" season package of 45 days with a 3-bird daily bag limit in the Eastern Management Region for the 2011–12 season as outlined in the Interim American Woodcock Harvest Strategy (available at <http://www.fws.gov/migratorybirds/>

NewsPublicationsReports.html). They also recommended that States previously allowed to zone for woodcock be allowed to continue that arrangement with the associated 20-percent penalty in season length (*i.e.*, 36 days in each of New Jersey's zones).

Service Response: We agree with the Council's recommendation. Last year, following review and comment by the Flyway Councils and the public, we adopted an interim harvest strategy for woodcock beginning in the 2011–12 hunting season for a period of 5 years (2011–15) (75 FR 52873, August 30, 2010). Specifics of the interim harvest strategy can be found at <http://www.fws.gov/migratorybirds/NewsPublicationsReports.html>. This year, based on the status of woodcock, the interim strategy calls for selection of the "moderate" season package in both the Eastern and Central Management Units.

As we stated last year, the interim harvest strategy provides a transparent framework for making regulatory decisions for woodcock season length and bag limits while we work to improve monitoring and assessment protocols for this species.

16. Mourning Doves

Council Recommendations: The Atlantic and Mississippi Flyway Councils recommended use of the "moderate" season framework for States within the Eastern Management Unit population of mourning doves resulting in a 70-day season and 15-bird daily bag limit. The daily bag limit could be composed of mourning doves and white-winged doves, singly or in combination.

The Mississippi and Central Flyway Councils recommend the use of the standard (or "moderate") season package of a 15-bird daily bag limit and a 70-day season for the 2011–12 mourning dove season in the States within the Central Management Unit. The Central Flyway Council also recommended that the opening date for the South Dove Zone in Texas be the Friday before the third Saturday in September.

The Pacific Flyway Council recommended use of the "moderate" season framework for States in the Western Management Unit (WMU) population of mourning doves, which represents no change from last year's frameworks. The Council also recommended combining mourning and white-winged dove season frameworks into a single framework, and allowing an aggregate bag in all Pacific Flyway States in the WMU.

Service Response: In 2008, we accepted and endorsed the interim harvest strategies for the Central, Eastern, and Western Management Units (73 FR 50678, August 27, 2008). As we stated then, the interim mourning dove harvest strategies are a step towards implementing the Mourning Dove National Strategic Harvest Plan (Plan) that was approved by all four Flyway Councils in 2003. The Plan represents a new, more informed means of decision-making for dove harvest management besides relying solely on traditional roadside counts of mourning doves as indicators of population trend. However, recognizing that a more comprehensive, national approach would take time to develop, we requested the development of interim harvest strategies, by management unit, until the elements of the Plan can be fully implemented. In 2009, the interim harvest strategies were successfully employed and implemented in all three Management Units (74 FR 36870, July 24, 2009).

This year, based on the interim harvest strategies and current population status, we agree with the recommended selection of the "moderate" season frameworks for doves in the Eastern, Central, and Western Management Units.

Regarding the Central Flyway Council's recommendation to move the opening date for the South Dove Zone in Texas from the Saturday nearest September 20 (but not earlier than September 17) to the Friday before the third Saturday in September, we do not support the Council's recommendation. We remain concerned about the potential impact on the recruitment of late-nesting doves when opening hunting seasons earlier than the State currently does. We believe that additional biological information should be collected to assess potential biological impacts before making additional changes to the opening date.

Lastly, we concur with the Pacific Flyway Council's recommendation to combine mourning and white-winged dove season frameworks into a single framework, and allow an aggregate bag in all Pacific Flyway States in the WMU. We believe this change will simplify the frameworks for use by the States when selecting seasons. Further, we have applied this change to all dove frameworks in all management units (see the Doves framework section of this final rule for further information).

18. Alaska

Council Recommendations: The Pacific Flyway Council recommended removal of Canada goose daily bag limit

restrictions within the overall dark goose daily bag limit in Units 9, 10, 17, and 18. In these Units, the dark goose limits would be 6 geese per day, with 12 geese in possession.

Written Comments: The North Slope Borough questioned the Service's insistence on classifying Alaska's migratory bird hunting as either spring and summer hunting (*i.e.*, subsistence hunting) or fall and winter hunting (*i.e.*, sport hunting) and urged the Service to accommodate subsistence hunters by modifying the regulations to continue subsistence hunting (contained in 50 CFR part 92) after September 1.

Service Response: We concur with the proposed removal of the Canada goose daily bag limit restrictions within the overall dark goose daily bag limit. We agree with the Council that cackling geese restrictions on primary breeding and staging areas are not warranted given recent reassessments of population data and the fact that Alaska's Units 9, 10, 17, and 18 have very little Canada goose sport harvest. We expect the harvest increase in Alaska will be small.

Regarding the comments from the North Slope Borough, we acknowledge the North Slope Borough's concerns, and will respond in more detail in the forthcoming rule for "Harvest Regulations for Migratory Birds in Alaska During the 2012 Season." We also acknowledge that the response to this comment will occur after the regulations for subpart D of 50 CFR part 92 are no longer effective for this year. We encourage the North Slope Borough to contact us this fall when the Service proposes new Alaska subsistence regulations for 2012 to possibly resolve the issues they raise.

22. Falconry

Written Comments: An individual proposed adding a spring hunting season for falconers, primarily in March. Another individual requested that falconers be allowed the same daily bag limits as gun hunters.

Service Response: Currently, we allow falconry as a permitted means of taking migratory game birds in any State meeting Federal falconry standards in 50 CFR 21.29. Such States may select an extended season for taking migratory game birds as long as the combined length of the extended season, regular season, and any special or experimental seasons does not exceed 107 days for any species or group of species in a geographical area. In addition, all such seasons must fall between September 1 and March 10, as stipulated in the Migratory Bird Treaty (Treaty). We note that in those States that already

experience 107-day seasons (*i.e.*, ducks in the Pacific Flyway), there is no opportunity for extended falconry seasons. Further, given the Treaty limitations, no hunting seasons (including falconry) may extend past March 10.

Regarding the daily bag limit for falconers, while we understand the concerns expressed, at this time we are not supporting any changes to the daily bag limit. We note that falconers are generally afforded much longer seasons than gun hunters for most species in most Flyways. Further, to our knowledge, we have not received any requests from either the Flyway Councils or States requesting such a change.

NEPA Consideration

NEPA considerations are covered by the programmatic document "Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88-14)," filed with the Environmental Protection Agency on June 9, 1988. We published a notice of availability in the **Federal Register** on June 16, 1988 (53 FR 22582). We published our Record of Decision on August 18, 1988 (53 FR 31341). In addition, an August 1985 environmental assessment entitled "Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands" is available from the address indicated under the caption **FOR FURTHER INFORMATION CONTACT**.

In a notice published in the September 8, 2005, **Federal Register** (70 FR 53376), we announced our intent to develop a new Supplemental Environmental Impact Statement (SEIS) for the migratory bird hunting program. Public scoping meetings were held in the spring of 2006, as detailed in a March 9, 2006, **Federal Register** (71 FR 12216). We released the draft SEIS on July 9, 2010 (75 FR 39577). The draft SEIS is available either by writing to the address indicated under **FOR FURTHER INFORMATION CONTACT** or by viewing our Web site at <http://www.fws.gov/migratorybirds>.

Endangered Species Act Consideration

Section 7 of the Endangered Species Act, as amended (16 U.S.C. 1531-1543; 87 Stat. 884), provides that, "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act" (and) shall "insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered

species or threatened species or result in the destruction or adverse modification of [critical] habitat. * * *."

Consequently, we conducted formal consultations to ensure that actions resulting from these regulations would not likely jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat. Findings from these consultations are included in a biological opinion, which concluded that the regulations are not likely to jeopardize the continued existence of any endangered or threatened species. Additionally, these findings may have caused modification of some regulatory measures previously proposed, and the final frameworks reflect any such modifications. Our biological opinions resulting from this section 7 consultation are public documents available for public inspection at the address indicated under **ADDRESSES**.

Executive Order 12866

The Office of Management and Budget has determined that this rule is significant and has reviewed this rule under Executive Order 12866. OMB bases its determination of regulatory significance upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

An economic analysis was prepared for the 2008-09 season. This analysis was based on data from the 2006 National Hunting and Fishing Survey, the most recent year for which data are available (see discussion in Regulatory Flexibility Act section below). This analysis estimated consumer surplus for three alternatives for duck hunting (estimates for other species are not quantified due to lack of data). The alternatives are (1) Issue restrictive regulations allowing fewer days than those issued during the 2007-08 season, (2) Issue moderate regulations allowing more days than those in alternative 1, and (3) Issue liberal regulations identical to the regulations in the 2007-08 season. For the 2008-09 season, we chose alternative 3, with an estimated

consumer surplus across all flyways of \$205-\$270 million. We also chose alternative 3 for the 2009-10 and the 2010-11 seasons. At this time, we are proposing no changes to the season frameworks for the 2011-12 season, and as such, we will again consider these three alternatives. However, final frameworks for waterfowl will be dependent on population status information available later this year. For these reasons, we have not conducted a new economic analysis, but the 2008-09 analysis is part of the record for this rule and is available at <http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/SpecialTopics.html#HuntingRegs> or at <http://www.regulations.gov> at Docket No. FWS-R9-MB-2011-0014.

Regulatory Flexibility Act

The annual migratory bird hunting regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We analyzed the economic impacts of the annual hunting regulations on small business entities in detail as part of the 1981 cost-benefit analysis. This analysis was revised annually from 1990-95. In 1995, the Service issued a Small Entity Flexibility Analysis (Analysis), which was subsequently updated in 1996, 1998, 2004, and 2008. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The 2008 Analysis was based on the 2006 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns, from which it was estimated that migratory bird hunters would spend approximately \$1.2 billion at small businesses in 2008. Copies of the Analysis are available upon request from the Division of Migratory Bird Management (see **ADDRESSES**) or from our Web site at <http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/SpecialTopics.html#HuntingRegs> or at <http://www.regulations.gov> at Docket No. FWS-R9-MB-2011-0014.

Small Business Regulatory Enforcement Fairness Act

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule would have an annual effect on the economy of \$100 million or more. However, because this rule would establish hunting seasons, we do not

plan to defer the effective date under the exemption contained in 5 U.S.C. 808(1).

Paperwork Reduction Act

We examined these regulations under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The various recordkeeping and reporting requirements imposed under regulations established in 50 CFR part 20, subpart K, are utilized in the formulation of migratory game bird hunting regulations. Specifically, OMB has approved the information collection requirements of our Migratory Bird Surveys and assigned control number 1018-0023 (expires 4/30/2014). This information is used to provide a sampling frame for voluntary national surveys to improve our harvest estimates for all migratory game birds in order to better manage these populations. OMB has also approved the information collection requirements of the Alaska Subsistence Household Survey, an associated voluntary annual household survey used to determine levels of subsistence take in Alaska, and assigned control number 1018-0124 (expires 4/30/2013).

A Federal 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.

Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking would not impose a cost of \$100 million or more in any given year on local or State government or private entities. Therefore, this rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Civil Justice Reform—Executive Order 12988

The Department, in promulgating this rule, has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings Implication Assessment

In accordance with Executive Order 12630, this rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule would not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules would allow hunters to exercise

otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

Energy Effects—Executive Order 13211

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this rule is a significant regulatory action under Executive Order 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated possible effects on Federally-recognized Indian tribes and have determined that there are no effects on Indian trust resources. However, in the April 8 **Federal Register**, we solicited proposals for special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2011-12 migratory bird hunting season. The resulting proposals were contained in a separate August 8, 2011, proposed rule (76 FR 48694). By virtue of these actions, we have consulted with Tribes affected by this rule.

Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and tribes to determine which seasons meet their individual needs. Any State or Indian tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy

or administration. Therefore, in accordance with Executive Order 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement.

Regulations Promulgation

The rulemaking process for migratory game bird hunting must, by its nature, operate under severe time constraints. However, we intend that the public be given the greatest possible opportunity to comment. Thus, when the preliminary proposed rulemaking was published, we established what we believed were the longest periods possible for public comment. In doing this, we recognized that when the comment period closed, time would be of the essence. That is, if there were a delay in the effective date of these regulations after this final rulemaking, States would have insufficient time to select season dates and limits; to communicate those selections to us; and to establish and publicize the necessary regulations and procedures to implement their decisions. We therefore find that "good cause" exists, within the terms of 5 U.S.C. 553(d)(3) of the Administrative Procedure Act, and these frameworks will, therefore, take effect immediately upon publication.

Therefore, under authority of the Migratory Bird Treaty Act (July 3, 1918), as amended (16 U.S.C. 703-711), we prescribe final frameworks setting forth the species to be hunted, the daily bag and possession limits, the shooting hours, the season lengths, the earliest opening and latest closing season dates, and hunting areas, from which State conservation agency officials will select hunting season dates and other options. Upon receipt of season selections from these officials, we will publish a final rulemaking amending 50 CFR part 20 to reflect seasons, limits, and shooting hours for the conterminous United States for the 2011-12 season.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 2011-12 hunting season are authorized under 16 U.S.C. 703-712 and 16 U.S.C. 742a-j.

Dated: August 16, 2011.

Jane Lyder,

Acting Assistant Secretary for Fish and Wildlife and Parks.

Final Regulations Frameworks for 2011–12 Early Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department of the Interior approved the following proposed frameworks, which prescribe season lengths, bag limits, shooting hours, and outside dates within which States may select hunting seasons for certain migratory game birds between September 1, 2011, and March 10, 2012.

General

Dates: All outside dates noted below are inclusive.

Shooting and Hawking (taking by falconry) Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are twice the daily bag limit.

Permits: For some species of migratory birds, the Service authorizes the use of permits to regulate harvest or monitor their take by sport hunters, or both. In many cases (*e.g.*, tundra swans, some sandhill crane populations), the Service determines the amount of harvest that may be taken during hunting seasons during its formal regulations-setting process, and the States then issue permits to hunters at levels predicted to result in the amount of take authorized by the Service. Thus, although issued by States, the permits would not be valid unless the Service approved such take in its regulations.

These Federally authorized, State-issued permits are issued to individuals, and only the individual whose name and address appears on the permit at the time of issuance is authorized to take migratory birds at levels specified in the permit, in accordance with provisions of both Federal and State regulations governing the hunting season. The permit must be carried by the permittee when exercising its provisions and must be presented to any law enforcement officer upon request. The permit is not transferrable or assignable to another individual, and may not be sold, bartered, traded, or otherwise provided to another person. If the permit is altered or defaced in any way, the permit becomes invalid.

Flyways and Management Units

Waterfowl Flyways

Atlantic Flyway—includes Connecticut, Delaware, Florida, Georgia,

Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Mississippi Flyway—includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

Central Flyway—includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

Pacific Flyway—includes Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming not included in the Central Flyway.

Management Units

Mourning Dove Management Units

Eastern Management Unit—All States east of the Mississippi River, and Louisiana.

Central Management Unit—Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

Western Management Unit—Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

Woodcock Management Regions

Eastern Management Region—Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Central Management Region—Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin.

Other geographic descriptions are contained in a later portion of this document.

Definitions

Dark geese: Canada geese, white-fronted geese, brant (except in Alaska, California, Oregon, Washington, and the Atlantic Flyway), and all other goose species, except light geese.

Light geese: snow (including blue) geese and Ross's geese.

Waterfowl Seasons in the Atlantic Flyway

In the Atlantic Flyway States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, and Virginia, where Sunday hunting is prohibited Statewide by State law, all Sundays are closed to all take of migratory waterfowl (including mergansers and coots).

Special September Teal Season

Outside Dates: Between September 1 and September 30, an open season on all species of teal may be selected by the following States in areas delineated by State regulations:

Atlantic Flyway—Delaware, Florida, Georgia, Maryland, North Carolina, South Carolina, and Virginia.

Mississippi Flyway—Alabama, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Tennessee.

Central Flyway—Colorado (part), Kansas, Nebraska (part), New Mexico (part), Oklahoma, and Texas.

Hunting Seasons and Daily Bag Limits: Not to exceed 16 consecutive hunting days in the Atlantic, Mississippi, and Central Flyways. The daily bag limit is 4 teal.

Shooting Hours:

Atlantic Flyway—One-half hour before sunrise to sunset, except in Maryland, where the hours are from sunrise to sunset.

Mississippi and Central Flyways—One-half hour before sunrise to sunset, except in the States of Arkansas, Illinois, Indiana, Missouri, and Ohio, where the hours are from sunrise to sunset.

Special September Duck Seasons

Florida, Kentucky and Tennessee: In lieu of a special September teal season, a 5-consecutive-day season may be selected in September. The daily bag limit may not exceed 4 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks.

Iowa: Iowa may hold up to 5 days of its regular duck hunting season in September. All ducks that are legal during the regular duck season may be taken during the September segment of the season. The September season segment may commence no earlier than the Saturday nearest September 20 (September 17). The daily bag and possession limits will be the same as those in effect last year but are subject to change during the late-season regulations process. The remainder of the regular duck season may not begin before October 10.

Special Youth Waterfowl Hunting Days

Outside Dates: States may select 2 days per duck-hunting zone, designated as "Youth Waterfowl Hunting Days," in addition to their regular duck seasons. The days must be held outside any regular duck season on a weekend, holidays, or other non-school days when youth hunters would have the maximum opportunity to participate. The days may be held up to 14 days before or after any regular duck-season frameworks or within any split of a regular duck season, or within any other open season on migratory birds.

Daily Bag Limits: The daily bag limits may include ducks, geese, mergansers, coots, moorhens, and gallinules and would be the same as those allowed in the regular season. Flyway species and area restrictions would remain in effect.

Shooting Hours: One-half hour before sunrise to sunset.

Participation Restrictions: Youth hunters must be 15 years of age or younger. In addition, an adult at least 18 years of age must accompany the youth hunter into the field. This adult may not duck hunt but may participate in other seasons that are open on the special youth day.

Scoter, Eider, and Long-Tailed Ducks (Atlantic Flyway)

Outside Dates: Between September 15 and January 31.

Hunting Seasons and Daily Bag Limits: Not to exceed 107 days, with a daily bag limit of 7, singly or in the aggregate, of the listed sea duck species, of which no more than 4 may be scoters.

Daily Bag Limits During the Regular Duck Season: Within the special sea duck areas, during the regular duck season in the Atlantic Flyway, States may choose to allow the above sea duck limits in addition to the limits applying to other ducks during the regular duck season. In all other areas, sea ducks may be taken only during the regular open season for ducks and are part of the regular duck season daily bag (not to exceed 4 scoters) and possession limits.

Areas: In all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York; in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 1 mile of open water from any shore, island, and emergent vegetation in New Jersey, South Carolina, and Georgia; and in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 800 yards of open water from any shore, island, and

emergent vegetation in Delaware, Maryland, North Carolina, and Virginia; and provided that any such areas have been described, delineated, and designated as special sea duck hunting areas under the hunting regulations adopted by the respective States.

Special Early Canada Goose Seasons*Atlantic Flyway***General Seasons**

Canada goose seasons of up to 15 days during September 1–15 may be selected for the Eastern Unit of Maryland.

Seasons not to exceed 30 days during September 1–30 may be selected for Connecticut, Florida, Georgia, New Jersey, New York (Long Island Zone only), North Carolina, Rhode Island, and South Carolina. Seasons may not exceed 25 days during September 1–25 in the remainder of the Flyway. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Daily Bag Limits: Not to exceed 15 Canada geese.

Shooting Hours: One-half hour before sunrise to sunset, except that during any general season, shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

Mississippi Flyway**General Seasons**

Canada goose seasons of up to 15 days during September 1–15 may be selected, except in the Upper Peninsula in Michigan, where the season may not extend beyond September 10, and in Minnesota, where a season of up to 22 days during September 1–22 may be selected. The daily bag limit may not exceed 5 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

A Canada goose season of up to 10 consecutive days during September 1–10 may be selected by Michigan for Huron, Saginaw, and Tuscola Counties, except that the Shiawassee National Wildlife Refuge, Shiawassee River State Game Area Refuge, and the Fish Point Wildlife Area Refuge will remain closed. The daily bag limit may not exceed 5 Canada geese.

Shooting Hours: One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

Central Flyway**General Seasons**

In Kansas, Nebraska, Oklahoma, South Dakota, and Texas, Canada goose seasons of up to 30 days during September 1–30 may be selected. In Colorado, New Mexico, North Dakota, Montana, and Wyoming, Canada goose seasons of up to 15 days during September 1–15 may be selected. The daily bag limit may not exceed 5 Canada geese, except in Kansas, Nebraska, North Dakota, Oklahoma, and South Dakota, where the bag limit may not exceed 8 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Shooting Hours: One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

Pacific Flyway**General Seasons**

California may select a 9-day season in Humboldt County during the period September 1–15. The daily bag limit is 2.

Colorado may select a 9-day season during the period of September 1–15. The daily bag limit is 4.

Oregon may select a special Canada goose season of up to 15 days during the period September 1–15. In addition, in the NW Goose Management Zone in Oregon, a 15-day season may be selected during the period September 1–20. Daily bag limits may not exceed 5 Canada geese.

Idaho may select a 7-day season during the period September 1–15. The daily bag limit is 2, and the possession limit is 4.

Washington may select a special Canada goose season of up to 15 days during the period September 1–15. Daily bag limits may not exceed 5 Canada geese.

Wyoming may select an 8-day season on Canada geese during the period September 1–15. This season is subject to the following conditions:

A. Where applicable, the season must be concurrent with the September portion of the sandhill crane season.

B. A daily bag limit of 2, with season and possession limits of 4, will apply to the special season.

Areas open to hunting of Canada geese in each State must be described, delineated, and designated as such in each State's hunting regulations.

Regular Goose Seasons

Regular goose seasons may open as early as September 16 in Wisconsin and Michigan. Season lengths, bag and possession limits, and other provisions will be established during the late-season regulations process.

Sandhill Cranes**Regular Seasons in the Mississippi Flyway**

Outside Dates: Between September 1 and February 28.

Hunting Seasons: A season not to exceed 37 consecutive days may be selected in the designated portion of northwestern Minnesota (Northwest Goose Zone).

Daily Bag Limit: 2 sandhill cranes.

Permits: Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Experimental Seasons in the Mississippi Flyway

Outside Dates: Between September 1 and January 31.

Hunting Seasons: A season not to exceed 30 consecutive days may be selected in Kentucky.

Daily Bag Limit: Not to exceed 2 daily and 4 per season.

Permits: Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Other Provisions: Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with the management plan and approved by the Mississippi Flyway Council.

Regular Seasons in the Central Flyway

Outside Dates: Between September 1 and February 28.

Hunting Seasons: Seasons not to exceed 37 consecutive days may be selected in designated portions of North Dakota (Area 2) and Texas (Area 2). Seasons not to exceed 58 consecutive days may be selected in designated portions of the following States: Colorado, Kansas, Montana, North Dakota, South Dakota, and Wyoming. Seasons not to exceed 93 consecutive days may be selected in designated portions of the following States: New Mexico, Oklahoma, and Texas.

Daily Bag Limits: 3 sandhill cranes, except 2 sandhill cranes in designated portions of North Dakota (Area 2) and Texas (Area 2).

Permits: Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Special Seasons in the Central and Pacific Flyways

Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming may select seasons for hunting sandhill cranes within the range of the Rocky Mountain Population (RMP) subject to the following conditions:

Outside Dates: Between September 1 and January 31.

Hunting Seasons: The season in any State or zone may not exceed 30 consecutive days.

Bag limits: Not to exceed 3 daily and 9 per season.

Permits: Participants must have a valid permit, issued by the appropriate State, in their possession while hunting.

Other Provisions: Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with the management plan and approved by the Central and Pacific Flyway Councils, with the following exceptions:

A. In Utah, 100 percent of the harvest will be assigned to the RMP quota;

B. In Arizona, monitoring the racial composition of the harvest must be conducted at 3-year intervals;

C. In Idaho, 100 percent of the harvest will be assigned to the RMP quota; and

D. In New Mexico, the season in the Estancia Valley is experimental, with a requirement to monitor the level and racial composition of the harvest; greater sandhill cranes in the harvest will be assigned to the RMP quota.

Common Moorhens and Purple Gallinules

Outside Dates: Between September 1 and the last Sunday in January (January 29) in the Atlantic, Mississippi, and Central Flyways. States in the Pacific Flyway have been allowed to select their hunting seasons between the outside dates for the season on ducks; therefore, they are late season frameworks, and no frameworks are provided in this document.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 70 days in the Atlantic, Mississippi, and Central Flyways. Seasons may be split into 2 segments. The daily bag limit is 15 common moorhens and purple gallinules, singly or in the aggregate of the two species.

Zoning: Seasons may be selected by zones established for duck hunting.

Rails

Outside Dates: States included herein may select seasons between September 1 and the last Sunday in January (January 29) on clapper, king, sora, and Virginia rails.

Hunting Seasons: Seasons may not exceed 70 days, and may be split into 2 segments.

Daily Bag Limits: Clapper and King Rails—In Rhode Island, Connecticut, New Jersey, Delaware, and Maryland, 10, singly or in the aggregate of the 2 species. In Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Virginia, 15, singly or in the aggregate of the two species.

Sora and Virginia Rails—In the Atlantic, Mississippi, and Central Flyways and the Pacific Flyway portions of Colorado, Montana, New Mexico, and Wyoming, 25 daily and 25 in possession, singly or in the aggregate of the two species. The season is closed in the remainder of the Pacific Flyway.

Common Snipe

Outside Dates: Between September 1 and February 28, except in Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, and Virginia, where the season must end no later than January 31.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 107 days and may be split into two segments. The daily bag limit is 8 snipe.

Zoning: Seasons may be selected by zones established for duck hunting.

American Woodcock

Outside Dates: States in the Eastern Management Region may select hunting seasons between October 1 and January 31. States in the Central Management Region may select hunting seasons between the Saturday nearest September 22 (September 24) and January 31.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 45 days in the Eastern Region and 45 days in the Central Region. The daily bag limit is 3. Seasons may be split into two segments.

Zoning: New Jersey may select seasons in each of two zones. The season in each zone may not exceed 36 days.

Band-Tailed Pigeons**Pacific Coast States (California, Oregon, Washington, and Nevada)**

Outside Dates: Between September 15 and January 1.

Hunting Seasons and Daily Bag Limits: Not more than 9 consecutive days, with a daily bag limit of 2 band-tailed pigeons.

Zoning: California may select hunting seasons not to exceed 9 consecutive days in each of two zones. The season in the North Zone must close by October 3.

Four-Corners States (Arizona, Colorado, New Mexico, and Utah)

Outside Dates: Between September 1 and November 30.

Hunting Seasons and Daily Bag Limits: Not more than 30 consecutive days, with a daily bag limit of 5 band-tailed pigeons.

Zoning: New Mexico may select hunting seasons not to exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

Doves

Outside Dates: Between September 1 and January 15, except as otherwise provided, States may select hunting seasons and daily bag limits as follows:

Eastern Management Unit

Hunting Seasons and Daily Bag Limits: Not more than 70 days, with a daily bag limit of 15 mourning and white-winged doves in the aggregate.

Zoning and Split Seasons: States may select hunting seasons in each of two zones. The season within each zone may be split into not more than three periods. Regulations for bag and possession limits, season length, and shooting hours must be uniform within specific hunting zones.

Central Management Unit

For all States except Texas:

Hunting Seasons and Daily Bag Limits: Not more than 70 days, with a daily bag limit of 15 mourning and white-winged doves in the aggregate.

Zoning and Split Seasons: States may select hunting seasons in each of two zones. The season within each zone may be split into not more than three periods.

Texas:

Hunting Seasons and Daily Bag Limits: Not more than 70 days, with a daily bag limit of 15 mourning, white-winged, and white-tipped doves in the aggregate, of which no more than 2 may be white-tipped doves.

Zoning and Split Seasons: Texas may select hunting seasons for each of three zones subject to the following conditions:

A. The hunting season may be split into not more than two periods, except in that portion of Texas in which the special white-winged dove season is allowed, where a limited mourning dove season may be held concurrently with that special season (see Special White-winged Dove Area).

B. A season may be selected for the North and Central Zones between September 1 and January 25; and for the South Zone between the Friday nearest September 20 (September 23), but not

earlier than September 17, and January 25.

C. Except as noted above, regulations for bag and possession limits, season length, and shooting hours must be uniform within each hunting zone.

Special White-winged Dove Area in Texas:

In addition, Texas may select a hunting season of not more than 4 days for the special white-winged dove area of the South Zone between September 1 and September 19. The daily bag limit may not exceed 15 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 4 may be mourning doves and no more than 2 may be white-tipped doves.

Western Management Unit

Hunting Seasons and Daily Bag Limits:

Idaho, Nevada, Oregon, Utah, and Washington—Not more than 30 consecutive days, with a daily bag limit of 10 mourning and white-winged doves in the aggregate.

Arizona and California—Not more than 60 days, which may be split between two periods, September 1–15 and November 1–January 15. In Arizona, during the first segment of the season, the daily bag limit is 10 mourning and white-winged doves in the aggregate. During the remainder of the season, the daily bag limit is 10 mourning doves. In California, the daily bag limit is 10 mourning and white-winged doves in the aggregate.

Alaska

Outside Dates: Between September 1 and January 26.

Hunting Seasons: Alaska may select 107 consecutive days for waterfowl, sandhill cranes, and common snipe in each of 5 zones. The season may be split without penalty in the Kodiak Zone. The seasons in each zone must be concurrent.

Closures: The hunting season is closed on emperor geese, spectacled eiders, and Steller's eiders.

Daily Bag and Possession Limits:

Ducks—Except as noted, a basic daily bag limit of 7 and a possession limit of 21 ducks. Daily bag and possession limits in the North Zone are 10 and 30, and in the Gulf Coast Zone, they are 8 and 24. The basic limits may include no more than 1 canvasback daily and 3 in possession and may not include sea ducks.

In addition to the basic duck limits, Alaska may select sea duck limits of 10 daily, 20 in possession, singly or in the aggregate, including no more than 6 each of either harlequin or long-tailed ducks. Sea ducks include scoters,

common and king eiders, harlequin ducks, long-tailed ducks, and common and red-breasted mergansers.

Light Geese—A basic daily bag limit of 4 and a possession limit of 8.

Dark Geese—A basic daily bag limit of 4 and a possession limit of 8.

Dark-geese seasons are subject to the following exceptions:

A. In Units 5 and 6, the taking of Canada geese is permitted from September 28 through December 16.

B. On Middleton Island in Unit 6, a special, permit-only Canada goose season may be offered. A mandatory goose identification class is required. Hunters must check in and check out. The bag limit is 1 daily and 1 in possession. The season will close if incidental harvest includes 5 dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value five or less) with a bill length between 40 and 50 millimeters.

C. In Units 6–B, 6–C, and on Hinchinbrook and Hawkins Islands in Unit 6–D, a special, permit-only Canada goose season may be offered. Hunters must have all harvested geese checked and classified to subspecies. The daily bag limit is 4 daily and 8 in possession. The Canada goose season will close in all of the permit areas if the total dusky goose (as defined above) harvest reaches 40.

D. In Units 9, 10, 17, and 18, dark goose limits are 6 per day, 12 in possession.

Brant—A daily bag limit of 2 and a possession limit of 4.

Common snipe—A daily bag limit of 8.

Sandhill cranes—Bag and possession limits of 2 and 4, respectively, in the Southeast, Gulf Coast, Kodiak, and Aleutian Zones, and Unit 17 in the Northern Zone. In the remainder of the Northern Zone (outside Unit 17), bag and possession limits of 3 and 6, respectively.

Tundra Swans—Open seasons for tundra swans may be selected subject to the following conditions:

A. All seasons are by registration permit only.

B. All season framework dates are September 1—October 31.

C. In Game Management Unit (GMU) 17, no more than 200 permits may be issued during this operational season. No more than 3 tundra swans may be authorized per permit, with no more than 1 permit issued per hunter per season.

D. In Game Management Unit (GMU) 18, no more than 500 permits may be issued during the operational season. Up to 3 tundra swans may be authorized

per permit. No more than 1 permit may be issued per hunter per season.

E. In GMU 22, no more than 300 permits may be issued during the operational season. Each permittee may be authorized to take up to 3 tundra swans per permit. No more than 1 permit may be issued per hunter per season.

F. In GMU 23, no more than 300 permits may be issued during the operational season. No more than 3 tundra swans may be authorized per permit, with no more than 1 permit issued per hunter per season.

Hawaii

Outside Dates: Between October 1 and January 31.

Hunting Seasons: Not more than 65 days (75 under the alternative) for mourning doves.

Bag Limits: Not to exceed 15 (12 under the alternative) mourning doves.

Note: Mourning doves may be taken in Hawaii in accordance with shooting hours and other regulations set by the State of Hawaii, and subject to the applicable provisions of 50 CFR part 20.

Puerto Rico

Doves and Pigeons

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days.

Daily Bag and Possession Limits: Not to exceed 20 Zenaida, mourning, and white-winged doves in the aggregate, of which not more than 10 may be Zenaida doves and 3 may be mourning doves. Not to exceed 5 scaly-naped pigeons.

Closed Seasons: The season is closed on the white-crowned pigeon and the plain pigeon, which are protected by the Commonwealth of Puerto Rico.

Closed Areas: There is no open season on doves or pigeons in the following areas: Municipality of Culebra, Desecheo Island, Mona Island, El Verde Closure Area, and Cidra Municipality and adjacent areas.

Ducks, Coots, Moorhens, Gallinules, and Snipe

Outside Dates: Between October 1 and January 31.

Hunting Seasons: Not more than 55 days may be selected for hunting ducks, common moorhens, and common snipe. The season may be split into two segments.

Daily Bag Limits:

Ducks—Not to exceed 6.

Common moorhens—Not to exceed 6.

Common snipe—Not to exceed 8.

Closed Seasons: The season is closed on the ruddy duck, white-cheeked

pintail, West Indian whistling duck, fulvous whistling duck, and masked duck, which are protected by the Commonwealth of Puerto Rico. The season also is closed on the purple gallinule, American coot, and Caribbean coot.

Closed Areas: There is no open season on ducks, common moorhens, and common snipe in the Municipality of Culebra and on Desecheo Island.

Virgin Islands

Doves and Pigeons

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days for Zenaida doves.

Daily Bag and Possession Limits: Not to exceed 10 Zenaida doves.

Closed Seasons: No open season is prescribed for ground or quail doves or pigeons.

Closed Areas: There is no open season for migratory game birds on Ruth Cay (just south of St. Croix).

Local Names for Certain Birds: Zenaida dove, also known as mountain dove; bridled quail-dove, also known as Barbary dove or partridge; common ground-dove, also known as stone dove, tobacco dove, rola, or tortolita; scaly-naped pigeon, also known as red-necked or scaled pigeon.

Ducks

Outside Dates: Between December 1 and January 31.

Hunting Seasons: Not more than 55 consecutive days.

Daily Bag Limits: Not to exceed 6.

Closed Seasons: The season is closed on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck.

Special Falconry Regulations

Falconry is a permitted means of taking migratory game birds in any State meeting Federal falconry standards in 50 CFR 21.29. These States may select an extended season for taking migratory game birds in accordance with the following:

Extended Seasons: For all hunting methods combined, the combined length of the extended season, regular season, and any special or experimental seasons must not exceed 107 days for any species or group of species in a geographical area. Each extended season may be divided into a maximum of 3 segments.

Framework Dates: Seasons must fall between September 1 and March 10.

Daily Bag and Possession Limits: Falconry daily bag and possession limits

for all permitted migratory game birds must not exceed 3 and 6 birds, respectively, singly or in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in all States, including those that do not select an extended falconry season.

Regular Seasons: General hunting regulations, including seasons and hunting hours, apply to falconry in each State listed in 50 CFR 21.29. Regular season bag and possession limits do not apply to falconry. The falconry bag limit is not in addition to gun limits.

Area, Unit, and Zone Descriptions

Doves

Alabama

South Zone—Baldwin, Barbour, Coffee, Covington, Dale, Escambia, Geneva, Henry, Houston, and Mobile Counties.

North Zone—Remainder of the State.

California

White-winged Dove Open Areas—Imperial, Riverside, and San Bernardino Counties.

Florida

Northwest Zone—The Counties of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, Washington, Leon (except that portion north of U.S. 27 and east of State Road 155), Jefferson (south of U.S. 27, west of State Road 59 and north of U.S. 98), and Wakulla (except that portion south of U.S. 98 and east of the St. Marks River).

South Zone—Remainder of State.

Louisiana

North Zone—That portion of the State north of a line extending east from the Texas border along State Highway 12 to U.S. Highway 190, east along U.S. 190 to Interstate Highway 12, east along Interstate 12 to Interstate Highway 10, then east along Interstate Highway 10 to the Mississippi border.

South Zone—The remainder of the State.

Mississippi

North Zone—That portion of the State north and west of a line extending west from the Alabama State line along U.S. Highway 84 to its junction with State Highway 35, then south along State Highway 35 to the Louisiana State line.

South Zone—The remainder of Mississippi.

Texas

North Zone—That portion of the State north of a line beginning at the

International Bridge south of Fort Hancock; north along FM 1088 to TX 20; west along TX 20 to TX 148; north along TX 148 to I-10 at Fort Hancock; east along I-10 to I-20; northeast along I-20 to I-30 at Fort Worth; northeast along I-30 to the Texas-Arkansas State line.

South Zone—That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to State Loop 1604 west of San Antonio; then south, east, and north along Loop 1604 to Interstate Highway 10 east of San Antonio; then east on I-10 to Orange, Texas.

Special White-winged Dove Area in the South Zone—That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to State Loop 1604 west of San Antonio, southeast on State Loop 1604 to Interstate Highway 35, southwest on Interstate Highway 35 to TX 44; east along TX 44 to TX 16 at Freer; south along TX 16 to FM 649 in Randado; south on FM 649 to FM 2686; east on FM 2686 to FM 1017; southeast on FM 1017 to TX 186 at Linn; east along TX 186 to the Mansfield Channel at Port Mansfield; east along the Mansfield Channel to the Gulf of Mexico.

Area with additional restrictions—Cameron, Hidalgo, Starr, and Willacy Counties.

Central Zone—That portion of the State lying between the North and South Zones.

Band-Tailed Pigeons

California

North Zone—Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity Counties.

South Zone—The remainder of the State.

New Mexico

North Zone—North of a line following U.S. 60 from the Arizona State line east to I-25 at Socorro and then south along I-25 from Socorro to the Texas State line.

South Zone—The remainder of the State.

Washington

Western Washington—The State of Washington excluding those portions lying east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

Woodcock

New Jersey

North Zone—That portion of the State north of NJ 70.

South Zone—The remainder of the State.

Special September Canada Goose Seasons

Atlantic Flyway

Connecticut

North Zone—That portion of the State north of I-95.

South Zone—The remainder of the State.

Maryland

Eastern Unit—Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; and that part of Anne Arundel County east of Interstate 895, Interstate 97 and Route 3; that part of Prince George's County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State line.

Western Unit—Allegany, Baltimore, Carroll, Frederick, Garrett, Howard, Montgomery, and Washington Counties and that part of Anne Arundel County west of Interstate 895, Interstate 97 and Route 3; that part of Prince George's County west of Route 3 and Route 301; and that part of Charles County west of Route 301 to the Virginia State line.

Massachusetts

Western Zone—That portion of the State west of a line extending south from the Vermont border on I-91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut border.

Central Zone—That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire border on I-95 to U.S. 1, south on U.S. 1 to I-93, south on I-93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I-195, west to the Rhode Island border; except the waters, and the lands 150 yards inland from the high-water mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center St.-Elm St. bridge will be in the Coastal Zone.

Coastal Zone—That portion of Massachusetts east and south of the Central Zone.

New York

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast

along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Eastern Long Island Goose Area (North Atlantic Population (NAP) High Harvest Area)—That area of Suffolk County lying east of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Roanoke Avenue in the Town of Riverhead; then south on Roanoke Avenue (which becomes County Route 73) to State Route 25; then west on Route 25 to Peconic Avenue; then south on Peconic Avenue to County Route (CR) 104 (Riverleigh Avenue); then south on CR 104 to CR 31 (Old Riverhead Road); then south on CR 31 to Oak Street; then south on Oak Street to Potunk Lane; then west on Stevens Lane; then south on Jessup Avenue (in Westhampton Beach) to Dune Road (CR 89); then due south to international waters.

Western Long Island Goose Area (Resident Population (RP) Area)—That area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of the Sunken Meadow State Parkway; then south on the Sunken Meadow Parkway to the Sagtikos State Parkway; then south on the Sagtikos Parkway to the Robert Moses State Parkway; then south on the Robert Moses Parkway to its southernmost end; then due south to international waters.

Central Long Island Goose Area (NAP Low Harvest Area)—That area of Suffolk County lying between the Western and Eastern Long Island Goose Areas, as defined above.

Western Zone—That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, and south along I-81 to the Pennsylvania border.

Northeastern Zone—That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, south along I-81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I-87, north along I-87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone—The remaining portion of New York.

North Carolina

Northeast Hunt Unit—Camden, Chowan, Currituck, Dare, Hyde, Pasquotank, Perquimans, Tyrrell, and

Washington Counties; that portion of Bertie County north and east of a line formed by NC 45 at the Washington County line to US 17 in Midway, US 17 in Midway to US 13 in Windsor to the Hertford County line; and that portion of Northampton County that is north of US 158 and east of NC 35.

Pennsylvania

Southern James Bay Population (SJB) Zone—The area north of I-80 and west of I-79, including in the city of Erie west of Bay Front Parkway to and including the Lake Erie Duck Zone (Lake Erie, Presque Isle, and the area within 150 yards of the Lake Erie Shoreline).

Vermont

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area north and west of the line extending from the New York border along U.S. 4 to VT 22A at Fair Haven; VT 22A to U.S. 7 at Vergennes; U.S. 7 to the Canadian border.

Interior Zone—That portion of Vermont west of the Lake Champlain Zone and eastward of a line extending from the Massachusetts border at Interstate 91; north along Interstate 91 to US 2; east along US 2 to VT 102; north along VT 102 to VT 253; north along VT 253 to the Canadian border.

Connecticut River Zone—The remaining portion of Vermont east of the Interior Zone.

Mississippi Flyway

Arkansas

Early Canada Goose Area—Baxter, Benton, Boone, Carroll, Clark, Conway, Crawford, Faulkner, Franklin, Garland, Hempstead, Hot Springs, Howard, Johnson, Lafayette, Little River, Logan, Madison, Marion, Miller, Montgomery, Newton, Perry, Pike, Polk, Pope, Pulaski, Saline, Searcy, Sebastian, Sevier, Scott, Van Buren, Washington, and Yell Counties.

Illinois

Northeast Canada Goose Zone—Cook, Du Page, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, and Will Counties.

North Zone—That portion of the State outside the Northeast Canada Goose Zone and north of a line extending west from the Indiana border along Peotone-Beecher Road to Illinois Route 50, south along Illinois Route 50 to Wilmington-Peotone Road, west along Wilmington-Peotone Road to Illinois Route 53, north along Illinois Route 53 to New River Road, northwest along New River Road to Interstate Highway 55, south along I-55 to Pine Bluff-Lorenzo Road, west

along Pine Bluff-Lorenzo Road to Illinois Route 47, north along Illinois Route 47 to I-80, west along I-80 to I-39, south along I-39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

Central Zone—That portion of the State outside the Northeast Canada Goose Zone and south of the North Zone to a line extending west from the Indiana border along Interstate Highway 70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 156, west along Illinois Route 156 to A Road, north and west on A Road to Levee Road, north on Levee Road to the south shore of New Fountain Creek, west along the south shore of New Fountain Creek to the Mississippi River, and due west across the Mississippi River to the Missouri border.

South Zone—The remainder of Illinois.

Iowa

North Zone—That portion of the State north of U.S. Highway 20.

South Zone—The remainder of Iowa.

Cedar Rapids/Iowa City Goose Zone—Includes portions of Linn and Johnson Counties bounded as follows: Beginning at the intersection of the west border of Linn County and Linn County Road E2W; then south and east along County Road E2W to Highway 920; then north along Highway 920 to County Road E16; then east along County Road E16 to County Road W58; then south along County Road W58 to County Road E34; then east along County Road E34 to Highway 13; then south along Highway 13 to Highway 30; then east along Highway 30 to Highway 1; then south along Highway 1 to Morse Road in Johnson County; then east along Morse Road to Wapsi Avenue; then south along Wapsi Avenue to Lower West Branch Road; then west along Lower West Branch Road to Taft Avenue; then south along Taft Avenue to County Road F62; then west along County Road F62 to Kansas Avenue; then north along Kansas Avenue to Black Diamond Road; then west on Black Diamond Road to Jasper Avenue; then north along Jasper Avenue to Robert Road; then west along Robert Road to Ivy Avenue; then north along Ivy Avenue to 340th Street; then west along 340th Street to Half Moon Avenue; then north along Half Moon Avenue to Highway 6; then west along

Highway 6 to Echo Avenue; then north along Echo Avenue to 250th Street; then east on 250th Street to Green Castle Avenue; then north along Green Castle Avenue to County Road F12; then west along County Road F12 to County Road W30; then north along County Road W30 to Highway 151; then north along the Linn-Benton County line to the point of beginning.

Des Moines Goose Zone—Includes those portions of Polk, Warren, Madison and Dallas Counties bounded as follows: Beginning at the intersection of Northwest 158th Avenue and County Road R38 in Polk County; then south along R38 to Northwest 142nd Avenue; then east along Northwest 142nd Avenue to Northeast 126th Avenue; then east along Northeast 126th Avenue to Northeast 46th Street; then south along Northeast 46th Street to Highway 931; then east along Highway 931 to Northeast 80th Street; then south along Northeast 80th Street to Southeast 6th Avenue; then west along Southeast 6th Avenue to Highway 65; then south and west along Highway 65 to Highway 69 in Warren County; then south along Highway 69 to County Road G24; then west along County Road G24 to Highway 28; then southwest along Highway 28 to 43rd Avenue; then north along 43rd Avenue to Ford Street; then west along Ford Street to Filmore Street; then west along Filmore Street to 10th Avenue; then south along 10th Avenue to 155th Street in Madison County; then west along 155th Street to Cumming Road; then north along Cumming Road to Badger Creek Avenue; then north along Badger Creek Avenue to County Road F90 in Dallas County; then east along County Road F90 to County Road R22; then north along County Road R22 to Highway 44; then east along Highway 44 to County Road R30; then north along County Road R30 to County Road F31; then east along County Road F31 to Highway 17; then north along Highway 17 to Highway 415 in Polk County; then east along Highway 415 to Northwest 158th Avenue; then east along Northwest 158th Avenue to the point of beginning.

Cedar Falls/Waterloo Goose Zone—Includes those portions of Black Hawk County bounded as follows: Beginning at the intersection of County Roads C66 and V49 in Black Hawk County, then south along County Road V49 to County Road D38, then west along County Road D38 to State Highway 21, then south along State Highway 21 to County Road D35, then west along County Road D35 to Grundy Road, then north along Grundy Road to County Road D19, then west along County Road D19 to Butler Road, then north along Butler Road to

County Road C57, then north and east along County Road C57 to U.S. Highway 63, then south along U.S. Highway 63 to County Road C66, then east along County Road C66 to the point of beginning.

Minnesota

Twin Cities Metropolitan Canada Goose Zone—

A. All of Hennepin and Ramsey Counties.

B. In Anoka County, all of Columbus Township lying south of County State Aid Highway (CSAH) 18, Anoka County; all of the cities of Ramsey, Andover, Anoka, Coon Rapids, Spring Lake Park, Fridley, Hilltop, Columbia Heights, Blaine, Lexington, Circle Pines, Lino Lakes, and Centerville; and all of the city of Ham Lake except that portion lying north of CSAH 18 and east of U.S. Highway 65.

C. That part of Carver County lying north and east of the following described line: Beginning at the northeast corner of San Francisco Township; then west along the north boundary of San Francisco Township to the east boundary of Dahlgren Township; then north along the east boundary of Dahlgren Township to U.S. Highway 212; then west along U.S. Highway 212 to State Trunk Highway (STH) 284; then north on STH 284 to County State Aid Highway (CSAH) 10; then north and west on CSAH 10 to CSAH 30; then north and west on CSAH 30 to STH 25; then east and north on STH 25 to CSAH 10; then north on CSAH 10 to the Carver County line.

D. In Scott County, all of the cities of Shakopee, Savage, Prior Lake, and Jordan, and all of the Townships of Jackson, Louisville, St. Lawrence, Sand Creek, Spring Lake, and Credit River.

E. In Dakota County, all of the cities of Burnsville, Eagan, Mendota Heights, Mendota, Sunfish Lake, Inver Grove Heights, Apple Valley, Lakeville, Rosemount, Farmington, Hastings, Lilydale, West St. Paul, and South St. Paul, and all of the Township of Nininger.

F. That portion of Washington County lying south of the following described line: Beginning at County State Aid Highway (CSAH) 2 on the west boundary of the county; then east on CSAH 2 to U.S. Highway 61; then south on U.S. Highway 61 to State Trunk Highway (STH) 97; then east on STH 97 to the intersection of STH 97 and STH 95; then due east to the east boundary of the State.

Northwest Goose Zone—That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State

Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Southeast Goose Zone—That part of the State within the following described boundaries: beginning at the intersection of U.S. Highway 52 and the south boundary of the Twin Cities Metro Canada Goose Zone; then along the U.S. Highway 52 to State Trunk Highway (STH) 57; then along STH 57 to the municipal boundary of Kasson; then along the municipal boundary of Kasson County State Aid Highway (CSAH) 13, Dodge County; then along CSAH 13 to STH 30; then along STH 30 to U.S. Highway 63; then along U.S. Highway 63 to the south boundary of the State; then along the south and east boundaries of the State to the south boundary of the Twin Cities Metro Canada Goose Zone; then along said boundary to the point of beginning.

Five Goose Zone—That portion of the State not included in the Twin Cities Metropolitan Canada Goose Zone, the Northwest Goose Zone, or the Southeast Goose Zone.

West Zone—That portion of the State encompassed by a line beginning at the junction of State Trunk Highway (STH) 60 and the Iowa border, then north and east along STH 60 to U.S. Highway 71, north along U.S. 71 to I-94, then north and west along I-94 to the North Dakota border.

Tennessee

Middle Tennessee Zone—Those portions of Houston, Humphreys, Montgomery, Perry, and Wayne Counties east of State Highway 13; and Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Hickman, Lawrence, Lewis, Lincoln, Macon, Marshall, Maury, Moore, Robertson, Rutherford, Smith, Sumner, Trousdale, Williamson, and Wilson Counties.

East Tennessee Zone—Anderson, Bledsoe, Bradley, Blount, Campbell, Carter, Claiborne, Clay, Cocke, Cumberland, DeKalb, Fentress, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, Jackson, Jefferson, Johnson, Knox, Loudon, Marion, McMinn, Meigs, Monroe, Morgan, Overton, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier,

Sullivan, Unicoi, Union, Van Buren, Warren, Washington, and White Counties.

Wisconsin

Early-Season Subzone A—That portion of the State encompassed by a line beginning at the intersection of U.S. Highway 141 and the Michigan border near Niagara, then south along U.S. 141 to State Highway 22, west and southwest along State 22 to U.S. 45, south along U.S. 45 to State 22, west and south along State 22 to State 110, south along State 110 to U.S. 10, south along U.S. 10 to State 49, south along State 49 to State 23, west along State 23 to State 73, south along State 73 to State 60, west along State 60 to State 23, south along State 23 to State 11, east along State 11 to State 78, then south along State 78 to the Illinois border.

Early-Season Subzone B—The remainder of the State.

Central Flyway

Nebraska

September Canada Goose Unit—That part of Nebraska bounded by a line from the Nebraska-Iowa State line west on U.S. Highway 30 to US Highway 81, then south on US Highway 81 to NE Highway 64, then east on NE Highway 64 to NE Highway 15, then south on NE Highway 15 to NE Highway 41, then east on NE Highway 41 to NE Highway 50, then north on NE Highway 50 to NE Highway 2, then east on NE Highway 2 to the Nebraska-Iowa State line.

North Dakota

Missouri River Canada Goose Zone—The area within and bounded by a line starting where ND Hwy 6 crosses the South Dakota border; then north on ND Hwy 6 to I-94; then west on I-94 to ND Hwy 49; then north on ND Hwy 49 to ND Hwy 200; then north on Mercer County Rd. 21 to the section line between sections 8 and 9 (T146N-R87W); then north on that section line to the southern shoreline to Lake Sakakawea; then east along the southern shoreline (including Mallard Island) of Lake Sakakawea to US Hwy 83; then south on US Hwy 83 to ND Hwy 200; then east on ND Hwy 200 to ND Hwy 41; then south on ND Hwy 41 to US Hwy 83; then south on US Hwy 83 to I-94; then east on I-94 to US Hwy 83; then south on US Hwy 83 to the South Dakota border; then west along the South Dakota border to ND Hwy 6.

Rest of State: Remainder of North Dakota.

South Dakota

Special Early Canada Goose Unit—Entire State of South Dakota *except* the

Counties of Bennett, Gregory, Hughes, Lyman, Perkins, and Stanley; that portion of Potter County west of US Highway 83; that portion of Bon Homme, Brule, Buffalo, Charles Mix, and Hyde County south and west of a line beginning at the Hughes-Hyde County line of SD Highway 34, east to Lees Boulevard, southeast to SD 34, east 7 miles to 350th Avenue, south to I-90, south and east on SD Highway 50 to Geddes, east on 285th Street to US Highway 281, south on US Highway 281 to SD 50, east and south on SD 50 to the Bon Homme-Yankton County boundary; that portion of Fall River County east of SD Highway 71 and US Highway 385; that portion of Custer County east of SD Highway 79 and south of French Creek; that portion of Dewey County south of BIA Road 8, BIA Road 9, and the section of US 212 east of BIA Road 8 junction.

Pacific Flyway

Idaho

East Zone—Bonneville, Caribou, Fremont, and Teton Counties.

Oregon

Northwest Zone—Benton, Clackamas, Clatsop, Columbia, Lane, Lincoln, Linn, Marion, Polk, Multnomah, Tillamook, Washington, and Yamhill Counties.

Southwest Zone—Coos, Curry, Douglas, Jackson, Josephine, and Klamath Counties.

East Zone—Baker, Gilliam, Malheur, Morrow, Sherman, Umatilla, Union, and Wasco Counties.

Washington

Area 1—Skagit, Island, and Snohomish Counties.

Area 2A (SW Quota Zone)—Clark County, except portions south of the Washougal River; Cowlitz County; and Wahkiakum County.

Area 2B (SW Quota Zone)—Pacific County.

Area 3—All areas west of the Pacific Crest Trail and west of the Big White Salmon River that are not included in Areas 1, 2A, and 2B.

Area 4—Adams, Benton, Chelan, Douglas, Franklin, Grant, Kittitas, Lincoln, Okanogan, Spokane, and Walla Walla Counties.

Area 5—All areas east of the Pacific Crest Trail and east of the Big White Salmon River that are not included in Area 4.

Ducks

Atlantic Flyway

New York

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area east and north of a line extending along

NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Long Island Zone—That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I-95, and their tidal waters.

Western Zone—That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, and south along I-81 to the Pennsylvania border.

Northeastern Zone—That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, south along I-81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I-87, north along I-87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone—The remaining portion of New York.

Maryland

Special Teal Season Area—Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; that part of Anne Arundel County east of Interstate 895, Interstate 97, and Route 3; that part of Prince Georges County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State Line.

Mississippi Flyway

Indiana

North Zone—That portion of the State north of a line extending east from the Illinois border along State Road 18 to U.S. Highway 31, north along U.S. 31 to U.S. 24, east along U.S. 24 to Huntington, then southeast along U.S. 224 to the Ohio border.

Ohio River Zone—That portion of the State south of a line extending east from the Illinois border along Interstate Highway 64 to New Albany, east along State Road 62 to State 56, east along State 56 to Vevay, east and north on State 156 along the Ohio River to North Landing, north along State 56 to U.S. Highway 50, then northeast along U.S. 50 to the Ohio border.

South Zone—That portion of the State between the North and Ohio River Zone boundaries.

Iowa

North Zone—That portion of the State north of a line extending east from the Nebraska border along State Highway 175 to State Highway 37, southeast along State Highway 37 to State Highway 183, northeast along State Highway 183 to State Highway 141, east along State Highway 141 to U.S. Highway 30, then east along U.S. Highway 30 to the Illinois border.

South Zone—The remainder of Iowa.

Central Flyway

Colorado

Special Teal Season Area—Lake and Chaffee Counties and that portion of the State east of Interstate Highway 25.

Kansas

High Plains Zone—That portion of the State west of U.S. 283.

Low Plains Early Zone—That area of Kansas east of U.S. 283, and generally west of a line beginning at the Junction of the Nebraska State line and KS 28; south on KS 28 to U.S. 36; east on U.S. 36 to KS 199; south on KS 199 to Republic Co. Road 563; south on Republic Co. Road 563 to KS 148; east on KS 148 to Republic Co. Road 138; south on Republic Co. Road 138 to Cloud Co. Road 765; south on Cloud Co. Road 765 to KS 9; west on KS 9 to U.S. 24; west on U.S. 24 to U.S. 281; north on U.S. 281 to U.S. 36; west on U.S. 36 to U.S. 183; south on U.S. 183 to U.S. 24; west on U.S. 24 to KS 18; southeast on KS 18 to U.S. 183; south on U.S. 183 to KS 4; east on KS 4 to I-135; south on I-135 to KS 61; southwest on KS 61 to KS 96; northwest on KS 96 to U.S. 56; west on U.S. 56 to U.S. 281; south on U.S. 281 to U.S. 54; west on U.S. 54 to U.S. 183; north on U.S. 183 to U.S. 56; and southwest on U.S. 56 to U.S. 283.

Low Plains Late Zone—The remainder of Kansas.

Nebraska

Special Teal Season Area—That portion of the State south of a line beginning at the Wyoming State line; east along U.S. 26 to Nebraska Highway L62A east to U.S. 385; south to U.S. 26; east to NE 92; east along NE. 92 to NE. 61; south along NE. 61 to U.S. 30; east along U.S. 30 to the Iowa border.

High Plains—That portion of Nebraska lying west of a line beginning at the South Dakota-Nebraska border on U.S. Hwy. 183; south on U.S. Hwy. 183 to U.S. Hwy. 20; west on U.S. Hwy. 20 to NE. Hwy. 7; south on NE. Hwy. 7 to NE Hwy. 91; southwest on NE. Hwy. 91 to NE. Hwy. 2; southeast on NE. Hwy. 2 to NE. Hwy. 92; west on NE. Hwy. 92 to NE Hwy. 40; south on NE. Hwy. 40

to NE. Hwy. 47; south on NE. Hwy. 47 to NE. Hwy. 23; east on NE. Hwy. 23 to U.S. Hwy. 283; and south on U.S. Hwy. 283 to the Kansas-Nebraska border.

Low Plains Zone 1—That portion of Dixon County west of NE. Hwy. 26E Spur and north of NE. Hwy. 12; those portions of Cedar and Knox Counties north of NE. Hwy. 12; that portion of Keya Paha County east of U.S. Hwy. 183; and all of Boyd County. Both banks of the Niobrara River in Keya Paha and Boyd counties east of U.S. 183 shall be included in Zone 1.

Low Plains Zone 2—Area bounded by designated Federal and State highways and political boundaries beginning at the Kansas-Nebraska border on U.S. Hwy. 75 to U.S. Hwy. 136; east to the intersection of U.S. Hwy. 136 and the Steamboat Trace (Trace); north along the Trace to the intersection with Federal Levee R-562; north along Federal Levee R-562 to the intersection with the Trace; north along the Trace/Burlington Northern Railroad right-of-way to NE Hwy. 2; west to U.S. Hwy. 75; north to NE. Hwy. 2; west to NE Hwy. 43; north to U.S. Hwy. 34; east to NE. Hwy. 63; north and west to U.S. Hwy. 77; north to NE. Hwy. 92; west to County Road X; south to County Road 21 (Seward County Line); west to NE. Hwy. 15; north to County Road 34; west to County Road J; south to NE Hwy. 92; west to U.S. 81; south to NE. 66; west to County Road C; north to NE. Hwy. 92; west to U.S. Hwy. 30; west to NE. Hwy. 14; south to County Road 22 (Hamilton County); west to County Road M; south to County Road 21; west to County Road K; south U.S. Hwy. 34; west to NE. Hwy. 2; south to U.S. Hwy. I-80; west to Gunbarrel Road (Hall/Hamilton county line); south to Giltner Road; west to U.S. Hwy. 281; south to U.S. Hwy. 34; west to NE. Hwy. 10; north to County Road "R" (Kearney County) and County Road #742 (Phelps County); west to County Road #438 (Gosper County line); south along County Road #438 (Gosper County line) to County Road #726 (Furnas County line); east to County Road #438 (Harlan County line); south to U.S. Hwy. 34; south and west to U.S. Hwy. 136; east to U.S. Hwy. 183; north to NE. Hwy. 4; east to NE. Hwy. 10; south to U.S. Hwy 136; east to NE. Hwy. 14; south to the Kansas-Nebraska border; west to U.S. Hwy. 283; north to NE. Hwy. 23; west to NE. Hwy. 47; north to U.S. Hwy. 30; east to County Road 13; north to County Road O; east to NE. Hwy. 14; north to NE. Hwy. 52; west and north to NE. Hwy. 91; west to U.S. Hwy. 281; south to NE. Hwy. 22; west to NE. Hwy. 11; northwest to NE. Hwy. 91; west to U.S. Hwy. 183; south to Round Valley Road; west to Sargent

River Road; west to Sargent Road; west to Milburn Road; north to Blaine County Line; east to Loup County Line; north to NE. Hwy. 91; west to North Loup Spur Road; north to North Loup Road; east to Pleasant Valley/Worth Road; east to Loup County Line; north to Loup-Brown county line; east along northern boundaries of Loup, Garfield and Wheeler counties; south on the Wheeler-Antelope county line to NE. Hwy. 70; east to NE. Hwy. 14; south to NE. Hwy. 39; southeast to NE. Hwy. 22; east to U.S. Hwy. 81; southeast to U.S. Hwy. 30; east to U.S. Hwy. 75; north to the Washington County line; east to the Iowa-Nebraska border; south along the Iowa-Nebraska border; to the beginning at U.S. Hwy. 75 and the Kansas-Nebraska border.

Low Plains Zone 3—The area east of the High Plains Zone, excluding Low Plains Zone 1, north of Low Plains Zone 2.

Low Plains Zone 4—The area east of the High Plains Zone and south of Zone 2.

New Mexico (Central Flyway Portion)

North Zone—That portion of the State north of I-40 and U.S. 54.

South Zone—The remainder of New Mexico.

Pacific Flyway

California

Northeastern Zone—In that portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to Main Street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines west along

the California-Oregon State line to the point of origin.

Colorado River Zone—Those portions of San Bernardino, Riverside, and Imperial Counties east of a line extending from the Nevada border south along U.S. 95 to Vidal Junction; south on a road known as "Aqueduct Road" in San Bernardino County through the town of Rice to the San Bernardino-Riverside County line; south on a road known in Riverside County as the "Desert Center to Rice Road" to the town of Desert Center; east 31 miles on I-10 to the Wiley Well Road; south on this road to Wiley Well; southeast along the Army-Milpitas Road to the Blythe, Brawley, Davis Lake intersections; south on the Blythe-Brawley paved road to the Ogilby and Tumco Mine Road; south on this road to U.S. 80; east 7 miles on U.S. 80 to the Andrade-Algodones Road; south on this paved road to the Mexican border at Algodones, Mexico.

Southern Zone—That portion of southern California (but excluding the Colorado River Zone) south and east of a line extending from the Pacific Ocean east along the Santa Maria River to CA 166 near the City of Santa Maria; east on CA 166 to CA 99; south on CA 99 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to CA 178 at Walker Pass; east on CA 178 to U.S. 395 at the town of Inyokern; south on U.S. 395 to CA 58; east on CA 58 to I-15; east on I-15 to CA 127; north on CA 127 to the Nevada border.

Southern San Joaquin Valley Temporary Zone—All of Kings and Tulare Counties and that portion of Kern County north of the Southern Zone.

Balance-of-the-State Zone—The remainder of California not included in the Northeastern, Southern, and Colorado River Zones, and the Southern San Joaquin Valley Temporary Zone.

Canada Geese

Michigan

Mississippi Valley Population (MVP)-Upper Peninsula Zone—The MVP-Upper Peninsula Zone consists of the entire Upper Peninsula of Michigan.

MVP-Lower Peninsula Zone—The MVP-Lower Peninsula Zone consists of the area within the Lower Peninsula of Michigan that is north and west of the point beginning at the southwest corner of Branch County, north continuing along the western border of Branch and Calhoun Counties to the northwest corner of Calhoun County, then east to the southwest corner of Eaton County, then north to the southern border of Ionia County, then east to the southwest

corner of Clinton County, then north along the western border of Clinton County continuing north along the county border of Gratiot and Montcalm Counties to the southern border of Isabella county, then east to the southwest corner of Midland County, then north along the west Midland County border to Highway M-20, then easterly to U.S. Highway 10, then easterly to I-75/U.S. 23, then northerly along I-75/U.S. 23 and easterly on U.S. 23 to the centerline of the Au Gres River, then southerly along the centerline of the Au Gres River to Saginaw Bay, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canadian border.

SJBP Zone—The rest of the State, that area south and east of the boundary described above.

Sandhill Cranes

Mississippi Flyway

Minnesota

Northwest Goose Zone—That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Central Flyway

Colorado—The Central Flyway portion of the State except the San Luis Valley (Alamosa, Conejos, Costilla, Hinsdale, Mineral, Rio Grande, and Saguache Counties east of the Continental Divide) and North Park (Jackson County).

Kansas—That portion of the State west of a line beginning at the Oklahoma border, north on I-35 to Wichita, north on I-135 to Salina, and north on U.S. 81 to the Nebraska border.

Montana—The Central Flyway portion of the State except for that area south and west of Interstate 90, which is closed to sandhill crane hunting.

New Mexico

Regular-Season Open Area—Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.

Middle Rio Grande Valley Area—The Central Flyway portion of New Mexico in Socorro and Valencia Counties.

Estancia Valley Area—Those portions of Santa Fe, Tarrant and Bernallilo Counties within an area bounded on the west by New Mexico Highway 55 beginning at Mountainair north to NM 337, north to NM 14, north to I-25; on the north by I-25 east to U.S. 285; on the east by U.S. 285 south to U.S. 60; and on the south by U.S. 60 from U.S. 285 west to NM 55 in Mountainair.

Southwest Zone—Area bounded on the south by the New Mexico/Mexico border; on the west by the New Mexico/Arizona border north to Interstate 10; on the north by Interstate 10 east to U.S. 180, north to N.M. 26, east to N.M. 27, north to N.M. 152, and east to Interstate 25; on the east by Interstate 25 south to Interstate 10, west to the Luna county line, and south to the New Mexico/Mexico border.

North Dakota

Area 1—That portion of the State west of U.S. 281.

Area 2—That portion of the State east of U.S. 281.

Oklahoma—That portion of the State west of I-35.

South Dakota—That portion of the State west of U.S. 281.

Texas

Zone A—That portion of Texas lying west of a line beginning at the international toll bridge at Laredo, then northeast along U.S. Highway 81 to its junction with Interstate Highway 35 in Laredo, then north along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 at Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line.

Zone B—That portion of Texas lying within boundaries beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with Interstate Highway 35W in Fort Worth, then southwest along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 in the town of Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway

62 to the Texas-Oklahoma State line, then south along the Texas-Oklahoma State line to the south bank of the Red River, then eastward along the vegetation line on the south bank of the Red River to U.S. Highway 81.

Zone C—The remainder of the State, except for the closed areas.

Closed areas—(A) That portion of the State lying east and north of a line beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with Interstate Highway 35W in Fort Worth, then southwest along Interstate Highway 35 to its junction with U.S. Highway 290 East in Austin, then east along U.S. Highway 290 to its junction with Interstate Loop 610 in Harris County, then south and east along Interstate Loop 610 to its junction with Interstate Highway 45 in Houston, then south on Interstate Highway 45 to State Highway 342, then to the shore of the Gulf of Mexico, and then north and east along the shore of the Gulf of Mexico to the Texas-Louisiana State line.

(B) That portion of the State lying within the boundaries of a line beginning at the Kleberg-Nueces County line and the shore of the Gulf of Mexico, then west along the County line to Park Road 22 in Nueces County, then north and west along Park Road 22 to its junction with State Highway 358 in Corpus Christi, then west and north along State Highway 358 to its junction with State Highway 286, then north along State Highway 286 to its junction with Interstate Highway 37, then east along Interstate Highway 37 to its junction with U.S. Highway 181, then north and west along U.S. Highway 181 to its junction with U.S. Highway 77 in Sinton, then north and east along U.S. Highway 77 to its junction with U.S. Highway 87 in Victoria, then south and east along U.S. Highway 87 to its junction with State Highway 35 at Port Lavaca, then north and east along State Highway 35 to the south end of the Lavaca Bay Causeway, then south and east along the shore of Lavaca Bay to its junction with the Port Lavaca Ship Channel, then south and east along the Lavaca Bay Ship Channel to the Gulf of Mexico, and then south and west along the shore of the Gulf of Mexico to the Kleberg-Nueces County line.

Wyoming

Regular Season Open Area—Campbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston

Counties, and portions of Johnson and Sheridan Counties.

Riverton-Boysen Unit—Portions of Fremont County.

Park and Big Horn County Unit—All of Big Horn, Hot Springs, Park and Washakie Counties.

Pacific Flyway

Arizona

Special Season Area—Game Management Units 30A, 30B, 31, and 32.

Montana

Special Season Area—See State regulations.

Utah

Special Season Area—Rich, Cache, and Uintah Counties and that portion of Box Elder County beginning on the Utah-Idaho State line at the Box Elder-Cache County line; west on the State line to the Pocatello Valley County Road; south on the Pocatello Valley County Road to I-15; southeast on I-15 to SR-83; south on SR-83 to Lamp Junction; west and south on the Promontory Point County Road to the tip of Promontory Point; south from Promontory Point to the Box Elder-Weber County line; east on the Box Elder-Weber County line to the Box Elder-Cache County line; north on the Box Elder-Cache County line to the Utah-Idaho State line.

Wyoming

Bear River Area—That portion of Lincoln County described in State regulations.

Salt River Area—That portion of Lincoln County described in State regulations.

Farson-Eden Area—Those portions of Sweetwater and Sublette Counties described in State regulations.

Uinta County Area—That portion of Uinta County described in State regulations.

All Migratory Game Birds in Alaska

North Zone—State Game Management Units 11-13 and 17-26.

Gulf Coast Zone—State Game Management Units 5-7, 9, 14-16, and 10 (Unimak Island only).

Southeast Zone—State Game Management Units 1-4.

Pribilof and Aleutian Islands Zone—State Game Management Unit 10 (except Unimak Island).

Kodiak Zone—State Game Management Unit 8.

All Migratory Game Birds in the Virgin Islands

Ruth Cay Closure Area—The island of Ruth Cay, just south of St. Croix.

All Migratory Game Birds in Puerto Rico

Municipality of Culebra Closure Area—All of the municipality of Culebra.

Desecheo Island Closure Area—All of Desecheo Island.

Mona Island Closure Area—All of Mona Island.

El Verde Closure Area—Those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for 1 kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public.

Cidra Municipality and adjacent areas—All of Cidra Municipality and portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality boundary to the point of the beginning.

[FR Doc. 2011-21987 Filed 8-29-11; 8:45 am]

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H.R. 2553/P.L. 112-27

Airport and Airway Extension Act of 2011, Part IV (Aug. 5, 2011; 125 Stat. 270)

H.R. 2715/P.L. 112-28

To provide the Consumer Product Safety Commission with greater authority and discretion in enforcing the consumer product safety laws, and for other purposes. (Aug. 12, 2011; 125 Stat. 273)
Last List August 5, 2011

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