FEDERAL REGISTER

Vol. 76 Wednesday,

No. 188 September 28, 2011

Pages 59883–60356

OFFICE OF THE FEDERAL REGISTER

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Presidential Documents

Title 3—

The President

Proclamation 8720 of September 23, 2011

National Hunting and Fishing Day, 2011

By the President of the United States of America

A Proclamation

On vast plains and through dense forests, along rocky riverbanks and atop tranquil lakes, Americans of every age and background cherish their connection to the great outdoors. As we mark National Hunting and Fishing Day, we are reminded of the uniquely American idea that each of us has an equal share in the land around us and an equal responsibility to protect it.

America's hunters and anglers directly experience the endless beauty and reward of our Nation's bounty. We have long depended on this land to sustain us, from our Native American ancestors and the settlers on the Eastern Seaboard to the sportsmen and women of today. Fishing and hunting are traditions that span untold lengths of time, enabling important bonds to the land and between generations to form. Sportsmen also develop unique connections to the land they enjoy, and hunters and fishermen were some of our first conservationists. These relationships are preserved and passed on with pride, along with a deep and abiding respect for nature.

Today, we continue the essential work of conserving and sustaining our precious environment. Our landscapes are not only a source of pleasure, but a valuable resource for our local economies and the livelihood of many across America. Last year, after an unprecedented public engagement effort, with input from across our country, my Administration launched the America's Great Outdoors Initiative. Through this initiative, we are working to meet the unique challenges of environmental stewardship in the 21st century and create community-based solutions for conservation.

As part of the America's Great Outdoors Initiative, we recently established the Federal Interagency Council on Outdoor Recreation to assist with promoting outdoor recreational activities for American families on public lands. By coordinating with State, local, and tribal governments, and other stakeholders, the Council aims to connect our families, and especially our youth, to the rugged beauty of the natural wonders our Nation's hunters and anglers know so well.

Protecting the conservation legacy of our past is the responsibility of all Americans. Working together, we can preserve the wonder of nature while building a future where all Americans are able to enjoy and share in her bounty.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 24, 2011, as National Hunting and Fishing Day. I call upon all Americans to observe this day with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of September, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2011–25066
Filed 9–27–11; 8:45 am]
Billing code 3195–W1–P

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

RIN 0584–AE13

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Implementation of Nondiscretionary, Non-Electronic Benefits Transfer-Related Provisions

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule.

SUMMARY: This final rule incorporates into the regulations governing the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) several changes set forth in the Healthy, Hunger-Free Kids Act of 2010 (HHFK Act). These provisions address: certification periods for children participating in the WIC Program; increased emphasis on breastfeeding promotion and support; compiling and publishing data for partially and fully breastfed infants; sharing nutrition education materials with institutions participating in the Child and Adult Care Food Program (CACFP); and infant formula (and other foods) rebate management.

DATES: *Effective Date:* This rule is effective on October 28, 2011.

Implementation Date: The provisions in this rule must be implemented no later than October 1, 2011.

FOR FURTHER INFORMATION CONTACT: Debra R. Whitford, Director, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 520, Alexandria, Virginia 22302; (703) 305–2746; *e-mail: Debbie.Whitford@fns.usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

This final rule amends the WIC regulations to implement five nondiscretionary provisions from Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010 (HHFK Act), signed into law on December 13, 2010. FNS previously issued policy and guidance to State agencies on implementation of the legislative requirements addressed in this rulemaking because four of the five nondiscretionary provisions of the HHFK Act were effective on October 1, 2010. The fifth provision, the recording of rebate payments, becomes effective on October 1, 2011. FNS anticipates that the current rule will accomplish the goals of the HHFK Act concerning participant certification, breastfeeding support and general program administration. Specifically, the WIC provisions are as follows:

1. Extended Certification Period for Children

Section 131 of the HHFK Act amends section 17(d)(3) of the Child Nutrition Act (CNA) (42 U.S.C. 1786(d)(3)) to allow State agencies the option to certify participant children for a period of up to one year if the State agency electing this option ensures that participant children receive required health and nutrition assessments. Section 246.7(g)(1)(v) of the WIC regulations (7 CFR 246.7(g)(1)(v))currently provides that children participating in the WIC Program shall be certified at intervals of approximately six months, ending with the last day of the month in which a child reaches his/her fifth birthday. The new legislative provision now allows a participant child, at the State agency's option, to be certified for a period of up to one year. This increased flexibility will provide administrative relief for participant children's parents, as well as for State and local agencies. In some cases, it will also allow a local WIC agency to certify a toddler, a breastfeeding mother, and an infant in the same household for the same relative period of time, as all three categories of participants may now be certified for up to one year if the State agency ensures that health care and nutrition services are not diminished. To comply with the legislative intent of the extended certification periods, *i.e.,* that participant children receive required health and nutrition assessments, WIC State agencies electing the one-year option must continue to provide the nutrition services a participant would otherwise receive during a shorter certification period. Delivering quality nutrition services to WIC participants and to their parents/caregivers distinguishes WIC as an exemplary nutrition assistance program.

This provision became effective on October 1, 2010, as stipulated in the HHFK Act and was implemented via a March 11, 2011 memorandum #2011–2, ''Implementation of the Nondiscretionary, Non-Electronic Benefits Transfer-Related Provisions of Public Law 111–296.'' This final rule amends § 246.7(g) to add the State agency option to allow certification of children for a period of up to one year, provided the local agency ensures that the participant child receives the required nutrition services. Section 246.4(a) is amended to require State agencies electing to implement this option to address in the State Plan of Operations how participants will receive required health and nutrition assessments when certified for a period of greater than six months.

A corresponding amendment is made to § 246.11(e)(3) to add that nutrition education contacts must be made available quarterly for participants certified for a period of time in excess of six months to ensure that health care and nutrition services are not diminished.

2. Increased Support for Breastfeeding in the WIC Program

The Department has long been strongly committed to the support and promotion of breastfeeding. WIC has historically promoted breastfeeding to all pregnant women as the optimal infant feeding choice, unless medically contraindicated. Current WIC regulations (§§ 246.7(e)(1)(iii), 246.7(g)(1)(iii), 246.10(e)(7), and 246.11(c)) contain provisions to encourage women to breastfeed and to provide appropriate nutritional support for breastfeeding participants, including:

- Information provided to WIC mothers choosing to breastfeed through counseling and breastfeeding educational materials;
- Follow-up support through peer counselors;
- Eligibility to participate in WIC longer than non-breastfeeding mothers;

• Enhanced food package for mothers who exclusively breastfeed their infants; and

• Provision of breast pumps, breast shells or supplemental nursing systems to help support the initiation and continuation of breastfeeding as allowable WIC costs.

Section 231 of the HHFK Act amends several paragraphs in section 17 of the CNA to reinforce the importance of the promotion and support of breastfeeding as an integral element of WIC services and benefits. The specific changes are:

1. Section 17(a) of the CNA is amended to add references to breastfeeding promotion and support to the WIC Program's general purpose and to the benefits provided. This addition is incorporated by this rulemaking into § 246.1 and § 246.11(b) of the WIC regulations, but does not require any specific action on the part of WIC State agencies.

2. The definition of ''Costs of nutrition services and administration'' in Section 17(b)(4) of the CNA is amended to include ''breastfeeding support and promotion.'' Breastfeeding support and promotion has always been an allowable cost under nutrition services and administration (NSA) funds as defined in § 246.2; this provision now makes the definitions in the CNA and the regulations consistent, and as with the amendment to the statement of purpose for the WIC Program cited above, does not require any specific action by WIC State agencies.

3. Section 17(c)(1) of the CNA is amended to include ''breastfeeding support and promotion'' as one of the specific services to be provided under the WIC Program. This phrase, and close variations of it, are added throughout the WIC regulations wherever references to WIC nutrition education services are found. While breastfeeding support and promotion have always been considered to be part of the nutrition services provided through the WIC Program, the HHFK Act now ensures that such functions are specifically named. This final rule amends § 246.11(a)(1) to include breastfeeding support and promotion as a benefit of the Program, and to clarify that breastfeeding support and promotion shall be made available at no cost to participants.

4. Section 17(e)(2) of the CNA is amended to expand WIC State and local agency staff training requirements to include breastfeeding support and education. Therefore, § 246.11(c) is amended to require State agencies to include breastfeeding promotion and support as part of their responsibilities. All WIC State agencies are now expected to provide an assurance via the State Plan of Operations to the effect that any training related to nutrition education and counseling provided to State and local staff will include breastfeeding promotion and support as part of such training.

5. Section 17(f)(6)(B) of the CNA is amended to expand the limitations on State agencies' authority to provide WIC food instruments by a method other than direct pick-up at the local agency, specifically to include participants scheduled for breastfeeding counseling. Section 246.12(r)(4) is amended accordingly to require participants, parents and caretakers of infant and child participants, and proxies to pick up food instruments and cash value vouchers in person when scheduled for breastfeeding counseling. State agencies must also ensure that WIC EBT benefits will not be not loaded, nor will paper food instruments be mailed or otherwise issued to participants in some method besides face-to-face distribution at the local agency, if the participant is scheduled for nutrition education, breastfeeding counseling, or recertification.

All of these provisions became effective on October 1, 2010, as stipulated in the HHFK Act and were implemented via the March 11, 2011 memorandum, ''Implementation of the Nondiscretionary, Non-Electronic Benefits Transfer-Related Provisions of Public Law 111–296.''

3. Data Collection for Breastfed Infants

Section 231 of the HHFK Act also amends section 17(h)(4)(A) of the CNA (42 U.S.C. 1786(h)(4)(A)) to require USDA to compile, and to publish annually, breastfeeding performance measurements based on program participant data on the number of partially and fully breastfed infants for each WIC State agency and each local WIC agency.

This requirement became effective on October 1, 2010. WIC State agencies currently report cumulative data on the number of partially and fully breastfed infants as part of their monthly participation report. WIC local agencies provide their data on partially and fully breastfed infants to the State agency for the cumulative monthly participation report; however, the individual local-level data are currently not reported by State agencies to FNS.

The local agency data on fully and partially breastfed infants reported monthly to the State will now be compiled by the State agency, using a format provided by FNS for the annual local level data reporting. This information will then be reported to FNS and published annually by USDA. Section 246.25(a) is revised to reflect the reporting of this local level data to FNS by the State agency. No new burden is incurred since this information is currently collected by the local agency and submitted on a monthly basis to the State agency for its monthly participation report.

4. Sharing Materials With CACFP

Nutrition education is an important component of WIC nutrition services. It is provided to all pregnant, breastfeeding and postpartum participants as well as to the parents or caregivers of infant and child participants, and when appropriate, to child participants directly. As such, the WIC Program develops a variety of nutrition education materials for use by State and local cooperators.

Section 351 of the HHFK Act amends section 17(e)(3)(B) of the CNA (42 U.S.C. 1786(e)(3)(B)) to allow local WIC agencies, at the State agency's option, to share nutrition education materials with institutions participating in the CACFP at no cost, if a written materials sharing agreement exists between WIC State or local agencies and CACFP institutions. WIC State agencies may initiate a sharing agreement with their State-level CACFP counterparts that would apply Statewide, or may authorize their local agencies or clinics to initiate a sharing agreement at the local level with their local level CACFP counterparts.

This requirement became effective on October 1, 2010, as stipulated in the HHFK Act, and was implemented via the March 11, 2011 memorandum, ''Implementation of the Nondiscretionary, Non-Electronic Benefits Transfer-Related Provisions of Public Law 111–296.'' This final rule amends § 246.11(c)(3) to allow State agencies the option to allow their local agencies or clinics to share nutrition education materials with CACFP entities.

5. Recording WIC Rebate Payments

Section 352(b) of the HHFK Act amends section 17(h)(8) of the CNA (42 U.S.C. 1786(h)(8)) to add a new paragraph (K) requiring WIC State agencies to report rebate payments received from manufacturers in the month in which the payments are received, rather than in the month in which the payments are earned. To assist State agencies in making the transition to this change in reporting, Section 352(f) of the HHFK Act amends section 17(i) of the CNA (42 U.S.C. 1786(i)) to add a new paragraph (8) providing for temporary adjustments in spending authority.

This provision requires State agencies to report rebate payments from manufacturers on the FNS–798 (Financial Management and Participation Report) in the month in which the payments are received, rather than in the month that rebates are earned. This change does not affect how rebates are earned and billed on rebate invoices to manufacturers, which will continue in accordance with current and future rebate contracts. Rather, this change in reporting will assist the State agency in more accurately estimating its annual amount of rebates, which is a key component in determining its need for food funds during the course of the fiscal year.

This requirement becomes effective on October 1, 2011, as stipulated in the HHFK Act. Section 246.14 is modified to incorporate the reporting change.

6. New Rebate Bid Solicitation Requirements

Section 352(c) of the HHFK Act amends section 17(h)(9) of the CNA (42 U.S.C. 1786(h)(9)) to add several new requirements for the solicitation and billing of all rebates on authorized foods, including infant formula, specifically:

A. The bid solicitation must:

○ Identify the composition of State alliances for the purposes of a cost containment measure, and

○ Verify that no additional States shall be added to the State alliance between the date of the bid solicitation and the end of the contract.

B. The State agency must have a system to ensure that rebate invoices under competitive bidding provide a reasonable estimate or an actual count of the number of units sold to WIC participants.

C. The State agency must publicly open and read all bids aloud on the day the bids are due.

D. The State agency must provide a minimum of 30 days between the publication of the solicitation and the date on which the bids are due, unless exempted by the Secretary.

E. The State agency must extend current provisions and requirements regarding State alliances for infant formula rebates to all other authorized foods for which rebates are sought.

Rebates are offsets to food costs and allow the Program to serve a greater number of participants without increasing the annual appropriation of WIC funds by Congress. Infant formula rebates have been a very successful cost containment initiative in the WIC Program since the mid-1980's. Over the years, State agencies have also implemented rebate contracts for other foods, such as infant cereal and juice; and more recently, infant foods such as fruit, vegetables and meat. A key to the success of rebate contracts is ensuring fair and open competition for the contracts.

The rebate bid solicitation requirements became effective on October 1, 2010, as stipulated by the HHFK Act. Section 246.16a is modified to incorporate these new requirements.

Notice and Comment

In accordance with the Secretary's Statement of Policy (36 FR 13804), it is found and determined with good cause that it is unnecessary to engage in the Notice and Comment provisions of 5 U.S.C. 553 normally required before the adoption of final regulations in an FNS-sponsored program. The provisions set forth in this rulemaking are nondiscretionary, *i.e.,* the Department has not exercised any authority to interpret the statutory provisions beyond the language that is specifically provided in the legislation. The nondiscretionary nature of the provisions contained in Public Law 111–296 means that notice and comment would serve no useful purpose in the promulgation of this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been designated not significant under section 3(f) of Executive Order 12866.

Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget; therefore, a Regulatory Impact Analysis is not necessary.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Pursuant to that review, it has been certified that this rule will not have a significant economic impact on a substantial number of small entities.

This rule incorporates into the regulations governing the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) several changes set forth in the Healthy, Hunger-Free Kids Act of 2010 (HHFK Act). The provisions of this rulemaking are applicable to all State and local agencies that administer the WIC Program.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

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

Executive Order 12372

WIC is listed in the Catalog of Federal Domestic Assistance under No. 10.557. For the reasons set forth in the final rule at 7 CFR part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 that requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

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

has determined that this rule does not have federalism implications. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988

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

In WIC, the administrative procedures are as follows: State and local agencies, farmers, farmers' markets, and roadside stands—State agency hearing procedures issued pursuant to 7 CFR 246.18; applicants and participants—State agency hearing procedures pursuant to 7 CFR 246.18; sanctions against State agencies (but not claims for repayment assessed against a State agency) pursuant to 7 CFR 246.19—administrative appeal in accordance with 7 CFR 246.16, and procurement by State or local agencies—administrative appeal to the extent required by 7 CFR 3016.36.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Departmental Regulations 4300–4, ''Civil Rights Impact Analysis,'' and 1512–1, ''Regulatory Decision Making Requirements.'' After a careful review of the rule's intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits in the WIC Program. Federal WIC regulations specifically prohibit State agencies that administer the WIC Program, and their cooperators, from engaging in actions that discriminate against any individual in any of the protected classes (see 7 CFR 246.8 for the nondiscrimination policy in the WIC Program). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the WIC Program regulations set forth at § 246.8.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to host periodic collaborative conversations with Tribal officials or their designees concerning ways to improve this rule in Indian country. We are not aware of any current Tribal laws that could be in conflict with this final rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. While some of the provisions of this rule are related to the current collection of information for the WIC Program, this final rule has no new information collection requirements. The information collection burdens associated with collecting local agency breastfeeding data and the recording of rebates in this final rule have been previously approved under OMB No. 0584–0045, *WIC Financial Management and Participation Report with Addendum.*

E-Government Act Compliance

FNS is committed to complying with the E-Government Act of 2002 to promote the use of the internet and other information technologies to provide increased opportunities to provide for citizen access to government information and services, and for other purposes. State Plan amendments regarding the implementation of the provisions contained in this rule, as is the case with the entire State Plan, may be transmitted electronically by the State agency to FNS. Also, State agencies may provide WIC Program information, as well as their financial reports, to FNS electronically.

List of Subjects in 7 CFR Part 246

Food assistance programs, Food donations, Grant programs—Social programs, Indians, Nutrition education, Public assistance programs, WIC.

For reasons discussed above, 7 CFR part 246 is amended as follows:

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

■ 1. The authority citation for part 246 continues to read as follows:

Authority: 7 U.S.C. 1786.

§ 246.1 [Amended]

■ 2. Section 246.1 is amended by adding the phrase '', including breastfeeding promotion and support,'' after the word ''education'' in the third sentence.

§ 246.3 [Amended]

■ 3. Section 246.3 is amended in paragraph (e) by adding the phrase ''breastfeeding promotion and support,'' after the word ''education,'' in the first sentence.

■ 4. In § 246.4:

■ a. Revise paragraph (a)(9);

■ b. Amend paragraph (a)(11)(ii) by adding the phrase '', including breastfeeding promotion and support,'' after the word ''education'' in the first sentence; and

■ c. Redesignate paragraphs (a)(19) through (a)(26) as paragraphs (a)(20) through (a)(27), and add a new paragraph (a)(19).

The revisions and additions read as follows:

§ 246.4 State plan.

(a) * * *

(9) The State agency's nutrition education goals and action plans to include:

(i) A description of the methods that will be used to provide drug and other harmful substance abuse information, to promote and support breastfeeding, and to meet the special nutrition education needs of migrant farmworkers and their families, Indians, and homeless persons.

(ii) State agencies have the option to provide nutrition education materials to institutions participating in the CACFP at no cost, as long as a written agreement for sharing such materials is in place between the relevant WIC and CACFP entities. State agencies may initiate a sharing agreement with their State-level CACFP counterparts that would apply statewide, or may

authorize their local agencies or clinics to initiate a sharing agreement at the local level with their local level CACFP counterparts.

* * * * *

(19) The State agency's plan to ensure that participants receive required health and nutrition assessments when certified for a period of greater than six months.

* * * * *

§ 246.6 [Amended]

■ 5. In § 246.6 paragraph (b)(6) is amended by adding the phrase '', including breastfeeding promotion and support,'' after the word ''services''.

■ 6. In § 246.7:

■ a. Revise the fourth sentence in paragraph (e);

■ b. Revise paragraph (g)(1)(v) to read as set forth below;

■ c. Amend paragraph (j)(2)(iii) by removing the phrase ''and nutrition education'' and adding in its place the phrase '', nutrition education and breastfeeding support''; and

■ d. Amend paragraph (m)(1)(i)(C) by removing the phrase ''and nutrition education'' and adding in its place the phrase '', nutrition education and breastfeeding support'';

■ e. Amend paragraph (m)(4) by adding the phrase '', including breastfeeding promotion and support,'' after the word ''education''.

The revisions read as follows:

§ 246.7 Certification of participants.

* * * * *

(e) * * * Nutritional risk data shall be documented in the participant's file and shall be used to assess an applicant's nutritional status and risk; tailor the food package to address nutritional needs; design appropriate nutrition education, including breastfeeding promotion and support; and make referrals to health and social services for follow-up, as necessary and appropriate.

* * * * *

(g) * * *

(1) * * *

A/an:	Will be certified:
*	* * * * * * *
(v) Child	Approximately every six months ending with the last day of the month in which a child reaches his/her fifth birthday. The State agency may permit its local agencies to certify a child for a period of up to one year, provided the local agency ensures that the child receives the required health and nutrition assessments, as set forth in § 246.11(e)(3).

* * * * *

■ 7. In § 246.11:

■ a. Amend paragraphs (a)(1), and (b) introductory text, by adding the phrase ''including breastfeeding promotion and support,'' after the phrase ''Nutrition education'' wherever it appears;

■ b. Amend paragraph (a)(2) by adding the phrase '', including breastfeeding promotion and support, as appropriate,'' after the word ''education'' in the first sentence;

■ c. Amend paragraph (c) introductory text by adding the phrase '', including breastfeeding promotion and support,'' after the word ''responsibilities'';

■ d. Add new paragraph (c)(8);

■ e. Amend paragraph (d) introductory text by adding the phrase '', including breastfeeding promotion and support,'' after the word ''responsibilities'';

■ f. Revise the first sentence in paragraph (d)(1);

■ g. Revise the first sentence in paragraph (d)(2);

■ h. Amend paragraph (e)(1) by adding the phrase ''including breastfeeding promotion and support,'' after the phrase ''nutrition education'' ; and

■ i. Revise paragraph (e)(3).

The revisions and additions read as follows:

§ 246.11 Nutrition education.

* * * * *

(c) * * *

(8) Determine if local agencies or clinics can share nutrition educational materials with institutions participating in the Child and Adult Care Food Program established under section 17 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1766) at no cost to that program, if a written materials sharing agreement exists between the relevant agencies.

(d) * * *

(1) Make nutrition education, including breastfeeding promotion and support, available or enter into an agreement with another agency to make nutrition education available to all adult participants, and to parents or caretakers of infant and child participants, and whenever possible and appropriate, to child participants.* * *

(2) Develop an annual local agency nutrition education plan, including breastfeeding promotion and support, consistent with the State agency's nutrition education component of Program operations and in accordance with this part and FNS guidelines.

* * *

(e) * * *

(3) Nutrition education contacts shall be made available at a quarterly rate to parents or caretakers of infant and child participants certified for a period in excess of six months. Nutrition education contacts shall be scheduled on a periodic basis by the local agency, but such contacts do not necessarily need to take place in each quarter of the certification period.

* * * * *

§ 246.12 [Amended]

■ 8. Section 246.12(d) is amended by adding the phrase '', and breastfeeding counseling ''after the word ''education''.

■ 9. In § 246.14:

■ a. Amend paragraph (c)(1) by adding the phrase '', including breastfeeding promotion and support, '' after the word ''education'' in the eleventh sentence;

■ b. Add a new paragraph (f).

The addition reads as follows:

§ 246.14 Program costs.

* * * * *

(f) *Use of funds received as rebates from manufacturers.* The State agency must credit and report rebate payments received from manufacturers in the month in which the payments are received.

■ 10. In § 246.16a:

■ a. Revise the section heading;

■ b. Redesignate paragraphs (c)(1) through (c)(8) as paragraphs (c)(2) through (c)(9);

■ c. Remove introductory text of paragraph (c) and add a new paragraph (c)(1);

■ d. Amend newly designated paragraph (c)(3) by adding a third sentence; and

■ e. Revise paragraphs (g) and (k).

The additions and revisions read as follows:

§ 246.16a Infant formula and authorized foods cost containment.

* * * * *

(c) *What is the single-supplier competitive system?*—(1) Under the single-supplier competitive system, a State agency solicits sealed bids from infant formula manufacturers to supply and provide a rebate for infant formulas. The State agency must conduct the

procurement in a manner that maximizes full and open competition consistent with the requirements of this section. A State agency must:

(i) Provide a minimum of 30 days between the publication of the solicitation and the date on which the bids are due, unless exempted by the Secretary; and

(ii) Publicly open and read all bids aloud on the day the bids are due.

* * * * *

(c) * * *

(3) * * * The bid solicitation must identify the composition of the State alliances for the purpose of a cost containment measure, and verify that no additional State shall be added to the State alliance between the date of the bid solicitation and the end of the contract. * * *

* * * * *

(g) *May a State agency implement cost containment systems for other supplemental foods*? Yes, when a State agency finds that it is practicable and feasible to implement a cost containment system for any WIC food other than infant formula. The State agency must:

(1) Provide notification to FNS by means of the State agency's State Plan.

(2) Comply with paragraphs (c)(2) and (k) of this section.

(3) Provide a minimum of 30 days between the publication of the solicitation and the date on which the bids are due, unless exempted by the Secretary. The State must publicly open and read all bids aloud on the day the bids are due.

(4) Issue separate solicitations for authorized foods if any alliance served a monthly average of more than 100,000 infants during the preceding 12-month period.

* * * * *

(k) *What are the requirements for infant formula and authorized food rebate invoices?* A State agency must have a system in place that ensures infant formula and authorized food rebate invoices, under competitive bidding, provide a reasonable estimate or an actual count of the number of units purchased by participants in the program.

* * * * *

§ 246.19 [Amended]

■ 11. Section 246.19(b)(2) is amended by adding the phrase ''breastfeeding promotion and support,'' after the word ''education,'' in the first sentence.

■ 12. In § 246.25:

■ a. Amend paragraph (a)(1) by adding the phrase ''including breastfeeding promotion and support,'' after the word ''education,'';

■ b. Redesignate paragraphs (b)(1)(i)(C) and (D) as paragraphs (b)(1)(i)(D) and (E), and add a new paragraph (b)(1)(i)(C); and

■ c. Add new paragraph (b)(2)(iii).

The additions read as follows:

§ 246.25 Records and reports.

(b) * * *

(1) * * *

(i) * * *

(C) Actual and projected rebate payments received from manufacturers.

* * * * *

(2) * * *

(iii) The State agency must submit local agency breastfeeding participation data on an annual basis to FNS.

* * * * *

Dated: September 20, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–24722 Filed 9–27–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30805; Amdt. No. 496]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, October 20, 2011.

FOR FURTHER INFORMATION CONTACT: Rick Dunham, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (*Mail Address:* P.O. Box 25082 Oklahoma City, OK 73125) *telephone:* (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the nticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on September 16, 2011.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, October 20, 2011.

PART 95—[AMENDED]

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES AND CHANGEOVER POINTS

[Amendment 496 effective date October 20, 2011]

From	To	MEA	MAA
§ 95.4000 High Altitude RNAV Routes			
§ 95.4037 RNAV Route Q37 Is Added to Read			
FORT STOCKTON, TX VORTAC	CAVRN, TX FIX	*25000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
CAVRN, TX FIX	YORUB, NM FIX	*25000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
YORUB, NM FIX	IMMAS, NM FIX	*25000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
IMMAS, NM FIX	PUEBLO, CO VORTAC	*25000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
§ 95.4042 RNAV Route Q42 Is Amended to Read in Part			
BRNAN, PA FIX	HOTEE, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
HOTEE, PA FIX	BTRIX, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
BTRIX, PA FIX	SPOTZ, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
SPOTZ, PA FIX	ZIMMZ, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
§ 95.4062 RNAV Route Q62 Is Added to Read			
NOLNN, OH FIX	WEEVR, OH FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
WEEVR, OH FIX	PSKUR, OH FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
PSKUR, OH FIX	FAALS, OH FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
FAALS, OH FIX	ALEEE, OH FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
ALEEE, OH FIX	QUARM, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
QUARM, PA FIX	BURNI, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
BURNI, PA FIX	MCMAN, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
MCMAN, PA FIX	VALLO, PA FIX	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
VALLO, PA FIX	RAVINE, PA VORTAC	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
RAVINE, PA VORTAC	SUZIE, PA FIX	*18000	45000

REVISIONS TO IFR ALTITUDES AND CHANGEOVER POINTS—Continued

[Amendment 496 effective date October 20, 2011]

From	To	MEA	MAA
*18000—GNSS MEA *DME/DME/IRU MEA			
SUZIE, PA FIX	SARAA, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
§ 95.4406	**RNAV Route Q406 Is Added to Read**		
BROADWAY, NJ VOR/DME	DBABE, NY FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
DBABE, NY FIX	BASYE, NY FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BASYE, NY FIX	TRIBS, CT FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
TRIBS, CT FIX	BIGGO, CT FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BIGGO, CT FIX	BARNES, MA VORTAC	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
§ 95.4448	**RNAV Route Q448 Is Added to Read**		
POTTSTOWN, PA VORTAC	LANNA, NJ FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
LANNA, NJ FIX	DBABE, NY FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
DBABE, NY FIX	BASYE, NY FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BASYE, NY FIX	TRIBS, CT FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
TRIBS, CT FIX	BIGGO, CT FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BIGGO, CT FIX	BARNES, MA VORTAC	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
§ 95.4480	**RNAV Route Q480 Is Added to Read**		
ZANDR, OH FIX	BELLAIRE, OH VOR/DME	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BELLAIRE, OH VOR/DME	LEJOY, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
LEJOY, PA FIX	VINSE, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
VINSE, PA FIX	BEETS, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BEETS, PA FIX	HOTEE, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
HOTEE, PA FIX	BTRIX, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
BTRIX, PA FIX	SPOTZ, PA FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			
SPOTZ, PA FIX	CANDR, NJ FIX	*18000	45000
*18000—GNSS MEA *DME/DME/IRU MEA			

REVISIONS TO IFR ALTITUDES AND CHANGEOVER POINTS—Continued

[Amendment 496 effective date October 20, 2011]

From	To	MEA	MAA
CANDR, NJ FIX *18000—GNSS MEA *DME/DME/IRU MEA	JEFFF, NJ FIX	*18000	45000
JEFFF, NJ FIX *18000—GNSS MEA *DME/DME/IRU MEA	KINGSTON, NY VOR/DME	*18000	45000
KINGSTON, NY VOR/DME *18000—GNSS MEA *DME/DME/IRU MEA	LESWL, CT FIX	*18000	45000
LESWL, CT FIX *18000—GNSS MEA *DME/DME/IRU MEA	BARNES, MA VORTAC	*18000	45000
BARNES, MA VORTAC *18000—GNSS MEA *DME/DME/IRU MEA	KENNEBUNK, ME VORTAC	*18000	45000

From	To	MEA
§ 95.6001 Victor Routes—U.S.		
§ 95.6003 VOR Federal Airway V3 Is Amended to Read in Part		
#KEY WEST, FL VORTAC *14500—MCA BIPIN, FL FIX, W BND **GNSS MEA #KEY WEST R–082 UNUSABLE	*BIPIN, FL FIX	**15000
BIPIN, FL FIX *GNSS MEA	DROWN, FL FIX	*3000
§ 95.6005 VOR Federal Airway V5 Is Amended to Read in Part		
*AWSON, GA FIX *5000—MRA **5500—MOCA	NELLO, GA FIX	**7000
§ 95.6006 VOR Federal Airway V6 Is Amended to Read in Part		
PITTS, CA FIX *2400—MOCA	REJOY, CA FIX	*4000
GIPPER, MI VORTAC *2400—MOCA	BRYTO, IN FIX	*3500
BRYTO, IN FIX *4000—MRA **2500—MOCA	*PIONS, OH FIX	**4000
*PIONS, OH FIX *4000—MRA **2300—MOCA	WATERVILLE, OH VOR/DME	**3300
§ 95.6016 VOR Federal Airway V16 Is Amended to Read in Part		
KENNEDY, NY VOR/DME	CALVERTON, NY VOR/DME	2000
§ 95.6020 VOR Federal Airway V20 Is Amended to Read in Part		
RESERVE, LA VOR/DME	GULFPORT, MS VORTAC	2000
§ 95.6047 VOR Federal Airway V47 Is Amended to Read in Part		
POCKET CITY, IN VORTAC	HOLAN, IN FIX	2600
HOLAN, IN FIX *2100—MOCA *3000—GNSS MEA	SACKO, IN FIX	*3500
SACKO, IN FIX *2300—MOCA *3000—GNSS MEA	MAIZE, IN FIX	*6000
MAIZE, IN FIX *2400—MOCA *3000—GNSS MEA	NABB, IN VORTAC	*3500
§ 95.6063 VOR Federal Airway V63 Is Amended to Read in Part		
DAVENPORT, IA VORTAC *4000—MRA	*MIHAL, IL FIX	2700

From	To	MEA
*MIHAL, IL FIX	ROCKFORD, IL VOR/DME	2700
*4000—MRA		
§ 95.6097 VOR Federal Airway V97 Is Amended to Read in Part		
PECAN, GA VORTAC	AMAPO, GA FIX	2300
AMAPO, GA FIX	*PRATZ, GA FIX	**3000
*3000—MRA		
*4000—MCA PRATZ, GA FIX, N BND		
**2300—MOCA		
*PRATZ, GA FIX	OLISY, GA FIX	**4000
*3000—MRA		
**2700—MOCA		
**3000—GNSS MEA		
OLISY, GA FIX	ATLANTA, GA VORTAC	*3000
*2400—MOCA		
§ 95.6114 VOR Federal Airway V114 Is Amended to Read in Part		
RESERVE, LA VOR/DME	GULFPORT, MS VORTAC	2000
§ 95.6155 VOR Federal Airway V155 Is Amended to Read in Part		
FLAT ROCK, VA VORTAC	#BROOKE, VA VORTAC	*2000
*2000—GNSS MEA		
#BROOKE R–214 UNUSABLE		
§ 95.6157 VOR FEDERAL AIRWAY V157 Is Amended to Read in Part		
#KEY WEST, FL VORTAC	DVALL, FL FIX	*3000
*1400—MOCA		
*GNSS MEA		
#KEY WEST R–037 UNUSABLE		
DVALL, FL FIX	*FAMIN, FL FIX	**5000
*5700—MRA		
**1300—MOCA		
**3000—GNSS MEA		
*FAMIN, FL FIX	DOLPHIN, FL VORTAC	**5000
*5700—MRA		
**1600—MOCA		
**3000—GNSS MEA		
§ 95.6163 VOR Federal Airway V163 Is Amended to Read in Part		
BROWNSVILLE, TX VORTAC	*MANNY, TX FIX	1700
*5000—MRA		
§ 95.6172 VOR Federal Airway V172 Is Amended to Read in Part		
LOTTE, IA FIX	*MIHAL, IL FIX	2700
*4000—MRA		
*MIHAL, IL FIX	POLO, IL VOR/DME	2700
*4000—MRA		
§ 95.6229 VOR Federal Airway V229 Is Amended to Read in Part		
KENNEDY, NY VOR/DME	KEEPM, NY FIX	2000
KEEPM, NY FIX	TRANZ, NY FIX	2000
TRANZ, NY FIX	PUGGS, NY FIX	*2500
*2000—GNSS MEA		
PUGGS, NY FIX	BRIDGEPORT, CT VOR/DME	*2500
*2000—GNSS MEA		
§ 95.6269 VOR Federal Airway V269 Is Amended to Read in Part		
POCATELLO, ID VOR/DME	*JATTS, ID FIX	8000
*9700—MCA JATTS, ID FIX, NW BND		
JATTS, ID FIX	YOYYU, ID FIX	*16000
*13300—MOCA		
*13300—GNSS MEA		
YOYYU, ID FIX	SALMON, ID VOR/DME	*14000
*13500—MOCA		
*13500—GNSS MEA		

From	To	MEA
§ 95.6311 VOR Federal Airway V311 Is Amended to Read in Part		
NELLO, GA FIX	*AWSON, GA FIX	**7000
*5000—MRA		
**5500—MOCA		
§ 95.6417 VOR Federal Airway V417 Is Amended to Read in Part		
NELLO, GA FIX	*AWSON, GA FIX	**7000
*5000—MRA		
**5500—MOCA		
§ 95.6449 VOR Federal Airway V449 Is Amended to Read in Part		
MILTON, PA VORTAC	MEGSS, PA FIX	*3500
*GNSS MEA		
MEGSS, PA FIX	LAKE HENRY, PA VORTAC	*4000
*GNSS MEA		
§ 95.6472 VOR Federal Airway V472 Is Amended to Read in Part		
ELIZABETH CITY, NC VOR/DME	BERTI, NC FIX	*4000
*1600—MOCA		
BERTI, NC FIX	*ZAGGY, NC FIX	**7000
*7000—MRA		
**2100—MOCA		
**2100—GNSS MEA		
*ZAGGY, NC FIX	KINSTON, NC VORTAC	**2000
*7000—MRA		
**1600—MOCA		
§ 95.6500 VOR Federal Airway V500 Is Amended to Read in Part		
DERSO, ID FIX	*SOLDE, ID FIX	**17000
*16600—MCA SOLDE, ID FIX, W BND		
**9200—MOCA		
SOLDE, ID FIX	*REAPS, ID FIX	**14000
*12900—MCA	REAPS, ID FIX, W BND	**14000
**8000—MOCA		
§ 95.6512 VOR Federal Airway V512 Is Amended to Read in Part		
POCKET CITY, IN VORTAC	HOLAN, IN FIX	2600
HOLAN, IN FIX	SACKO, IN FIX	*3500
*2100—MOCA		
*3000—GNSS MEA		
§ 95.6521 VOR Federal Airway V521 Is Amended to Read in Part		
HEVVN, FL FIX	*TERES, FL FIX	**2000
*7000—MRA		
**1300—MOCA		
**GNSS MEA		
**GNSS REQUIRED		
§ 95.6526 VOR Federal Airway V526 Is Amended to Read in Part		
MUSKY, MI FIX	MAPER, MI FIX	*3500
*1700—MOCA		
*2600—GNSS MEA		
MAPER, MI FIX	GIPPER, MI VORTAC	2600

From	To	MEA	MAA
§ 95.7001 Jet Routes **§ 95.7060 Jet Route J60 Is Amended to Read in Part**			
PHILIPSBURG, PA VORTAC	DANNR, PA FIX	18000	38000
DANNR, PA FIX	SPARTA, NJ VORTAC	18000	45000

Airway segment		Changeover points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Points V47 Is Amended to Add Changeover Point			
POCKET CITY, IN VORTAC	NABB, IN VORTAC	53	POCKET CITY
V163 Is Amended to Delete Changeover Point			
BROWNSVILLE, TX VORTAC	CORPUS CHRISTI, TX VORTAC	71	BROWNSVILLE
V203 Is Amended to Delete Changeover Point			
SARANAC LAKE, NY VOR/DME	MASSENA, NY VORTAC	11	SARANAC LAKE

[FR Doc. 2011–24718 Filed 9–27–11; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB61

Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Postponement of Effective Date

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule; delay of effective date.

SUMMARY: The Department of Labor (Department) is postponing the effective date of the Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Final Rule, 76 FR 3452, Jan. 19, 2011, (the Wage Rule). The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H–2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H–2B status. The effective date of the Wage Rule was set at January 1, 2012. However, the Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Amendment of Effective Date; Final Rule, 76 FR 45667, August 1, 2011 revised the effective date to September 30, 2011. Due to pending legal challenges, we are postponing the effective date of the Wage Rule to November 30, 2011, pursuant to the Administrative Procedure Act, 5 U.S.C. 705.

DATES: The effective date of the rule amending 20 CFR part 655 published at 76 FR 45667, August 1, 2011 is delayed until November 30, 2011.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The Department published the Wage Rule on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H–2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in the H–2B status.

The Department originally set the effective date of the Wage Rule for January 1, 2012. On January 24, 2011, the plaintiffs in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP (E.D. Pa.) filed a motion in which they argued that the January 1, 2012 effective date did not comply with the court's August 30, 2010 order to promulgate new rules concerning the calculation of the prevailing wage rate in the H–2B program. *CATA* v. *Solis,* Dkt. No. 103–1, Plaintiff's Motion for an Order Enforcing the Judgment at 2 (Jan. 24, 2011). On June 16, 2011, the court issued a ruling that invalidated the January 1, 2012 effective date of the Wage Rule and ordered us to announce a new effective date for the rule within 45 days from June 16. *CATA,* 2011 WL 2414555 at *4.

In response to the court's order, we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686, June 28, 2011. After a period of public comment, we published the Final Rule on August 1, 2011, which set the new effective date for the Wage Rule at September 30, 2011, without altering the substance of the Wage Rule. 76 FR 45667.

On September 7, 2011, the Louisiana Forestry Association, Inc., and others filed suit against the Department in the United States District Court for the Western District of Louisiana, Alexandria Division. *Louisiana Forestry Association, Inc., et al (LFA)* v. *Solis, et al,* Civil Docket No. 11–1623. LFA claims that the Wage Rule, and the subsequent rule amending the Wage Rule's original effective date, violate the Takings Clause of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the Regulatory Flexibility Act, and the Immigration and Nationality Act of 1952, as amended. Accordingly, LFA seeks temporary injunctive relief before September 30, 2011, and permanent injunctive relief, barring the Department from implementing the Wage Rule.

On September 19, 2011, the plaintiffs in the *CATA* litigation moved to intervene in the *LFA* litigation, and also moved to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the *CATA* case remains pending. Both motions in the *LFA* litigation are currently pending.

On September 21, 2011, another group of employers filed a legal challenge to the Wage Rule in the United States District Court for the

Northern District of Florida, Pensacola Division. *Bayou Lawn & Landscape Services, et al. (Bayou)* v. *Solis, et al.,* Civil Docket No. 11–445. The *Bayou* plaintiffs' claims are similar to the *LFA* plaintiffs' claims, and they also seek to preliminarily and permanently enjoin the Department's implementation of the Wage Rule.

The Administrative Procedure Act, at 5 U.S.C. 705, provides that ''[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.'' In consideration of the two pending challenges to the Wage Rule and its new effective date, and the possibility that, in response to the *CATA* plaintiffs' motion, the litigation will be transferred to another court, the Department is postponing the effective date of the rule from September 30, 2011, until November 30, 2011. This delay will allow the Department to mount an appropriate defense of the rule, and will allow for the orderly resolution of the various claims pending in two Federal courts. The delay will permit the various courts involved in the litigation to determine the appropriate venue for the resolution of all claims, and allow the Department to avoid the possibility of administering the H–2B program under potentially conflicting court orders. In the interest of administering a nationwide program in a uniform fashion during the pending litigation, the Department has determined that, in the interest of justice, a delay in the effective date is necessary.

Signed at Washington, DC, this 22nd day of September, 2011.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–24969 Filed 9–26–11; 4:15 pm]

BILLING CODE 4510–FP–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 51

[TD 9544]

RIN 1545–BK34

Branded Prescription Drug Fee; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to temporary regulations (TD 9544) that were published in the **Federal Register** on Thursday, August 18, 2011. The temporary regulations provide guidance on the annual fee imposed on covered entities engaged in the business of manufacturing or importing branded prescription drugs. This fee was enacted by section 9008 of the Patient Protection and Affordable Care Act, as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010.

DATES: This correction is effective on September 28, 2011 and applies to any fee on branded prescription drug sales that is due on or after September 30, 2011.

FOR FURTHER INFORMATION CONTACT: Celia Gabrysh, (202) 622–3130 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Need for Correction

As published August 18, 2001 (76 FR 51245), the tempoary regulations (TD 9544) contains errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 51

Drugs, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 51 is corrected by making the following correcting amendments:

PART 51—BRANDED PRESCRIPTION DRUG FEE

■ **Paragraph 1.** The authority citation for part 51 continues to read in part as follows:

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

■ **Par. 2.** Section 51.2T is amended by revising paragraph (k)(1) to read as follows:

§ 51.2T Explanation of terms (temporary).

* * * * *

(k) *Orphan drugs*—(1) *In general.* Except as provided in paragraph (k)(2) of this section, the term *orphan drug* means any branded prescription drug for which any person claimed a section 45C credit and that credit was allowed for any taxable year.

* * * * *

■ **Par. 3.** Section 51.7T is amended by revising the last sentence of paragraph (c)(2) to read as follows.

§ 51.7T Dispute resolution process (temporary).

* * * * *

(c) * * *

(2) * * * A form 2848 must be filed with the error report;

* * * * *

■ **Par. 4.** Section 51.8T is amended by revising paragraph (a)(2) to read as follows.

§ 51.8T Notification and payment of fee (temporary).

(a) * * *

(2) After the 2011 fee year, the covered entity's adjustment amount calculated as described in § 51.5T(e);

* * * * *

LaNita VanDyke,

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

[FR Doc. 2011–24903 Filed 9–27–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 51

[TD 9544]

RIN 1545–BK34

Branded Prescription Drug Fee; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to temporary regulations.

SUMMARY: This document contains corrections to temporary regulations that were published in the **Federal Register** on Thursday, August 18, 2011. The temporary regulations provide guidance on the annual fee imposed on covered entities engaged in the business of manufacturing or importing branded prescription drugs. This fee was enacted by section 9008 of the Patient Protection and Affordable Care Act, as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010.

DATES: This correction is effective on September 28, 2011 and applies to any fee on branded prescription drug sales that is due on or after September 30, 2011.

FOR FURTHER INFORMATION CONTACT: Celia Gabrysh, (202) 435–3130 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

Need for Correction

As published August 18, 2011 (76 FR 51245), the temporary regulations (TD 9544) contains errors that may prove to

be misleading and are in need of clarification.

Correction of Publication

Accordingly, the temporary regulations (TD 9544), that are the subject of FR Doc. 2011–21011, are corrected as follows:

1. On page 51247, column 3, in the preamble, under the paragraph heading ''IV. Information Provided by the Agencies'', line 6 of the third full paragraph of the column, the language ''with a specific HCPCS Code. CMS'' is corrected to read ''with a specific Healthcare Common Procedure Coding System (HCPCS) Code. CMS''.

2. On page 51248, column 2, in the preamble, under the paragraph heading ''VI. Notice of Preliminary Fee Calculation'', line 5 from the bottom of the column, the language ''9008 (a)(2); the aggregate branded'' is corrected to read ''9008 (b)(2); the aggregate branded''.

3. On page 51248, column 3, under the paragraph heading ''VIII. Notification and Payment of Fee'', line 1 of the paragraph, the language ''Section 9008(a) provides that the'' is corrected to read ''Section 9008(a)(2) provides that the''

4. On page 51248, column 3, under the paragraph heading ''VIII. Notification and Payment of Fee'', line 4 from the bottom of the column, the language ''section 9008(a)(2); the aggregate'' is corrected to read ''section 9008(b)(2); the aggregate''

5. On page 51255, column 1, in the signature block line 2, the language ''Deputy Commissioner for Services and Enforcement.'' is corrected to read ''Acting Deputy Commissioner for Services and Enforcement.''

LaNita VanDyke,

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

[FR Doc. 2011–24911 Filed 9–27–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 51

[REG–112805–10]

RIN 1545–BJ39

Branded Prescription Drug Fee; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains a correction to a notice of proposed rulemaking that was published in the **Federal Register** on Thursday, August 18, 2011. The proposed regulation provides guidance relating to the branded prescription drug fee imposed by the Affordable Care Act.

FOR FURTHER INFORMATION CONTACT: Celia Gabrysh, (202) 622–3130 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Need for Correction

As published August 18, 2011 (76 FR 51310), the notice of proposed rulemaking (REG–112805–10) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking (REG–112805–10), that was the subject of FR Doc. 2011–21012, is corrected as follows:

1. On Page 51311, column 2, under the part heading PART 51—BRANDED PRESCRIPTION DRUGS, the last line of the first paragraph, the language ''this issue of the **Federal Register**.]'' is corrected to read ''this issue of the **Federal Register**].''.

2. On page 51311, column 2, under the part heading PART 51—BRANDED PRESCRIPTION DRUGS, the first line of the last paragraph, the language ''[The text of proposed § 51.6302–1 is'' is corrected to read ''[The text of proposed paragraphs (a) and (b) of § 51.6302–1 is''.

3. On page 51311, column 2, under the part heading PART 51—BRANDED PRESCRIPTION DRUGS, the last line of the last paragraph, the language ''Register.]'' is corrected to read ''Register].''

4. On page 51311, column 2, in the signature block, the language ''Sarah Hall Ingram, Deputy Commissioner for Services and Enforcement.'' is corrected to read ''Sarah Hall Ingram, Acting Deputy Commissioner for Services and Enforcement.''

LaNita VanDyke,

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

[FR Doc. 2011–24913 Filed 9–27–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0996

Special Local Regulation, Hydroplane Races, Lake Sammamish, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Special Local Regulation, Hydroplane Races within the Captain of the Port Puget Sound Area of Responsibility for the 2011 Fall Championship hydroplane event in Lake Sammamish, WA from 11 a.m. until 4:30 p.m. from September 30, 2011 through October 2, 2011. This action is necessary to restrict vessel movement in the vicinity of the race courses thereby ensuring the safety of participants and spectators during these events. During the enforcement period non-participant vessels are prohibited from entering the designated race areas. Spectator craft entering, exiting or moving within the spectator area must operate at speeds which will create a minimum wake.

DATES: The regulations in 33 CFR 100.1308 will be enforced from 11 a.m. until 4:30 p.m. each day from September 30, 2011 through October 2, 2011.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail Ensign Anthony P. LaBoy, Sector Puget Sound Waterways Management Division, Coast Guard; telephone 206–217–6323, e-mail *SectorPugetSoundWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard is providing notice of enforcement of the Special Local Regulation for Hydroplane Races within the Captain of the Port Puget Sound Area of Responsibility 33 CFR 100.1308. The Lake Sammamish area, 33 CFR 100.1308(a)(3) will be enforced from 11 a.m. until 4:30 p.m. from September 30, 2011 through October 2, 2011. These regulations can be found in the March 29, 2011 issue of the **Federal Register** (76 FR 17341).

Under the provisions of 33 CFR 100.1308, the regulated area shall be closed for the duration of the event to all vessel traffic not participating in the event and authorized by the event sponsor or Coast Guard Patrol Commander.

When this special local regulation is enforced, non-participant vessels are

prohibited from entering the designated race areas unless authorized by the designated on-scene Patrol Commander. Spectator craft may remain in designated spectator areas but must follow the directions of the designated on-scene Patrol Commander. The event sponsor may also function as the designated on-scene Patrol Commander. Spectator craft entering, exiting or moving within the spectator area must operate at speeds which will create a minimum wake.

Emergency Signaling: A succession of sharp, short signals by whistle or horn from vessels patrolling the areas under the discretion of the designated on-scene Patrol Commander shall serve as a signal to stop. Vessels signaled shall stop and shall comply with the orders of the patrol vessel. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

This notice is issued under authority of 33 CFR 100.1308 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners. If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: 9/12/11.

S.J. Ferguson,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. 2011–24728 Filed 9–27–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–1024; FRL–9471–9]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Prevention of Significant Deterioration Greenhouse Gas Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revisions to the Indiana State Implementation Plan (SIP), submitted by the Indiana Department of Environmental Management (IDEM) to EPA on July 7, 2011. The SIP revision modifies Indiana's Prevention of Significant Deterioration (PSD) program to establish appropriate emission thresholds for determining which new stationary sources and modification projects become subject to Indiana's PSD permitting requirements for their greenhouse gas (GHG) emissions. EPA proposed approval of these regulatory revisions on June 17, 2011, and received no comments. This action affects major stationary sources in Indiana that have GHG emissions above the thresholds established in the PSD regulations.

DATES: This final rule is effective on October 28, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2010–1024. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Sam Portanova, Environmental Engineer, at (312) 886–3189 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Sam Portanova, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–3189, *portanova.sam@epa.gov.*

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

I. What is the background for this action?

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's final action on the Indiana SIP. Four of these actions include, as they are commonly called, the ''Endangerment Finding'' and ''Cause or Contribute Finding,'' which EPA issued in a single final action,[1] the ''Johnson Memo Reconsideration,'' [2] the ''Light-Duty Vehicle Rule,'' [3] and the ''Tailoring Rule.'' [4] Taken together and in conjunction with the Clean Air Act (CAA), these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis.

Recognizing that some states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tons per year of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule, EPA published a final rule on December 30, 2010, narrowing its previous approval of PSD programs as applicable to GHG-emitting sources in SIPs for 24 states, including Indiana (PSD Narrowing Rule).[5] In the PSD Narrowing Rule, EPA withdrew its approval of Indiana's SIP, among other SIPs, to the extent that SIP applies PSD permitting requirements to GHG emissions from sources emitting at levels below those set in the Tailoring Rule. Subsequently, Indiana's approved SIP provided the state with authority to regulate GHGs, but only at and above the Tailoring Rule thresholds; and Federally required new and modified sources to receive a PSD permit based on GHG emissions only if they emitted at or above the Tailoring Rule thresholds.

On December 3, 2010, in response to the Tailoring Rule and earlier GHG-related EPA rules, IDEM submitted a draft revision to EPA for parallel processing approval into the Indiana SIP to establish appropriate emission thresholds for determining which new

[1] ''Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.'' 74 FR 66496 (December 15, 2009).

[2] ''Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.'' 75 FR 17004 (April 2, 2010).

[3] ''Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.'' 75 FR 25324 (May 7, 2010).

[4] ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.'' 75 FR 31514 (June 3, 2010).

[5] ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans.'' 75 FR 82536 (December 30, 2010).

or modified stationary sources become subject to PSD permitting requirements for GHG emissions. Subsequently, on June 17, 2011, EPA published a proposed approval of this parallel processing SIP submittal. *See* 76 FR 35380. Specifically, EPA proposed to approve revisions to 326 IAC 2–2–1 and 326 IAC 2–2–4 of Indiana's PSD rules to add GHG permitting requirements. Detailed background information and EPA's rationale for the proposed approval are provided in EPA's June 17, 2011, **Federal Register** action.

EPA's June 17, 2011, proposed approval was contingent upon Indiana providing a final SIP revision that was substantively the same as the December 3, 2010, submittal for parallel processing. Indiana provided its final SIP submittal on July 7, 2011, which included rules adopted final by IDEM on March 16, 2011. There were no differences between the December 3, 2010, draft SIP revision, and the July 7, 2011, final SIP revision.

II. What comments did EPA receive?

The public comment period on the proposed approval of Indiana's SIP revision ended on July 18, 2011. EPA did not receive any comments on the proposed approval of this SIP revision.

III. What is the effect of this action?

Final approval of Indiana's July 7, 2011, SIP revision incorporates changes to 326 IAC 2–2–1 and 326 IAC 2–2–4 of the state's rules to establish the GHG emission thresholds for PSD applicability set forth in EPA's Tailoring Rule, confirming that smaller GHG sources emitting less than these thresholds will not be subject to PSD permitting requirements under the approved Indiana SIP. EPA has determined that the SIP revision approved by today's action is consistent with EPA's regulations, including the Tailoring Rule. Furthermore, EPA has determined that this SIP revision is consistent with section 110 of the CAA. Pursuant to section 110 of the CAA, EPA approves this revision into Indiana's SIP.

As result of today's action approving Indiana's incorporation of the appropriate GHG permitting thresholds into its SIP, paragraph (k) in 40 CFR 52.773, as included in EPA's PSD Narrowing Rule, is no longer necessary.[6] Thus, today's action also amends 40 CFR 52.773 to remove this unnecessary regulatory language.

[6] 40 CFR 52.773(k) codifies EPA's limiting its approval of Indiana's PSD SIP to not cover the applicability of PSD to GHG-emitting sources below the Tailoring Rule thresholds.

IV. What action is EPA taking?

EPA is approving the revisions to 326 IAC 2–2–1 and 326 IAC 2–2–4 of Indiana's PSD regulations which were submitted by IDEM on July 7, 2011. These revisions establish appropriate emissions thresholds for determining PSD applicability with respect to new or modified GHG-emitting stationary sources in accordance with EPA's June 3, 2010, Tailoring Rule.

With this approval, EPA also amends 40 CFR 52.773 to remove paragraph (k).

V. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 28, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, and Reporting and recordkeeping requirements.

Dated: September 15, 2011.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. In § 52.770 the table in paragraph (c) is amended by revising the entries for ''2–2–1'' and ''2–2–4'' to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
* *	* *	*	* *	*
2–2–1	Definitions	03/16/2011	9/28/2011, [Insert page number where the document begins].	
* *	* *	*	* *	*
2–2–4	Air quality analysis; requirements	03/16/2011	9/28/2011, [Insert page number where the document begins].	
* *	* *	*	* *	*

* * * * *

■ 3. In § 52.773, paragraph (k) is removed.

[FR Doc. 2011–24790 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0087; FRL–8889–8]

Isaria fumosorosea Apopka Strain 97; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of *Isaria fumosorosea* (formerly known as *Paecilomyces fumosoroseus*) Apopka strain 97 in or on all food commodities when applied as an insecticide or miticide and used in accordance with good agricultural practices. Certis USA, LLC, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA) requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Isaria fumosorosea* Apopka strain 97 under the FFDCA.

DATES: This regulation is effective September 28, 2011. Objections and requests for hearings must be received on or before November 28, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0087. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–8097; *e-mail address: bacchus.shanaz@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.* To access the harmonized test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

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

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

in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0087 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 28, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0087, by one of the following methods:

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

II. Background and Statutory Findings

In the **Federal Register** of March 10, 2010 (75 FR 11171) (FRL–8810–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 9F7665) by Certis USA, LLC, 9145 Guilford Rd., Suite 175, Columbia, MD 21046. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Paecilomyces fumosoroseus* (now recognized as *Isaria fumosorosea*) Apopka strain 97. This notice referenced a summary of the petition prepared by the petitioner, Certis USA, LLC, which is available in the docket via *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the nomenclature of the active ingredient, which was recently reclassified as *Isaria fumosorosea* (Refs. 1, 2, and 3). The reason for this change is explained in Unit VII.C. Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance exemption and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *'' Additionally, section 408(b)(2)(D) of FFDCA requires that EPA consider ''available information concerning the cumulative effects of [a particular pesticide's] * * * residues and other substances that have a common mechanism of toxicity.''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

A. Overview of Isaria fumosorosea Apopka Strain 97

In 1986, *Paecilomyces fumosoroseus* Apopka strain 97, an entomopathogenic fungus, was isolated from a mealy bug in a greenhouse in Apopka, Florida. It was recently reclassified, however, as *Isaria fumosorosea* Apopka strain 97 (Refs. 1, 2, and 3). Because of this history, in this and other EPA documents it is variously referred to as *Isaria fumosorosea* Apopka strain 97, *Paecilomyces fumosoroseus* Apopka strain 97, or PFR–97. The pure culture was identified in 1988 and deposited at the American Type Culture Collection (ATCC # 20874) in Manassas, Virginia. Conidia of the fungus attach to, and penetrate, the cuticle of the host insect or mite where they germinate and grow. This leads to pathogenesis and eventual death of the diseased insect or mite host.

Isaria fumosorosea Apopka strain 97 is the active ingredient in two microbial pesticide products, which were registered under section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) on April 22, 1998 to Thermo Trilogy:

1. PFR–97™ MUP (EPA Reg. No. 70051–17); and
2. PFR–97™ 20% WDG (EPA Reg. No. 70051–19).

Later, Thermo Trilogy changed its name to Certis USA, LLC; Certis USA, LLC is both the petitioner and the current registrant of the aforementioned products. Since the registration of these pesticide products in 1998, they have been labeled specifically for non-food applications in greenhouses and nurseries to control various insects and mites (*e.g.,* whiteflies, aphids, thrips and spider mites).

After maintaining the registrations with non-food uses for 13 years, Certis USA, LLC has now petitioned EPA to establish an exemption from the requirement of a tolerance for residues of *Isaria fumosorosea* Apopka strain 97 in or on all food commodities. Accordingly, EPA has reassessed the mammalian toxicology data that were submitted prior to 1998 to support the initial applications for *Isaria fumosorosea* Apopka strain 97 pesticide products. The overall conclusions from these data, along with Toxicity Category classifications (as appropriate), are described in Unit III.B., while more in-depth synopses of the study results can be found in the 2011 *Isaria fumosorosea (formerly Paecilomyces fumosoroseus)* Apopka strain 97 Biopesticides Registration Action Document (BRAD) and a 2011 data evaluation record provided as references in Unit IX. (Refs.

3 and 4). To learn more about the Toxicity Categories, please see 40 CFR 156.62.

B. Microbial Pesticide Toxicology Data Requirements

All mammalian toxicology data requirements supporting the request for an exemption from the requirement of a tolerance for residues of *Isaria fumosorosea* Apopka strain 97 in or on all food commodities have been fulfilled with studies evaluated by EPA as acceptable (*i.e.,* data that are scientifically sound and useful for risk assessment) or supplemental (*i.e.,* data that provide some information useful for risk assessment).

1. *Acute oral toxicity/pathogenicity—rat (Harmonized Guideline 885.3050; Master Record Identification Number (MRID No.) 431639–01).* An acceptable acute oral toxicity/pathogenicity study demonstrated that *Isaria fumosorosea* Apopka strain 97 was not toxic, pathogenic, or infectious to test rodents. An oral dose of 1.7×10^6 colony-forming units (cfu)/animal in a conidia spore suspension did not produce mortality or abnormal clinical effects. No signs of fungal contamination were reported for the brain, mesenteric lymph nodes, blood, kidney, spleen, liver, lung or cecum, and no infectivity or pathogenicity was recorded (Toxicity Category IV).

2. *Acute dermal toxicity—rabbit (Harmonized Guideline 885.3100; MRID No. 432255–01).* An acceptable acute dermal toxicity test demonstrated that *Isaria fumosorosea* Apopka strain 97 was not toxic to rabbits when applied dermally. Two grams of test substance applied to the skin of rabbits produced a mild irritation at 72 hours post dosing, but dermal irritation was completely reversed by day 7. There were no deaths and no evidence of systemic toxicity. The acute dermal median lethal dose (LD_{50}) (*i.e.,* a statistically derived single dose that can be expected to cause death in 50% of test animals) was greater than 2,000 milligrams per kilogram (mg/kg) (Toxicity Category III).

3. *Acute pulmonary toxicity/pathogenicity—rat (Harmonized Guideline 885.3150; MRID No. 431398–02).* An acceptable acute pulmonary toxicity/pathogenicity study demonstrated that *Isaria fumosorosea* Apopka strain 97 was not toxic, pathogenic, or infectious when a single dose (10^6 conidia spores/animal) was intratrachaelly administered to rats. No deaths, signs of toxicity or infection, or colonization of the lungs were observed. Total clearance of the fungus was attained by day eight after treatment (Toxicity Category IV).

4. *Acute injection toxicity/pathogenicity (intraperitoneal)—rat (Harmonized Guideline 885.3200; MRID No. 431398–03).* An acceptable acute injection toxicity/pathogenicity study demonstrated that single intraperitoneal doses of *Isaria fumosorosea* Apopka strain 97 suspensions, containing 1.6×10^7 conidia spores per animal, had no toxic or pathogenic effects. Moreover, the spores were cleared from the body within two days (Toxicity Category IV).

5. *Acute eye irritation—rabbit (Harmonized Guideline 870.2400; MRID No. 431462–01).* An acceptable acute eye irritation study demonstrated that *Isaria fumosorosea* Apopka strain 97 produced slight eye irritation in rabbits. A dose of 0.1 milliliter of diluted test substance, containing $\geq 10^7$ cfu, was instilled in the eye, which was examined 1 hour, 24 hours, 48 hours, 72 hours, 4 days, and 7 days after treatment (irritation symptoms reversed by day 4; Toxicity Category IV).

6. *Primary dermal irritation—rabbit (Harmonized Guideline 870.2500; MRID No. 431462–02).* An acceptable primary dermal irritation study demonstrated that *Isaria fumosorosea* Apopka strain 97 was slightly irritating to the skin of rabbits (irritation symptoms reversed by 48 hours; Toxicity Category IV).

7. *Dermal sensitization—guinea pig (Harmonized Guideline 870.2600; MRID No. 431462–03).* A supplemental dermal sensitization study demonstrated that *Isaria fumosorosea* Apopka strain 97 was not a dermal sensitizer to guinea pigs when induced and challenged at $3.0 \times 10^7 - 5.3 \times 10^9$ cfu.

8. *Hypersensitivity incidents (Harmonized Guideline 885.3400).* No hypersensitivity incidents involving *Isaria fumosorosea* Apopka strain 97 have been reported to EPA over the last 13 years, during which time the associated pesticide products have been both manufactured and used for non-food uses.

IV. Aggregate Exposure

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

Dietary exposure to this microbial pesticide may occur (more likely through food than drinking water), but the lack of acute oral toxicity, infectivity, and/or pathogenicity, as exhibited in a toxicology test on rats presented in Unit III.B., supports the establishment of a tolerance exemption for residues of *Isaria fumosorosea* Apopka strain 97 in or on all food commodities when used in accordance with good agricultural practices.

1. *Food exposure.* For several reasons described in this unit, exposure to this microbial active ingredient through food is expected to be minimal. When applied in accordance with good agricultural practices, *Isaria fumosorosea* Apopka strain 97, a well-recognized pathogen of various insects and mites, is unlikely to persist on plants (Refs. 3 and 4). Any spores on plants due to pesticide application would presumably decrease over time, similar to other fungal entomopathogens and microbial pest control agents, because of constantly fluctuating environmental factors such as rainfall, ultraviolet radiation, and temperature (Refs. 2, 3, 4, 5, and 6). For instance, using artificial sunlight, Fargues *et al.* (1997) investigated the effects of solar radiation on *Paecilomyces fumosoroseus* Apopka strain 97 conidia and found that both ultraviolet-B (280–320 nm) and ultraviolet-A (320–400 nm) light were most detrimental to the germinability, survival, and infectivity of the conidia (Ref. 6). In addition to certain environmental factors, washing, peeling, and/or other processing of food treated with *Isaria fumosorosea* Apopka strain 97 should further remove, dilute, and/or inactivate pesticidal residues on food (to the extent they exist), particularly in light of the inability of this microbe to survive in water or at temperatures higher than 25° C (Refs. 3, 4, and 5). In the remote likelihood that this microbial pesticide is present in or on food, the acute oral toxicity and pathogenicity data demonstrated no toxicity, infectivity, and/or pathogenicity is likely to occur with any such exposure to *Isaria fumosorosea* Apopka strain 97 (see additional discussion in Unit III.B.).

2. *Drinking water exposure.* The potential for significant transfer of *Isaria fumosorosea* Apopka strain 97 to drinking water is minimal to non-existent, specifically given the three bases elaborated upon in this unit. First, there are no aquatic use sites permitted for pesticide products containing *Isaria fumosoroseus* Apopka strain 97, so exposure to surface water is not anticipated. Second, *Isaria fumosorosea* Apopka strain 97 is not known as an aquatic microorganism; therefore, even if *Isaria fumosorosea* Apopka strain 97 were to inadvertently come into contact with surface or ground waters, it is

unlikely to proliferate in water (Refs. 3 and 4). Finally, if *Isaria fumosorosea* Apopka strain 97 were to be transferred to surface water intended for eventual human consumption (*e.g.,* through spray drift or runoff) and also managed to persist, it would not survive the conditions water is subjected to in wastewater treatment systems or drinking water facilities, including high temperatures, chlorination, pH adjustments and/or filtration (Refs. 7 and 8). In the remote likelihood that this microbial pesticide is present in drinking water, the acute oral toxicity and pathogenicity data demonstrated no toxicity, infectivity and/or pathogenicity is likely to occur with any such exposure to *Isaria fumosorosea* Apopka strain 97 (see additional discussion in Unit III.B.).

B. Other Non-Occupational Exposure

Non-occupational dermal and inhalation exposure to *Isaria fumosorosea* Apopka strain 97 is expected to be minimal to non-existent, primarily because it will be applied to agricultural sites not in the proximity of residential areas where facilities with sensitive subpopulations (*e.g.,* schools, nursing homes, and daycares) are most often situated. Even if non-occupational dermal and inhalation exposure were to occur inadvertently (*e.g.,* through spray drift) or due to an eventual expansion of use sites, such exposure would not be of concern since testing indicates that *Isaria fumosorosea* Apopka strain 97 is not toxic, pathogenic, and/or infective (acute dermal toxicity and acute pulmonary toxicity/pathogenicity); is only slightly irritating (primary dermal irritation); and is not a sensitizer (dermal sensitization) (see additional discussion in Unit III.B.). In addition, this active ingredient has been in use for approximately 13 years without reported incidents.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance exemption, EPA consider ''available information concerning the cumulative effects of [a particular pesticide's] * * * residues and other substances that have a common mechanism of toxicity.'' These considerations include the possible cumulative effects of such residues on infants and children. EPA has not found *Isaria fumosorosea* Apopka strain 97 to share a common mechanism of toxicity to mammals with any other substances, and *Isaria fumosorosea* Apopka strain 97 does not appear to produce a toxic metabolite produced by other substances that may be of toxicological concern to human health. For the purposes of this tolerance action, therefore, EPA has assumed that *Isaria fumosorosea* Apopka strain 97 does not have a common mechanism of toxicity with other substances. Following from this, EPA concludes that no cumulative or incremental effects to humans, including infants and children, are anticipated in connection with the use of *Isaria fumosorosea* Apopka strain 97 when it is used in accordance with its label directions and good agricultural practices. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Determination of Safety for United States (U.S.) Population, Infants and Children

In considering the establishment of a tolerance or tolerance exemption for a pesticide chemical residue, FFDCA section 408(b)(2)(C) provides that EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues, and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor. In applying this provision, EPA either retains the default value of 10X or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

Based on the acute toxicity and pathogenicity data discussed in Unit III.B., as well as use of *Isaria fumosorosea* Apopka strain 97 as a microbial pesticide for approximately 13 years without reported adverse effects to humans, EPA concludes that there are no threshold effects of concern to infants, children, or adults when *Isaria fumosorosea* Apopka strain 97 is used as labeled in accordance with good agricultural practices. As a result, the Agency concludes that no additional margin of exposure (safety) is necessary to protect infants and children, and that not adding any additional margin of exposure (safety) will be safe for infants and children.

Moreover, based on the same data and EPA analysis as previewed in this unit, the Agency is able to conclude that there is a reasonable certainty that no harm will result to the U. S. population, including infants and children, from aggregate exposure to the residues of *Isaria fumosorosea* Apopka strain 97 when it is used—as labeled and in accordance with good agricultural practices—as an insecticide or miticide. Such exposure includes all anticipated dietary exposures and all other exposures for which there is reliable information. EPA has arrived at this conclusion because, considered collectively, the data and information available on *Isaria fumosorosea* Apopka strain 97 do not demonstrate toxic, pathogenic, and/or infective potential to mammals, including infants and children.

VII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since EPA is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

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

The Codex has not established a MRL for *Isaria fumosorosea* Apopka strain 97.

C. Revisions to Petitioned-for Tolerance Exemption

In the **Federal Register** of March 10, 2010, EPA announced Certis USA, LLC's filing of a pesticide petition that

proposed establishing an exemption from the requirement of a tolerance for residues of *Paecilomyces fumosoroseus* Apopka strain 97. Data submitted to EPA, as well as a review of current literature, demonstrate that the taxonomy of the microorganism has changed. *Paecilomyces fumosoroseus* Apopka strain 97 is now classified as *Isaria fumosorosea* Apopka strain 97 (Refs. 1, 2, and 3).

VIII. Conclusions

EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of *Isaria fumosorosea* Apopka strain 97. Therefore, an exemption from the requirement of a tolerance is established for residues of *Isaria fumosorosea* (formerly *Paecilomyces fumosoroseus*) Apopka strain 97 in or on all food commodities when applied as an insecticide or miticide and used in accordance with good agricultural practices.

IX. References

1. Agricultural Research Service Collection of Entomopathogenic Fungal (ARSEF) Cultures. January 24, 2011. *Isaria,* plus *Paecilomyces* and *Evlachovea* USDA–ARS Biological Integrated Pest Management Research, Robert W. Holley Center for Agriculture and Health. 538 Tower Road, Ithaca, New York 14853–2901.
2. Zimmermann G. 2008. The entomopathogenic fungi *Isaria farinosa* (formerly *Paecilomyces farinosus*) and the *Isaria fumosorosea* species complex (formerly *Paecilomyces fumosoroseus*): biology, ecology and use in biological control. *Biocontrol Science and Technology* 18:865–901.
3. U.S. EPA. 2011. *Isaria fumosorosea* (formerly *Paecilomyces fumosoroseus*) Apopka strain 97 Draft Biopesticides Registration Action Document (BRAD) dated August 10, 2011 (available as ''Supporting & Related Material'' within docket ID number EPA–HQ–OPP–2010–0088 at *http://www.regulations.gov*).
4. U.S. EPA. 2011. Request for Exemption from the Requirement of a Tolerance. Data evaluation record prepared by I. Barsoum, Ph.D. (available as ''Supporting & Related Material'' within docket ID number EPA–HQ–OPP–2010–0088 at *http://www.regulations.gov*).
5. U.S. EPA. 1996. Microbial Pesticide Test Guidelines—Background for Residue Analysis of Microbial Pest Control Agents (OPPTS 885.2000). Available from *http://www.epa.gov/ocspp/pubs/frs/publications/Test_Guidelines/series885.htm.*
6. Fargues J, Rougier M, Goujet R, Smits N, Coustere C, Itier B. 1997. Inactivation of Conidia of *Paecilomyces fumosoroseus* by Near-Ultraviolet (UVB and UVA) and Visible Radiation. *Journal of Invertebrate Pathology* 69:70–78.
7. U.S. EPA. 2004. Primer for Municipal Wastewater Treatment Systems. EPA 832–R–04–001. Available from *http://www.epa.gov/npdes/pubs/primer.pdf.*
8. Centers for Disease Control and Prevention. 2009. Drinking Water—Water Treatment. Available from *http://www.cdc.gov/healthywater/drinking/public/water_treatment.html.*

X. Statutory and Executive Order Reviews

This final rule establishes a tolerance exemption under section 408(d) of FFDCA in response to a petition submitted to EPA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, EPA has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, EPA has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

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

XI. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 20, 2011.

Steven Bradbury,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.1306 is added to subpart D to read as follows:

§ 180.1306 Isaria fumosorosea (formerly Paecilomyces fumosoroseus) Apopka strain 97; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of *Isaria fumosorosea* (formerly *Paecilomyces fumosoroseus*) Apopka strain 97 in or on all food commodities

when applied as an insecticide or miticide and used in accordance with good agricultural practices.

[FR Doc. 2011–24990 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0849; FRL–8889–1]

Fluazifop-P-butyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes and increases tolerances for residues of fluazifop-P-butyl in or on cotton, gin byproducts; cotton, refined oil; and cotton, undelinted seed. Syngenta Crop Protection requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 28, 2011. Objections and requests for hearings must be received on or before November 28, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0849. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Kathryn V. Montague, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–1243; *e-mail address: montague.kathryn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0849 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 28, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0849, by one of the following methods:

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

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of December 15, 2010 (75 FR 78240) (FRL–8853–1), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0F7768) by Syngenta Crop Protection, P.O. Box 18300, Greensboro, NC 27419. The petition requested that 40 CFR 180.411 be amended by establishing tolerances for residues of the herbicide, fluazifop-P-butyl, butyl(R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoate, and the free and conjugated forms of the resolved isomer of fluazifop, (R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoic acid, expressed as fluazifop, in or on cotton, undelinted seed at 0.9 ppm; and cotton, gin byproducts at 0.8 ppm. That notice referenced a summary of the petition prepared by Syngenta Crop Protection, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition EPA has made changes to the requested tolerances. First, EPA is raising the proposed cotton, gin byproducts tolerance from 0.8 ppm to 1.5 ppm; second, raising the established cotton, refined oil tolerance from 0.2 ppm to 1.3 ppm; and finally,

raising the proposed cotton, undelinted seed tolerance from 0.9 ppm to 1.0 ppm. EPA also retains the current tolerance expression for fluazifop-P-butyl that was established in 40 CFR 180.411 paragraph (a) in the **Federal Register** of February 2, 2011 (76 FR 5696) (FRL–8861–1). The reason for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

In the **Federal Register** of February 2, 2011 EPA issued a final rule establishing a tolerance for residues of fluazifop-P-butyl in or on banana; beet, sugar; citrus, fruit, group 10; grape and potato. EPA has determined that establishing revised tolerances for cotton commodities will not significantly change the risk assessments the Agency relied on to support the February 2, 2011, tolerance action, as explained in this unit.

Cotton commodities (undelinted seed, gin byproducts, meal, and hulls) may be used as roughage or protein concentrate feedstuffs in the diets of livestock. When the Agency conducted the risk assessment in support of the February 2, 2011 tolerance action, it considered secondary residues of fluazifop-P-butyl in livestock commodities from consumption of fluazifop-P-butyl treated feed. In calculating livestock dietary burdens for fluazifop-P-butyl, EPA assumed that 100% of feed items consumed by livestock are treated with fluazifop-P-butyl. EPA also assumed residues were present in the roughage and protein concentrate components of livestock diets at the tolerance level for soybean feedstuffs of 2.5 parts per million (ppm) which is greater than the tolerances being established for cotton feedstuffs. Therefore, the Agency has determined that the establishment of a tolerance on the feed commodity cotton, gin byproducts at 1.5 ppm and raising the cotton, undelinted seed tolerance from 0.1 ppm to 1.0 ppm will not increase residues of fluazifop-P-butyl in livestock feed commodities above those calculated in the previous risk assessment conducted for the February 2, 2011 tolerance action.

The only human food item affected by this action is cotton, refined oil. This commodity was included in the most recent acute and chronic dietary exposure assessment for the February 2, 2011 tolerance action at the level of 0.2 ppm using the food consumption data from the USDA 1994–1996 and 1998 Continuing Surveys of Food Intake by Individuals (CSFII). EPA conducted additional calculations using the increased level of 1.3 ppm for cotton, refined oil to determine if any increase in dietary exposure results. For both acute and chronic analyses, identical results were obtained to three significant figures. EPA typically reports dietary exposures as a percentage of the population adjusted dose (PAD) to just two significant figures. Therefore, EPA concludes that no significant increase in human dietary exposure resulting from the establishment of the revised cotton tolerances.

Based on these considerations, EPA has determined that establishing the tolerance for fluazifop-P-butyl in cotton, gin byproducts at 1.5 ppm, raising the established cotton, refined oil from 0.2 ppm to 1.3 ppm and raising the cotton, undelinted seed tolerance from 0.1 ppm to 1.0 ppm will not affect the estimated livestock dietary burden and will not change the estimated aggregate risks resulting from use of fluazifop-P-butyl, as discussed in the February 2, 2011 **Federal Register**. Refer to the **Federal Register** document, available at *http://www.regulations.gov,* for a detailed discussion of the aggregate risk assessment and determination of safety.

Therefore, based on this information and the findings in the final rule published in the **Federal Register** of February 2, 2011, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to fluazifop-P-butyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (High Performance Liquid Chromatography/Ultra-Violet Spectrometry (HPLC/UV)) is available to enforce the tolerance expression. The method is available in *Pesticide Analytical Methods* (PAM), Volume II or may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; *telephone number:* (410) 305–2905; *e-mail address: residuemethods@epa.gov.*

B. International Residue Limits

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

The Codex has not established a MRL for fluazifop-P-butyl.

C. Revisions to Petitioned-for Tolerances

EPA has revised the proposed tolerances levels. Based on the submitted cotton undelinted seed and gin byproducts data, EPA calculated that the cotton, gin byproducts tolerance should be 1.5 ppm; cotton, refined oil tolerance should be 1.3 ppm, and cotton, undelinted seed tolerance should be 1.0 ppm.

Also, EPA is retaining the current tolerance expression for fluazifop-P-butyl. The current tolerance expression makes clear that the tolerances cover residues of the herbicide fluazifop-P-butyl, including its metabolites and degradates, but that compliance with the tolerance levels is to be determined by measuring only the sum of fluazifop-P-butyl, butyl(R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoate, and the free and conjugated forms of the resolved isomer of fluazifop, (R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoic acid, calculated as the stoichiometric equivalent of fluazifop, in or on the commodity.

V. Conclusion

Therefore, tolerances are established for residues of fluazifop-P-butyl, butyl(R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoate, and the free and conjugated forms of the resolved isomer of fluazifop, (R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoic acid, expressed as fluazifop, in or on cotton, gin byproducts; cotton, refined oil; and cotton, undelinted seed at 1.5 ppm, 1.3 ppm and 1.0 ppm, respectively.

VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 15, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.411, paragraph (a), the table is amended by:

■ i. Revising the entries for ''cotton, refined oil'' and ''cotton, undelinted seed''; and

■ ii. Adding the entry for ''cotton, gin byproducts'' to the table in paragraph (a)

■ iii. The amendments read as follows:

§ 180.411 Fluazifop-P-butyl; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Cotton, gin byproducts	1.5
Cotton, refined oil	1.3
Cotton, undelinted seed	1.0
* * * * *	

* * * * *

[FR Doc. 2011–24517 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0888; FRL–8888–3]

Chlorantraniliprole; Pesticide Tolerances; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction amendment.

SUMMARY: EPA issued a final rule in the **Federal Register** of July 27, 2011, concerning the regulation to establish pesticide tolerances for residues of chlorantraniliprole in or on multiple commodities. This document is being issued to correct an omission of the tolerance for Bushberry, subgroup 13–07B.

DATES: This final rule is effective September 28, 2011.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0888. All documents in the docket are listed in the docket index available in *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m.

to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rita Kumar, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8291; *e-mail address: kumar.rita@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

The Agency included in the final rule a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

II. What does this technical amendment Do?

This technical amendment adds Bushberry, subgroup 13–07B to the table in paragraph (a) to 40 CFR 180.628. On July 27, 2011 (76 FR 44815) (FRL–8875–5), the Registration Division issued in the **Federal Register** an amendment to 40 CFR 180.628. In the preamble to the final rule RD discussed the addition of several commodities and tolerances, including a tolerance for Bushberry, subgroup 13–07B. However, the tolerance for Bushberry was inadvertently omitted from the regulatory amendment and the table in 180.628. This technical amendment corrects that omission.

III. Why is this correction issued as a final rule?

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the Agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making this technical amendment final without prior proposal and opportunity for comment, because this omission was a typographical error. The tolerance for Bushberry, subgroup 13–07B was included in the petitioned for tolerances, exposure and risk evaluation, determination of safety, and conclusion sections of the Final Rule, FR Doc. 2011–18708 published in the **Federal Register** of July 27, 2011 (76 FR 44815–44821). EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

IV. Do any of the statutory and Executive Order reviews apply to this action?

This technical amendment adds a tolerance that was inadvertently omitted from a previously published final rule and does not otherwise change the original requirements of the final rule. Since this rule corrects an omission, this action is not subject to the statutory and Executive Order review requirements. For information about the statutory and Executive Order review requirements as they related to the final rule, see Unit VI. in the **Federal Register** of July 27, 2011 (76 FR 44815–44821) (FRL–8875–5).

V. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 15, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.628, in the table to paragraph (a), add the entry for bushberry, subgroup 13–07B to read as follows:

§ 180.628 Chlorantraniliprole; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Bushberry, subgroup 13–07B	2.5
* * * * *	

[FR Doc. 2011–24370 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0186; FRL–8885–3]

Amisulbrom; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of amisulbrom in or on grapes and tomatoes. Nissan Chemical Industries, Inc., c/o Lewis & Harrison requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 28, 2011. Objections and requests for hearings must be received on or before November 28, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0186. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Olga Odiott, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington,

DC 20460–0001; *telephone number:* (703) 308–9369; *e-mail address: odiott.olga@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0186 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 28, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0186, by one of the following methods:

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

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of May 19, 2010 (75 FR 28009) (FRL–8823–2) and the **Federal Register** of February 25, 2011 (76 FR 10584) (FRL–8863–3), EPA issued notices pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 9E7650 and PP 0E7790) by Nissan Chemical Industries, Inc., c/o Lewis & Harrison, 122 C St., NW., Suite 740, Washington, DC 20001. The petitions requested that 40 CFR part 180 be amended by establishing tolerances for residues of the fungicide amisulbrom, 3-[(3-bromo-6-fluoro-2-methyl-1*H*-indole-1-yl) sulfonyl]-*N,N*-dimethyl-1*H*-1,2,4-triazole-1-sulfonamide, in or on grapes at 0.4 parts per million (ppm), raisins at 1.0 ppm (PP 9E7650), tomato at 0.5 ppm, and tomato paste at 1.2 ppm (PP 0E7790). The notices referenced summaries of the petitions prepared by Nissan Chemical Industries, Inc., the registrant, which are available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notices of filing.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

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

Amisulbrom is of low acute toxicity by the oral, dermal and inhalation routes and is not irritating to the eyes and skin. Rat, mouse, and rabbit studies indicate that amisulbrom systemic toxicity is primarily characterized by decreases in body weight and body weight gain, and reduced food consumption and/or efficiency. Based on the results of the acute and subchronic oral neurotoxicity studies in rats, as well as other subchronic and chronic studies, a developmental neurotoxicity (DNT) study is not needed for amisulbrom. None of these studies indicated specific neurotoxicity responses to amisulbrom. The T-cell dependent antibody response (TDAR) assay showed no evidence of treatment-related effects in rat and mouse immunotoxicity studies. The rat

developmental toxicity study demonstrated cleft palate and other malformations only at the highest doses. There were no effects in the fetuses in the rabbit developmental toxicity study at the highest dose tested.

In accordance with the *EPA's Final Guidelines for Carcinogen Risk Assessment* (March 2005), amisulbrom is classified as ''Suggestive Evidence of Carcinogenic Potential''. This classification is based on: Liver tumors in male mice at both an adequate and excessive dose; liver tumors in both sexes of rats only at an excessive dose; and forestomach tumors in female rats also only at an excessive dose.

In the case of amisulbrom, a cancer risk from dietary exposure is of low concern based on the following considerations:

- The liver tumors seen in male mice only were benign with no progression to malignancy;
- The liver tumors in rats seen only at excessive doses (*i.e.,* greater than the Limit Dose of 1,000 milligrams/kilogram/day (mg/kg/day)) were also benign with no progression to malignancy;
- The forestomach tumors seen only in female rats occurred only at an excessive dose which was greater than the Limit-Dose;
- None of these tumors resulted in reduced latency; and
- There is no concern for mutagenicity/genotoxicity.

In sum, the only evidence showing any concern for carcinogenicity is the occurrence of benign liver tumors in one sex and one species (*i.e.,* male mice). Given the marginal evidence relating to potential carcinogenicity, the Agency has determined that the chronic population adjusted dose (PAD) will adequately account for all chronic effects, including carcinogenicity, likely to result from exposure to amisulbrom.

Specific information on the studies received and the nature of the adverse effects caused by amisulbrom as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''Amisulbrom. Human-Health Risk Assessment for the Establishment of Tolerances for Amisulbrom Fungicide in/on Imported Grape and Tomato'' at page 23 in docket ID number EPA–HQ–OPP–2010–0186.

B. Toxicological Points of Departure/Levels of Concern

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

A summary of the toxicological endpoints for amisulbrom used for human risk assessment is shown in the following Table 1.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR AMISULBROM FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children)	NOAEL = 200 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 2 mg/kg/day aPAD = 2 mg/kg/day	Rat acute neurotoxicity screen study. LOAEL = 2,000 mg/kg/day based on 7% decrease in brain weight.
Chronic dietary (All populations)	NOAEL = 54 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.54 mg/kg/day cPAD = 0.54 mg/kg/day	Multiple studies: Combined chronic toxicity/carcinogenicity study in rats, multigenerational reproduction study in rats, mouse carcinogenicity, and subchronic and chronic dog studies. NOAEL = 54 mg/kg/day from the multigenerational study (parental systemic NOAEL). The LOAEL of 96 mg/kg/day is from the combined chronic toxicity/carcinogenicity study in rats and is based on decreased body weight, body weight gains in both sexes, and indications of hepatotoxicity and nephrotoxicity. The mouse (98 mg/kg/day) and dog (100 mg/kg/day) LOAELs are similar.
Cancer (Oral, dermal, inhalation)	''Suggestive Evidence of Carcinogenic Potential''. This classification is based on liver tumors in male mice at adequate and excessive doses and liver and stomach tumors in male and/or female rats at excessive doses. The chronic RfD is protective against potential carcinogenic effects.		

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

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to amisulbrom, EPA considered exposure under the petitioned-for tolerances. EPA assessed dietary exposures from amisulbrom in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments

are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for amisulbrom. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA used tolerance level residues, default processing factors, and 100% crop treated assumptions to characterize the acute dietary exposure assessment.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA used tolerance level residues, default processing factors, and 100% crop treated assumptions to characterize the chronic dietary exposure assessment.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier non-cancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach will be protective of any cancer risk posed by amisulbrom. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *chronic exposure.*

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

2. *Dietary exposure from drinking water.* Pesticide residues in drinking water are not expected. These tolerances are for residues of amisulbrom in/on imported grapes and tomatoes and there are no pesticide registrations in the United States associated with the tolerances. Therefore, the presence of amisulbrom in drinking water in this country resulting from the treatment of crops is not expected.

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

Amisulbrom is not registered for use in the United States; therefore, residential exposures are not expected.

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

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

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* There was an apparent indication of prenatal sensitivity in the rat developmental toxicity study. There were no effects in the dams at the highest dose tested (1,000 mg/kg/day). However, several of the rat fetuses in two litters were noted to have malformations and alterations including cleft palate, bent scapula, humerus ulna and/or radius, constricted spinal cord in the cervical region, cervical kyphosis, and medially thickened/kinked ribs with distorted ribcage. The NOAEL for the offspring in the rat developmental study was 300 mg/kg/day. There were no indications of increased postnatal offspring sensitivity in the rat reproduction study where the NOAEL (~54 mg/kg/day) and LOAEL (~274 mg/kg/day) for the pups was the same as for the parents. There were no effects in the rabbit developmental toxicity study at the highest dose tested (300 mg/kg/day). Since effects in the rat pups in the developmental toxicity study occur at a dose (1,000 mg/kg/day) well above the NOAELs used for risk assessment (54 and 200 mg/kg/day), no additional UF for sensitivity/susceptibility in the developing animal is needed because the application of the lower NOAEL will be protective against possible developmental effects in the offspring. Based on the available data and the selection of risk assessment endpoints that are protective of developmental effects, there are no residual uncertainties with regard to prenatal and/or postnatal toxicity.

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

i. The toxicity database for amisulbrom is complete.

ii. Neither the rat subchronic neurotoxicity screen studies or the rat multigenerational reproduction study or other subchronic or chronic studies indicated specific neurotoxicity responses to amisulbrom. Although the acute neurotoxicity study observed decreased brain weight, this effect occurred only at the very high limit dose for acute neurotoxicity testing, in only one sex, and a NOAEL was identified. Therefore, there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. Based on the developmental and reproductive toxicity studies discussed in Unit III.D.2., there are no residual uncertainties with regard to prenatal and/or postnatal toxicity.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues. Since there are no currently registered or proposed uses of amisulbrom in the United States and adequate food residue data are available, these assessments will not underestimate the exposure and risks posed by amisulbrom.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists. Since the subject tolerances are for residues of amisulbrom in/on imported commodities a risk assessment was conducted for exposure to amisulbrom from food only, as there are no drinking water or residential exposures associated with imported grapes and tomatoes. The acute and the chronic dietary risk estimates from food are not of concern for the general population or any other population subgroup. Exposures were equivalent to < 1% aPAD and < 1% cPAD for all population subgroups. As discussed in Unit III.C.1.iii, EPA concluded that regulation based on the chronic reference dose will be protective for both chronic and carcinogenic risks. As noted in this unit there are no chronic risks of concern.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

A Liquid Chromatography-Mass Spectrometer/Mass Spectrometer (LC–MS/MS) method (NAS 490/042294) is available as an enforcement method for the determination of amisulbrom in plant commodities. The limit of quantitation (LOQ) of the method was 0.01 ppm for amisulbrom. This method was adequately validated for data collection purposes and a successful independent laboratory validation study was conducted. Additionally, amisulbrom is amenable to analysis using FDA multi-residue methods C and E, which are also suitable confirmatory and/or enforcement methods.

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

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. The Codex has not established a MRL for amisulbrom.

V. Conclusion

Therefore, tolerances are established for residues of amisulbrom, 3-[(3-bromo-6-fluoro-2-methyl-1H-indole-1-yl)sulfonyl]-N,N-dimethyl-1H-1,2,4-triazole-1-sulfonamide, in or on grape at 0.40 ppm; grape, raisin at 1.0 ppm; tomato at 0.50 ppm; and tomato, paste at 1.2 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides

and pests, Reporting and recordkeeping requirements.

Dated: September 16, 2011.

Steven Bradbury,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.656 is added to read as follows:

§ 180.656 Amisulbrom; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide amisulbrom, including its metabolites and degradates, in or on the commodities listed below. Compliance with the tolerance levels is to be determined by measuring only amisulbrom, 3-[(3-bromo-6-fluoro-2-methyl-1*H*-indole-1-yl) sulfonyl]-*N, N*-dimethyl-1*H*-1, 2, 4-triazole-1-sulfonamide].

Commodity [1]	Parts per million
Grape	0.40
Grape, raisin	1.0
Tomato	0.50
Tomato, paste	1.2

[1] There is no U.S. registration for use of amisulbrom on grape or tomato.

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

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

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

[FR Doc. 2011–24685 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 300–3, 301–30, 301–31, Appendix E to Chapter 301, 302–3, 302–4, 302–6, and 303–70

[FTR Amendment 2011–04; FTR Case 2010–303; Docket Number 2011–0019, Sequence 1]

RIN 3090–AJ06

Federal Travel Regulation (FTR); Terms and Definitions for ''Dependent'', ''Domestic Partner'', ''Domestic Partnership'', and ''Immediate Family''

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA has adopted as final, with two changes, an interim rule amending the Federal Travel Regulation (FTR) by adding terms and definitions for ''Dependent'', ''Domestic partner'', and ''Domestic partnership'', and by revising the definition of ''Immediate family'' to include ''Domestic partner'' and children, dependent parents, and dependent brothers and sisters of the Domestic partner as named members of the employee's household. This final rule also adds references to domestic partners and domestic partnerships, where applicable, in the FTR.

DATES: *Effective date:* September 28, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Rick Miller, Office of Travel, Transportation, and Asset Management (MT), General Services Administration, at (202) 501–3822 or e-mail at *rodney.miller@gsa.gov.* Contact the Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FTR Amendment 2011–04; FTR case 2010–303.

SUPPLEMENTARY INFORMATION:

A. Background

On June 17, 2009, President Obama signed a Presidential Memorandum on Federal Benefits and Non-Discrimination stating that ''[t]he heads of all other executive departments and agencies, in consultation with the Office of Personnel Management, shall conduct a review of the benefits provided by their respective departments and agencies to determine what authority they have to extend such benefits to same-sex domestic partners of Federal employees.'' GSA conducted its review and, as part of that review, identified a number of changes to the FTR that could be made. Subsequently, on June 2, 2010, President Obama signed a Presidential Memorandum, ''Extension of Benefits to Same-Sex Domestic Partners of Federal Employees,'' which directed agencies to immediately take actions, consistent with existing law, to extend certain benefits, including travel and relocation benefits, to same-sex domestic partners of Federal employees, and, where applicable, to the children of same-sex domestic partners of Federal employees.

Pursuant to 5 U.S.C. 5707, the Administrator of General Services is authorized to prescribe necessary regulations to implement laws regarding Federal employees who are traveling while in the performance of official business away from their official stations. Similarly, 5 U.S.C. 5738 mandates that the Administrator of General Services prescribe regulations relating to official relocation. The overall implementing authority is the FTR, codified in Title 41 of the Code of Federal Regulations, Chapters 300–304 (41 CFR chapters 300–304).

Pursuant to this authority, this final rule adds the same terms and definitions, based on a published Office of Personnel Management (OPM) memorandum to agencies, dated June 2, 2010, ''Implementation of the President's Memorandum Regarding Extension of Benefits to Same-Sex Domestic Partners of Federal Employees,'' and guidance from 5 CFR 875, ''Federal Long Term Care Insurance Program,'' for ''Domestic partner'' and ''Domestic partnership'', adds a definition for ''Dependent'', and revises the definition of ''Immediate family'' to include ''Domestic partner'' and children, dependent parents, and dependent brothers and sisters of the Domestic partner as named members of the employee's household. This rule also adds references to ''Domestic partners'' and ''domestic partnership,'' where applicable, to travel and relocation allowances permitted under existing statutes. Due to current statutory restrictions, this final rule does not apply to house-hunting trip expense reimbursement, the relocation income tax allowance, the income tax reimbursement allowance, or non-Federal source travel.

B. Summary of Comments Received

GSA received 13 comments on the interim rule published in the **Federal Register** on November 3, 2010 (75 FR 67629).

- Three associations and three individuals supported the rule, four

individuals opposed it, and three comments did not express an opinion but posed specific inquiries.

- Four individuals, including two who opposed the rule overall, asked about including opposite-sex domestic partners.
- Two individuals and one association asked about making the rule retroactive.
- Three individuals asked how partnership status will be determined.
- One association offered alternate language for two definitions included in the rule.

As previously mentioned, several comments to the interim rule noted that the changes to the FTR definition of ''Immediate family'' exclude opposite-sex domestic partners. As the Presidential Memoranda of June 17, 2009, and June 2, 2010, do not specifically address opposite-sex domestic partners, opposite-sex domestic partners have not been included within the definition of ''Immediate family.''

In regards to the comments received suggesting retroactive application, the Presidential Memoranda did not address retroactivity; neither is there specific authority mandating GSA to do so. To assist with implementation, FTR § 302–2.3 states that relocation allowances are determined by the regulations that are in effect at the time an employee reports for duty at his or her new duty station. Thus, if orders are issued and the employee reports to the permanent duty station prior to March 3, 2011 (the effective date of the interim rule), there is no domestic partner coverage. However, if orders are issued and the employee reports to the new permanent duty station on or after March 3, 2011, there is coverage under the domestic partner benefits effective on March 3, 2011. Finally, if the orders are issued prior to March 3, 2011, and the employee does not report until after March 3, 2011, then the orders can be amended in accordance with the FTR.

As further noted above, several comments related to the status of domestic partnerships and how this status will be determined. GSA believes that the requirements listed in the new definition of ''Domestic Partnership'' are sufficient to determine partnership status. As Federal agencies use a wide variety of processes and systems to manage travel and relocation, GSA is deferring to individual agencies to develop their own processes for determining partnership status in accordance with the definition of ''Domestic Partnership.''

Finally, one association recommended changing the definition of ''Domestic Partnership.'' Specifically, it was recommended that GSA change the factor, ''[a]re not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which they reside'' to ''[a]re not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed''. GSA has considered this suggestion and is amending the definition of ''Domestic Partnership''.

This association also recommended changing the factor ''[s]hare responsibility for a significant measure of each other's financial obligations'' to ''[a]re financially interdependent.'' GSA considered this suggestion and has chosen to continue to use the interim rule's definition in order to be consistent with the OPM definition. However, as a result of this comment, GSA is including a ''Note'' at the end of the definition for ''Domestic Partnership,'' referencing OPM's position that this criterion, requires only that there be financial interdependence between the partners, and that it should not be interpreted to exclude partnerships in which one partner stays at home while the other is the primary breadwinner (see *e.g.,* 76 FR 45204, July 28, 2011).

The same association also suggested adding the term ''*in loco parentis''* for both children and dependent adults within the definition of ''Immediate family.'' Similarly, GSA considered this recommendation and has decided to maintain consistency with OPM's definition.

C. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action, and therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

This final rule will not have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This final rule is also exempt from the Administrative Procedures Act per 5 U.S.C. 553(a)(2) because it applies to agency management or personnel. However, this final rule is being published because this is a significant rule under Section 6(a)(3)(B) of Executive Order 12866 and to provide transparency in the promulgation of Federal policies.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

F. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 300–3, 301–30, 301–31, Appendix E to Chapter 301, 302–3, 302–4, 302–6, and 303–70

Government employees, Relocation, Travel, and Transportation expenses.

Dated: June 30, 2011.

Martha Johnson,

Administrator of General Services.

Interim Rule Adopted as Final With Two Changes

Accordingly, the interim rule amending 41 CFR parts 300–3, 301–30, 301–31, Appendix E to Chapter 301, 302–3, 302–4, 302–6, and 303–70, which was published in the **Federal Register** at 75 FR 67629 on November 3, 2010, is adopted as a final rule with two changes.

For the reasons set forth in the preamble, under 5 U.S.C. 5701–5709, 5721–5738, and 5741–5742, 41 CFR part 300–3 is amended to read as follows:

PART 300–3—GLOSSARY OF TERMS

■ 1. The authority citation for 41 CFR part 300–3 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); 49 U.S.C. 40118; 5 U.S.C. 5738; 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; E.O. 11609, as amended; 3 CFR, 1971–1975 Comp., p. 586, Office of Management and Budget Circular No. A–126, revised May 22, 1992.

■ 2. Amend § 300–3.1 by—

■ (a) Removing from the definition ''Domestic partnership'', paragraph (7),

''they reside'' and adding ''the domestic partnership was formed'' in its place; and

■ (b) Adding a ''Note'' at the end of the definition ''Domestic partnership'' to read as follows:

§ 300–3.1 What do the following terms mean?

* * * * *

Note to definition of ''Domestic partnership'': The definition of ''Domestic partnership'' requires that the partners ''share responsibility for a significant measure of each other's financial obligations.'' This criterion requires only that there be financial interdependence between the partners and should not be interpreted to exclude partnerships in which one partner stays at home while the other is the primary breadwinner.

* * * * *

[FR Doc. 2011–24605 Filed 9–27–11; 8:45 am]

BILLING CODE 6820–14–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 20

[PS Docket No. 07–114, GN Docket No. 11–117, WC Docket No. 05–196; FCC 11–107]

Interconnected VoIP Service; Wireless E911 Location Accuracy Requirements; E911 Requirements for IP-Enabled Service Providers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission continues to strengthen its existing Enhanced 911 (E911) location accuracy regime for wireless carriers by retaining the existing handset-based and network-based location accuracy standards and the eight-year implementation period established in our September 2010 E911 Location Accuracy *Second Report and Order* but providing for phasing out the network-based standard over time. We also require all Commercial Mobile Radio Service (CMRS) providers, launching new stand-alone networks, to comply with the handset-based location criteria, regardless of the location technology they actually use. In addition, we will require wireless carriers to periodically test their outdoor E911 location accuracy results and to share the results with Public Safety Answering Points (PSAPs), state 911 offices, and the Commission, subject to confidentiality safeguards.

DATES: Effective November 28, 2011, except for § 20.18(h)(2)(iv) which contains information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Patrick Donovan, Attorney Advisor, (202) 418–2413. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith Boley-Herman, (202) 418–0214, or send an e-mail to *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Third Report and Order (Third R&O) in PS Docket No. 07–114, GN Docket No. 11–117, WC Docket No. 05–196, FCC 11–107, released on July 13, 2011. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554, or online at *http://transition.fcc.gov/pshs/services/911-services/.*

I. Introduction

1. In the Third Report and Order, Second Further Notice of Proposed Rulemaking, and Notice of Proposed Rulemaking, we enhance the public's ability to contact emergency services personnel during times of crisis and enable public safety personnel to obtain accurate information regarding the location of the caller. In the Report and Order, we continue to strengthen our existing Enhanced 911 (E911) location accuracy regime for wireless carriers by retaining the existing handset-based and network-based location accuracy standards and the eight-year implementation period established in our September 2010 E911 Location Accuracy Second Report and Order but providing for phasing out the network-based standard over time. We also require new Commercial Mobile Radio Service (CMRS) networks to comply with the handset-based location criteria, regardless of the location technology they actually use. In addition, we will require wireless carriers to periodically test their outdoor E911 location accuracy results and to share the results with Public Safety Answering Points (PSAPs), state 911 offices, and the Commission, subject to confidentiality safeguards.

II. Background

2. In 1996, the Commission required CMRS providers to implement basic 911 and Enhanced 911 services. Under the Commission's wireless E911 rules, CMRS providers are obligated to provide the telephone number of the originator of a 911 call and information regarding the caller's location to any PSAP that has requested that such information be delivered with 911 calls. Recently amended § 20.18(h) of the Commission's rules states that licensees subject to the wireless E911 requirements:

Shall comply with the following standards for Phase II location accuracy and reliability: (1) For network-based technologies: 100 meters for 67 percent of calls, 300 meters for 90 percent of calls; (2) For handset-based technologies: 50 meters for 67 percent of calls, 150 meters for 90 percent of calls.

3. In June 2005, the Commission released a First Report and Order and Notice of Proposed Rulemaking adopting rules requiring providers of interconnected VoIP service to supply E911 capabilities to their customers as a standard feature from wherever the customer is using the service. The rules adopted in the 2005 VoIP 911 Order apply only to providers of interconnected VoIP services, which the Commission defined as services that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require Internet protocol-compatible customer premises equipment (CPE); and (4) permit users generally to receive calls that originate on the public switched telephone network (PSTN) and to terminate calls to the PSTN. Interconnected VoIP service providers generally must provide consumers with E911 service and transmit all 911 calls, including Automatic Number Identification (ANI) and the caller's Registered Location for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority. In 2008, Congress codified these requirements and granted the Commission authority to modify them.

4. In June 2007, the Commission released the Location Accuracy NPRM, seeking comment on several issues relating to wireless E911 location accuracy and reliability requirements. Specifically, the Commission sought comment on the capabilities and limitations of existing and new location technologies; the advantages of combining handset-based and network-based location technologies (a hybrid solution); the prospect of adopting more

stringent location accuracy requirements; and compliance testing methodologies in different environments, such as indoor versus outdoor use and rural versus urban areas. The Commission also invited comment on how to address location accuracy issues for 911 calls placed when roaming, particularly when roaming between carriers using different location technologies. Further, the Commission requested comment on a number of tentative conclusions and proposals, including establishing a single location accuracy standard rather than the separate accuracy requirements for network and handset-based technologies, adopting a mandatory schedule for accuracy testing, and applying the same location accuracy standards that apply to circuit-switched CMRS services to interconnected VoIP services used in more than one location.

5. In October 2008, as required by the NET 911 Improvement Act (NET 911 Act), the Commission released a Report and Order adopting rules providing ''interconnected VoIP providers rights of access to any and all capabilities necessary to provide 911 and E911 service from entities that own or control those capabilities.'' In the NET 911 Improvement Act Report and Order, the Commission declined to ''issue highly detailed rules listing capabilities or entities with ownership or control of these capabilities'' because the nation's 911 system varies depending on the locality and ''overly specific rules would fail to reflect these local variations.'' The Commission also declined ''to expand the applicability of the rights granted in the NET 911 Improvement Act to entities beyond those encompassed within that statute.''

6. On March 16, 2010, the Commission staff released the National Broadband Plan, which recommended that the Commission examine approaches for leveraging broadband technologies to enhance emergency communications with the public by moving towards Next Generation 911 (NG911), because NG911 will provide a ''more interoperable and integrated emergency response capability for PSAPs, first responders, hospitals and other emergency response professionals.'' Further, the National Broadband Plan notes that the Commission is ''considering changes to its location accuracy requirements and the possible extension of * * * ALI * * * requirements to interconnected VoIP services.'' The National Broadband Plan recommends that the Commission ''expand [the Location Accuracy NPRM] proceeding to explore how NG911 may affect location accuracy and ALI.''

7. On September 23, 2010, the Commission adopted the E911 Location Accuracy Second Report and Order, addressing wireless E911 location accuracy, and the Location Accuracy FNPRM and NOI, seeking comment on additional location accuracy issues affecting wireless, VoIP, and emerging broadband voice services. The E911 Location Accuracy Second Report and Order required CMRS providers to satisfy the E911 Phase II location accuracy requirements at either a county-based or PSAP-based geographic level. The order provided for implementation of this standard over an eight-year period with interim benchmarks. The Commission determined, however, that the revised location accuracy requirements would apply to outdoor measurements only and not to accuracy measurements for indoor locations. Additionally, regardless of whether a carrier employs handset-based or network-based location technology, the Commission required wireless carriers to provide confidence and uncertainty data on a per-call basis upon PSAP request. The Commission also extended the requirement to deliver confidence and uncertainty data to entities responsible for transporting this data between wireless carriers and PSAPs, including LECs, CLECs, owners of E911 networks, and emergency service providers (collectively, System Service Providers (SSPs)).

8. In the Location Accuracy FNPRM and NOI, the Commission sought comment on several issues with respect to amending the Commission's wireless 911 and E911 requirements and extending 911 and E911 requirements to additional VoIP and wireless services. In the Location Accuracy FNPRM, the Commission sought comment on a number of issues initially raised in the Location Accuracy NPRM, including: whether the Commission should consider more stringent location parameters for wireless E911 Phase II location accuracy and reliability; potential modifications to the accuracy standard, including adoption of a unitary or single standard; the methodology carriers should use to verify compliance, both initially and during ongoing testing; the format in which accuracy data should be automatically provided to PSAPs; how to address location accuracy while roaming; how to improve location information and accuracy in more challenging environments, such as indoors; and whether the Commission's location accuracy standards should include an elevation (z-axis) component. In the NOI, the Commission requested comment on a number of 911 and E911 issues related to VoIP services, including whether the Commission should require interconnected VoIP service providers to automatically identify the geographic location of a customer without the customer's active cooperation and whether the Commission should apply its E911 regulations to VoIP services that are not fully interconnected to the PSTN.

9. In March 2011, the Communications Security, Reliability, and Interoperability Council's (CSRIC's) Working Group 4C released a report entitled ''Technical Options for E9–1–1 Location Accuracy.'' CSRIC is a Federal Advisory Committee that was tasked with providing guidance and expertise on the nation's communications infrastructure and public safety communications. CSRIC Working Group 4C was responsible for examining E911 and public safety location technologies currently in use, identifying current performance and limitations for use in next generation public safety applications, examining emerging E911 public safety location technologies, and recommending options to CSRIC for the improvement of E911 location accuracy timelines. The CSRIC 4C Report made a number of recommendations, including that the FCC should: establish an E9–1–1 Technical Advisory Group to address specific location technology issues for 911, such as how to improve location accuracy in challenging environments, including indoor settings; actively engage in discussion on how to implement 911 auto-location for nomadic VoIP services; and consider extending E911 and location obligations to providers of over-the-top VoIP applications that are not subject to the FCC's interconnected VoIP regulations.

III. Third Report and Order

A. Unitary Location Accuracy Standard

10. Background. In the Location Accuracy FNPRM, the Commission sought comment on whether to change the current location accuracy requirements in Section 20.18(h) of our rules, including whether to adopt a unitary standard, rather than maintaining separate standards for network- and handset-based carriers. The Commission also sought to refresh the record developed on this issue in response to the Location Accuracy NPRM, in which the Commission had tentatively concluded that it should adopt a unitary location accuracy requirement.

11. Comments. Some commenters support the adoption of a unitary

location accuracy requirement. APCO supports the adoption of a unitary standard ''to the extent feasible,'' while NENA urges the FCC to ''lay out a regulatory vision for achieving [one] harmonized accuracy standard.'' Verizon Wireless and Intrado also support the use of a unitary standard, contending that the bifurcated handset and network standards create ''an unacceptable disparity'' among wireless users.

12. Other commenters oppose adoption of a unitary location accuracy standard. AT&T, Sprint Nextel, T-Mobile, the Telecommunications Industry Association (TIA), Andrew Corporation, Motorola, and CTIA contend that a unitary standard is not technically or economically feasible at this time. For instance, T-Mobile asserts that ''[f]or carriers using network-based E911 solutions * * * the [E911 Location Accuracy Second Report and Order] establishes a migration path from those technologies to the handset-based A–GPS solution.'' T-Mobile submits that the ''[Second Report and Order] already contemplates a handset change out for all non-A–GPS-capable handsets'' and urges the Commission to be ''reluctant to order another handset change out, especially before it can fully evaluate the results of the [Second Report and Order].'' T-Mobile contends that ''[d]oing so would likely impose significant additional unnecessary costs on consumers and providers without an ascertainable benefit[,]'' while ''continued refinements in GPS receiver performance and location algorithms, and the likely availability of additional navigation satellite systems will improve A–GPS capabilities during the eight-year transition.'' Also, TIA ''encourages the Commission not to impose a single uniform standard for location accuracy rules[,]'' because ''[m]andating a single standard for both network and device location accuracy will drive technological innovation and investment towards meeting such a standard, rather than developing location accuracy enhancements that go beyond any new requirements.'' Polaris argues that a single location accuracy standard should not be implemented ''until [the Commission] adopts a hybridization timeline.''

13. Discussion. Given the Commission's recent revisions to the handset- and network-based location accuracy requirements in the E911 Location Accuracy Second Report and Order and the establishment of an eight-year implementation period for these requirements, we find that it would be premature to replace the existing location accuracy rules with a unitary location accuracy standard. To comply with the E911 Location Accuracy Second Report and Order, CMRS providers are already making substantial efforts to improve their ability to provide accurate location information. We see no reason, at this time, to alter the amount of time provided to carriers under the E911 Location Accuracy Second Report and Order to comply with the rules adopted there.

14. Nevertheless, the record in this proceeding clearly signals that the wireless industry is engaged in a broad migration away from the dichotomy between network- and handset-based approaches to location accuracy. Current handset-based carriers are increasingly combining A–GPS technologies with refinements based on location determinations using network-based technologies. For instance, Sprint uses ''a combination of handset-based and network-based location technologies,'' and while its ''Phase II E–911 solution for its CDMA network has been categorized as a handset-based solution,'' it also deploys ''network-based components.'' Similarly, Verizon Wireless submits that it uses a mix of technologies, including ''A–GPS (network-assisted), Hybrid (A–GPS & AFLT), AFLT, and several default location technologies (cell sector with timing, mixed cell sector, cell sector) to provide location information for 9–1–1 calls.'' T-Mobile adds that besides ''A–GPS improvements, carriers have also made improvements in the use of the timing and triangulation technologies that serve as fallback location technologies implemented today as complements to A–GPS.''

15. As network-based carriers migrate to A–GPS and increase the penetration of A–GPS-capable handsets in accordance with our implementation benchmarks for location accuracy, the technological distinctions between handset- and network-based wireless E911 solutions will continue to diminish. We concur with T-Mobile that ''[a]s carriers transition to A–GPS, they will also transition from network-based accuracy standards to handset-based standards, moving toward a de facto unified standard'' and that ''the likely result * * * at least for major nationwide carriers, is that all will be using similar A–GPS E911 location technologies across nearly their entire subscriber base by the end of the ordered eight-year transition.''

16. Therefore, we decide not to alter the rules adopted in the E911 Location Accuracy Second Report and Order as they apply to existing wireless carriers and networks. Rather, we conclude that the network-based standard should sunset at an appropriate point after the end of the eight-year implementation period, at which point all carriers would be obligated to meet the handset-based location accuracy standard in the Commission's current rules. In adopting this approach, we assess the benefits of requiring, at a later date, the handset-based location accuracy standard as the unitary standard. The handset-based standard is more stringent than the network-based standard. This stricter standard is consistent with the Commission's chief objective of ''ensur[ing] that PSAPs receive accurate and meaningful location information'' while considering that ''compliance timeframes, limitations, and exemptions * * * provide carriers with a sufficient measure of flexibility to account for technical and cost-related concerns.'' With the more precise handset-based standard as the unitary standard, we expect it to be easier for first responders to locate wireless customers in emergency situations. It is reasonable to expect that the more accurate location information under the handset-based location accuracy parameters will lead to more direct and quicker response by first responders addressing wireless 911 calls, and that expediting their response time will have significant public safety benefits. For instance, we note that, in cardiac arrest emergencies, reducing response times by even three minutes improves a victim's chances of survival ''almost four-fold.''

17. There are substantial benefits to retaining the existing location accuracy rules with the eight-year implementation periods for both handset-based and network-based location accuracy solutions. The record shows convincing support from wireless carriers and the public safety community for retaining the Commission's current bifurcated approach for cost reasons. We agree with T-Mobile that adopting a unitary location accuracy standard now ''would likely impose significant additional unnecessary costs on consumers and providers without an ascertainable benefit.'' AT&T adds that ''mandating a specific technology or standard would prevent carriers from implementing E911 solutions that fully leverage their unique network characteristics,'' especially since, as we note above, carriers are currently taking initial steps to comply with our first location accuracy benchmarks. Also, although NENA supports a unitary location accuracy standard, it recognizes that the bifurcated regulatory regime in effect ''represent[s] a reasonable compromise between cost [and] capability.'' We thus

conclude that continuing this approach will provide the benefit of regulatory certainty without the likely precipitate costs of a unitary standard at this time, as the growing migration to A–GPS handsets continues and network-based carriers increasingly incorporate those handsets in accordance with their respective location accuracy benchmarks.

18. The phasing out of the network-based standard that we are adopting will allow carriers using network-based technologies to spread over the eight-year implementation period their actions to comply with the location accuracy benchmarks. Because in 2010 almost all 2G and 3G handsets shipped by manufacturers were equipped with GPS-chips, by the end of the eight-year implementation period, network-based carriers will likely have complied with their location accuracy benchmarks by ''blending in'' such location-capable handsets. Therefore, the costs of meeting the handset-based standard within a reasonable sunset period after 8 years should be minimal. Moreover, the fact that the eight-year benchmark permits ''a network-based carrier to comply * * * using only handset-based measurements, as long as it has achieved at least 85% A–GPS handset penetration among its subscribers'' should provide incentives to network-based carriers to achieve 85 percent A–GPS handset penetration by the end of the eight years and thereby contribute to minimizing subsequent costs. Nevertheless, given the constantly evolving nature of location technologies, we recognize that it is premature to adopt a specific sunset date at this time. Instead, we will seek comment on selecting a sunset date and on considering the costs and benefits associated with a particular sunset date at a later time. We believe that as the end of the eight-year period draws closer, the public safety community, wireless carriers, location technology vendors and other stakeholders will have a significantly better understanding of how much time network-based carriers will need following the conclusion of the eight-year implementation period to come into compliance with the handset-based standard.

19. In addition, we conclude that all new CMRS network providers that meet the definition of covered CMRS providers in Section 20.18 must comply with the handset-based location accuracy standard. We concur with Verizon and Verizon Wireless that due to the broad migration toward use of A–GPS-capable handsets, it is reasonable to harmonize our location accuracy requirements with regard to new CMRS networks. We define a ''new CMRS network'' as a CMRS network that is newly deployed subsequent to the effective date of this Report and Order and that is not associated with an existing CMRS network. In other words, our definition of ''new CMRS network'' excludes network changes or deployments that are part of an upgrade or expansion of an existing CMRS network. In adopting this definition, our intent is to require covered CMRS providers that are launching new stand-alone networks to meet the handset-based location accuracy standard from the start, rather than to accelerate the eight-year implementation period for existing covered CMRS providers that opt to upgrade their networks during the implementation period.

20. We find that requiring all new CMRS network providers to comply with our handset-based location accuracy standard is consistent with the regulatory principle of ensuring technological neutrality. Providers deploying new CMRS networks are free to use network-based location techniques, or to combine network and handset-based techniques, to provide 911 location information, provided that they meet the accuracy criteria applicable to handset-based providers. Given the long-term goal of universal support for one location accuracy standard, we believe that such a mandate allows appropriate planning and ensures that new technology will comply with the most stringent location accuracy standard that applies to existing technology. Additionally, as A–GPS-capable handsets become more widely available, and as consumer demand increases for handsets that provide GPS-based navigation and location-based services, new CMRS providers will have substantial incentive to provide such handsets to most if not all of their customers, thus minimizing the incremental cost to such carriers of complying with the Commission's handset-based location accuracy standard.

1. Outdoor Location Accuracy Testing

21. In April 2000, the Commission's Office of Engineering and Technology (OET) issued Bulletin No. 71 (OET Bulletin 71) to provide assistance in determining whether wireless licensees are in compliance with the location accuracy standards set by the Commission. The bulletin stated that compliance with the OET guidelines would establish ''a strong presumption that appropriate means have been applied to ensure that an [automatic location identification] (ALI) system complies with the Commission's Rules.''

22. Background. In the Location Accuracy FNPRM, the Commission sought comment on whether it should make wireless location accuracy compliance testing mandatory and whether to establish a mandatory testing schedule. The Commission also sought comment on whether OET Bulletin 71 should serve as the basis for a mandatory testing methodology, and the Commission sought to refresh the record on testing methodologies developed in response to the Location Accuracy NPRM.

23. Comments. A number of commenters support mandatory periodic testing of CMRS providers' compliance with the Commission's location accuracy rules. NENA argues that ''[s]uch testing is the PSAP's only real assurance that emergency services personnel will be able to locate callers in times of distress.'' NENA, however, acknowledges ''that compliance testing is an expensive and burdensome process for carriers'' and therefore proposes that the ''baseline compliance testing interval should be five years.'' NENA also advocates that in PSAP service areas where Phase II service capabilities have been deployed, new or upgraded base stations should undergo compliance testing before entering service. NENA reasons that without such a requirement, current rules ''could permit carriers to delay testing of location accuracy for newly-deployed base stations (or sectors in these areas) for up to six months'' and that this risks ''the creation of 'islands' where E9–1–1 Phase II level service is unavailable to consumers who have a reasonable expectation of service.'' NENA also recommends that ''[m]aterial changes to the wireless operational environment within a PSAP service area should trigger localized out-of-cycle testing.'' Finally, NENA argues that carriers should be required to share test results with relevant PSAPs and State 9–1–1 offices, ''subject to stringent confidentiality provisions,'' to foster collaboration between carriers and public safety agencies and to improve PSAPs' situational awareness.

24. APCO also supports mandatory accuracy testing but does not propose a specific schedule or timeframe. APCO argues that ''[c]ompliance testing must * * * be repeated within a reasonable time frame,'' as ''wireless system updates such as 're-homing' a cellular network or modifying internal databases have been known to have a negative impact on location and 9–1–1 delivery.'' APCO urges the Commission to ''seriously consider mandating that

compliance testing conforms to OET 71.'' APCO also argues that test results should be shared with relevant PSAPs and presented in a standardized format.

25. TruePosition also recommends periodic mandatory accuracy testing. TruePosition argues that ''[t]o identify the impact of the numerous changes that occur over time * * * it is necessary to characterize system performance periodically.'' TruePosition argues that ''such testing often turns up hidden problems that can usually be rectified quickly once discovered'' and that periodic testing ''also has the benefit of identifying common issues such that procedures can be put in place to address them on an on-going basis.'' Further, TruePosition argues that ''test calls from a specific cell site should be weighted according to the percentage of 911 calls originating on that cell site'' and that ''[w]hile accuracy is the main criteria for compliance, it is meaningless unless yield is also taken into account.''

26. Texas 9–1–1 Agencies argue that ''[w]ireless carriers must be required to do initial pre-deployment testing of Phase 2 service before turning up any new towers with live traffic or any new coverage areas with live traffic in 9–1–1 authority areas that have full Phase 2 service.'' Texas 9–1–1 Agencies argue further that ''[Section] 20.18 should not be interpreted to create an automatic loophole extension of up to six-months for wireless carriers to deploy Phase 2 service at a later date after they start handling live end user traffic.''

27. The Alliance for Telecommunications Industry Solutions' (ATIS) Emergency Services Forum (ESIF), an organization with wireless carriers as members, has developed and published several industry-accepted methodologies related to testing. In particular, ATIS's ESIF has published a technical report (ATIS Report) that specifies events that should trigger maintenance testing. These events include: (1) Major network changes that may significantly impact location accuracy; (2) problems such as unexplained significant degradation of service, systematic failed delivery of service and catastrophic events; and (3) every two years, at a minimum, consistent with NRIC VII Focus Group 1A recommendations. ATIS states that examples of major network changes that should trigger location accuracy testing include:

(a) Changes to core location technology;

(b) Major system software upgrades that impact location algorithms;

(c) Changes in radio frequency (RF) configuration that would result in a significant impact to location accuracy in the area being considered; and

(d) Natural disasters that alter the topology of a significant portion of the infrastructure in an area of consideration.''

According to AT&T, the ATIS report ''should be the starting point for [an advisory group] evaluation.''

28. Carrier commenters generally oppose mandatory testing. T-Mobile argues that periodic testing is not necessary because ''once initial data is collected indicating certain accuracy levels have been achieved, that data does not lose validity. In fact, performance generally tends to improve rather than degrade over time.'' T-Mobile further contends that ''[r]equiring periodic re-testing would * * * be unnecessary and impose a huge burden. At a minimum, the Commission is obligated by the Paperwork Reduction Act to evaluate the Second Report and Order mechanisms before imposing additional information collection requirements.'' AT&T also opposes a testing requirement, arguing that ''[t]he NPRM's discussion of these topics ignores the Commission's decision in the Second R&O to trend uncertainty data to validate accuracy in an ongoing manner.'' T-Mobile similarly contends that ''trending of confidence and uncertainty data * * * provides a way of better targeting areas where remedial measures may be needed,'' while ''[n]etworkwide accuracy retesting is a costly and unnecessary burden absent any clear evidence of need.''

29. However, according to NENA, confidence and uncertainty trends are not sufficient proxies for location accuracy testing because ''reported confidence and uncertainty data are themselves subject to systemic error.'' NENA disputes T-Mobile's claim that network performance does not materially change with time, noting that ''routine changes in deployed networks can adversely affect location accuracy.''

30. Commenters also urge caution regarding using OET Bulletin 71 as the basis for testing procedures, arguing that the bulletin is outdated and further work on testing criteria is required. Andrew Corporation supports mandatory testing but cautions that ''in order to ensure that such testing is as meaningful as possible, the compliance verification methodology should be based on empirical test data collected at a statistically significant number of test points representative of calling patterns in the targeted compliance area.'' Andrew Corporation also argues that ''compliance testing parameters should account for the fact that performance among individual handset models may vary for handset-based location methods and can strongly influence measured results for GPS-based location technology.''

31. Discussion. We conclude that requiring CMRS providers to periodically test their outdoor location accuracy results and to share these results with PSAPs within their service areas, state 911 offices in the states or territories in which they operate, and the Commission, subject to confidentiality safeguards, is important to ensure that our location accuracy requirements are being met. Indeed, as NENA, APCO, and TruePosition note, the current lack of available data on location accuracy results has made it difficult for public safety entities, the Commission, and the public to assess whether the Commission's rules are effectively ensuring that CMRS providers are providing meaningful location information to PSAPs. The lack of available data has also made it difficult to assess the effects of emerging technologies on location accuracy results and has negatively affected the ability of public safety personnel to have confidence in the location information they do receive.

32. As noted, there is disagreement in the record regarding the need for periodic testing of carriers' networks. T-Mobile contends that only initial test data on accuracy levels is necessary and that periodic retesting yields no public safety benefit. Other commenters, including NENA and TruePosition, cite examples of common environmental and network changes that can affect the reliability of previous test results, such as new construction or development, new Phase II capabilities, re-homing of cellular networks, and rectifying problems discovered in previous testing. They argue that in the absence of periodic retesting, these changes can result in degradation of location accuracy performance that would not be identifiable based on initial test results.

33. We find that periodic testing is important to ensure that test data does not become obsolete as a result of environmental changes and network reconfiguration. Indeed, even ATIS, which is comprised of wireless carriers, notes that ''major network change * * * could significantly impact location accuracy and trigger accuracy maintenance testing.'' In addition, carrier disclosure to PSAPs and 911 offices will enable them to better gauge whether they are receiving accurate location information from CMRS providers and thus base their responses to emergencies accordingly. Disclosure of the information to the Commission

will enable the Commission to monitor trends in location accuracy and thereby ensure that its regulations are appropriately tailored to enhance location accuracy without imposing unnecessary costs or administrative burdens. We also recognize that test results subject to disclosure may contain proprietary information. Therefore, before the Commission implements any disclosure requirements, we will seek comment on safeguards that should be implemented to ensure the protection of confidential information in the test results.

34. No entity has suggested a means other than periodic testing to ensure the accuracy of location information. However, further work is needed to develop approaches to testing criteria, procedures, and timeframes that are reasonable and cost-effective. We also agree with commenters that basing testing criteria and procedures on the current OET Bulletin 71, developed eleven years ago, would be inappropriate at this time. Rather, we conclude that development of these issues should be referred to the newly re-chartered CSRIC. More specifically, the CSRIC should be tasked with making recommendations to the Commission within six months regarding cost-effective and specific approaches to testing requirements, methodologies, and implementation timeframes that will substantially meet the goals articulated above, including appropriate updates to OET Bulletin 71. The Commission will then subject these recommendations to further notice and comment prior to implementing specific testing requirements and procedures.

35. We encourage the CSRIC to consider the feasibility of flexible testing criteria and methodologies. To the extent that any stakeholders have concerns about the potential expense of periodic testing, we expect them to substantiate such concerns by providing the CSRIC with detailed cost data relating to particular testing methodologies. Overall, the CSRIC's recommendations should attempt to find cost-effective testing solutions.

2. Legal Authority

36. We act pursuant to well-established legal authority. Since 1996, the Commission has required CMRS providers to implement basic 911 and E911 services. As the Commission has explained before, sections 301 and 303(r) of the Act give us the authority to require CMRS providers to implement these services. E911 requirements also further the Commission's mandate to ''promot[e] safety of life and property through the use of wire and radio communication.'' Our actions in this item enhance E911 service to ''promote safety of life and property'' and fall within this authority.

IV. Procedural Matters

A. Accessible Formats

37. 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 & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

B. Regulatory Flexibility Analyses

38. As required by the Regulatory Flexibility Act of 1980, see 5 U.S.C. 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFA is set forth in Appendix B of the document.

C. Paperwork Reduction Act Analysis

39. The Report and Order contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

40. We note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix C, infra.

D. Congressional Review Act

41. The Commission will send a copy of the Third R&O in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), see 5 U.S.C. 801(a)(1)(A).

E. Final Regulatory Flexibility Analysis

42. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was included in the *Further Notice of Proposed Rulemaking and Notice of Inquiry (''FNPRM'')* in PS Docket No. 07–114. The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

V. Ordering Clauses

43. Accordingly, *It Is Ordered,* pursuant to sections 1, 4(i), 301, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 301, 303(r), and 332, that the Third R&O in PS Docket No. 07–114 *Is Adopted* and that parts 20 and 9 of the Commission's Rules, 47 CFR part 20 and 47 CFR part 9, are amended as set forth in Appendix C. The Third R&O shall become effective November 28, 2011, subject to OMB approval for new information collection requirements.

44. *It Is Further Ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *Shall Send* a copy of the Third R&O, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 20

Communications common carriers, Communications equipment.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 20 as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

■ 1. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 201, 251–254, 301, 303, 316, and 332 unless otherwise noted. Section 20.12 is also issued under 47 U.S.C. 1302.

■ 2. Section 20.18 is amended by adding paragraph (h)(2)(iv) to read as follows:

§ 20.18 911 Service.

* * * * *

(h) * * *

(2) * * *

(iv) Providers of new CMRS networks that meet the definition of covered CMRS providers under paragraph (a) of this section must comply with the requirements of paragraphs (h)(2)(i) through (iii) of this section. For this purpose, a ''new CMRS network'' is a CMRS network that is newly deployed subsequent to the effective date of the Third Report and Order in PS Docket No. 07–114 and that is not an expansion

or upgrade of an existing CMRS network.

* * * * *

[FR Doc. 2011–24865 Filed 9–27–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 535

[NHTSA 2010–0079; EPA–HQ–OAR–2010–0162; FRL–9455–1]

RIN 2127–AK74

Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final rule regulations (49 CFR 535.6), which were published in the **Federal Register** of Thursday, September 15, 2011 (76 FR 57106). The regulations established fuel efficiency standards for medium- and heavy-duty engines and vehicles, as prescribed under the Energy Independence and Security Act (49 U.S.C. 32902(k)(2)).

DATES: *Effective Date:* November 14, 2011.

FOR FURTHER INFORMATION CONTACT: Lily Smith, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* (202) 366–2992.

SUPPLEMENTARY INFORMATION:

Background

NHTSA and EPA published in the **Federal Register** of September 15, 2011, final rules to establish a comprehensive Heavy-Duty National Program that will increase fuel efficiency and reduce greenhouse gas emissions for on-road heavy-duty vehicles, responding to the President's directive on May 21, 2010, to take coordinated steps to produce a new generation of clean heavy-duty vehicles.

Need for Correction

As published, the final regulations inadvertently contained incorrect conversion factors for determining fuel consumption values that resulted from a typographical error. The correct value that should have been used in the document is a factor of 8,887 grams of CO_2 per gallon of gasoline for conversion of gasoline fuel. The preamble text is not affected.

List of Subjects in 49 CFR Part 535

Fuel efficiency.

Accordingly, 49 CFR part 535 is corrected by making the following correcting amendments:

PART 535—MEDIUM- AND HEAVY-DUTY VEHICLES

■ 1. The authority citation for part 535 continues to read as follows:

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.50.

■ 2. Revise paragraphs (a)(4)(ii) and (c)(4)(ii) of § 535.6 to read as follows:

§ 535.6 Measurement and calculation procedures.

* * * * *

(a) * * *

(4) * * *

(ii) Calculate the equivalent fuel consumption test group results as follows for spark-ignition vehicles and alternative fuel spark-ignition vehicles. CO_2 emissions test group result (grams per mile)/8,887 grams per gallon of gasoline fuel) × (10^2) = Fuel consumption test group result (gallons per 100 mile).

* * * * *

(c) * * *

(4) * * *

(ii) Calculate equivalent fuel consumption FCL values for spark-ignition engines and alternative fuel spark-ignition engines. CO_2 FCL value (grams per bhp-hr)/8,887 grams per gallon of gasoline fuel) × (10^2) = Fuel consumption FCL value (gallons per 100 bhp-hr).

* * * * *

Issued: September 22, 2011.

Christopher J. Bonanti,

Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, Department of Transportation.

[FR Doc. 2011–24978 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–02]

RIN 0648–XA729

Pacific Cod by Non-American Fisheries Act Crab Vessels Harvesting Pacific Cod for Processing by the Inshore Component in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by non-American Fisheries Act (AFA) crab vessels that are subject to sideboard limits harvesting Pacific cod for processing by the inshore component in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2011 Pacific cod sideboard limit established for non-AFA crab vessels harvesting Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 25, 2011, through 2400 hrs, A.l.t., December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The 2011 Pacific cod sideboard limit established for non-AFA crab vessels that are subject to sideboard limits harvesting Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA is 1,747 metric tons (mt), as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (75 FR 11111, March 1, 2011).

In accordance with § 680.22(e)(2)(i), the Administrator, Alaska Region, NMFS (Regional Administrator) has determined that the 2011 Pacific cod sideboard limit established for non-AFA crab vessels harvesting Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a sideboard directed fishing allowance of 1,700 mt, and is setting aside the remaining 47 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 680.22(e)(3), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by non-AFA crab vessels that are subject to sideboard limits harvesting Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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) as such 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 sideboard directed fishing closure of Pacific cod for non-AFA crab vessels that are subject to sideboard limits harvesting Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 22, 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.

This action is required by § 680.22 and is exempt from review under Executive Order 12866.

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

Dated: September 23, 2011.

Steven Thur,

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

[FR Doc. 2011–24972 Filed 9–23–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–2]

RIN 0648–XA734

Fisheries of the Exclusive Economic Zone Off Alaska; ''Other Rockfish'' in the Aleutian Islands Subarea of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of ''other rockfish'' in the Aleutian Island subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary because the 2011 total allowable catch (TAC) of ''other rockfish'' in the Aleutian Island subarea of the BSAI has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 24, 2011, through 2400 hrs, A.l.t., December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 TAC of ''other rockfish'' in the Aleutian Island subarea of the BSAI is 500 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11139, March 1, 2011) and apportionment of non-specified reserves (76 FR 53840, August 30, 2011).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2011 TAC of ''other rockfish'' in the Aleutian Island subarea of the BSAI has been reached. Therefore, NMFS is requiring that ''other rockfish'' caught in the Aleutian Island subarea of the BSAI be treated as prohibited species in accordance with § 679.21(b).

''Other rockfish'' in the Aleutian Island subarea of the BSAI means all Sebastes and Sebastolobus species except for Pacific ocean perch, northern, shortraker and rougheye rockfish.

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) as such 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 prohibiting the retention of ''other rockfish'' in the Aleutian Island subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 22, 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.

This action is required by § 679.20 and § 679.21 and is exempt from review under Executive Order 12866.

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

Steven Thur,

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

[FR Doc. 2011–24977 Filed 9–23–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–2]

RIN 0648–XA733

Fisheries of the Exclusive Economic Zone Off Alaska; Sharks 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; closure.

SUMMARY: NMFS is prohibiting retention of sharks in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary because the 2011 total allowable catch (TAC) of sharks in the BSAI has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 24, 2011, through 2400 hrs, A.l.t., December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 TAC of sharks in the BSAI is 50 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11139, March 1, 2011) and apportionment of non-specified reserves (76 FR 53840, August 30, 2011).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2011 TAC of sharks in the BSAI has been reached. Therefore, NMFS is requiring that sharks caught in the BSAI be treated as prohibited species in accordance with § 679.21(b).

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) as such 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 prohibiting the retention of sharks in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 22, 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.

This action is required by § 679.20 and § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: September 23, 2011.

Steven Thur,

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

[FR Doc. 2011–24970 Filed 9–23–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–2]

RIN 0648–XA731

Fisheries of the Exclusive Economic Zone Off Alaska; 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; closure.

SUMMARY: NMFS is prohibiting retention of skates in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary because the 2011 total allowable catch (TAC) of skates in the BSAI has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 24, 2011, through 2400 hrs, A.l.t., December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 TAC of skates in the BSAI is 16,500 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11139, March 1, 2011) and apportionment of non-specified reserves (76 FR 53840, August 30, 2011).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2011 TAC of skates in the BSAI has been reached. Therefore, NMFS is requiring that skates caught in the BSAI be treated as prohibited species in accordance with § 679.21(b).

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) as such 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 prohibiting the retention of skates in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 22, 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.

This action is required by § 679.20 and § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: September 23, 2011.

Steven Thur,

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

[FR Doc. 2011–24975 Filed 9–23–11; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 188
Wednesday, September 28, 2011

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

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2011–0086]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/U.S. Citizenship and Immigration Services–015 Electronic Immigration System-2 Account and Case Management System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a newly established system of records pursuant to the Privacy Act of 1974 for the ''Department of Homeland Security/U.S. Citizenship and Immigration Services–015 Electronic Immigration System-2 Account and Case Management System of Records'' and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before October 28, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0086, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Donald K. Hawkins (202–272–8000), Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529. 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) U.S. Citizenship and Immigration Services (USCIS) proposes to establish a new DHS system of records titled, ''DHS/USCIS–015 Electronic Immigration System-2 Account and Case Management System of Records.''

DHS/USCIS is creating a new electronic environment known as the Electronic Immigration System (USCIS ELIS). USCIS ELIS allows individuals requesting a USCIS benefit to register online and submit certain benefit requests through the online system. This system will improve customer service; increase efficiency for processing benefits; better identify potential national security concerns, criminality, and fraud; and create improved access controls and better auditing capabilities.

DHS and USCIS are promulgating the regulation ''Immigration Benefits Business Transformation, Increment I'' (August 29, 2011, 76 FR 53764) to make it possible for USCIS to transition to an electronic environment. This regulation will assist USCIS in the transformation of its operations by removing references and processes that inhibit the use of electronic systems or constrain USCIS's ability to respond to changing workloads, priorities, or statutory requirements.

Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependents, or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to the Applicant (Co-Applicants); and their attorneys and representatives accredited by the Board of Immigration Appeals (Representatives) may create individualized online accounts. These online accounts help Applicants and their Representatives file for benefits, track the status of open benefit requests, schedule appointments, change their addresses and contact information, and receive notices and notifications regarding their cases. Through USCIS ELIS, individuals may submit additional information and/or evidence electronically. Once an individual provides biographic information in one benefit request, USCIS ELIS uses that information to pre-populate any future benefit requests filed by the same individual. This eases the burden on an individual so he or she does not have to repeatedly type in the same information and decreases the opportunity for error.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/USCIS–015 Electronic Immigration System-2 Account and Case Management System of Records. Some information in Electronic Immigration System-2 Account and Case Management (USCIS ELIS Account and Case Management) relates to official DHS national security, law enforcement, and immigration activities. The exemptions are required to preclude subjects from compromising an ongoing law enforcement, national security or fraud investigation; to avoid disclosure of investigative techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; and to ensure DHS's ability to obtain information from third parties and other sources.

This system is exempted from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Additionally, many of the functions in this system require

retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule.

The exemptions proposed here are standard for agencies where the information may contain investigatory materials compiled for law enforcement purposes. These exemptions are exercised by executive Federal agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for DHS/USCIS–015 Electronic Immigration System-2 Account and Case Management System of Records is also published in this issue of the **Federal Register**.

II. Privacy Act

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph ''61'':

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

61. The DHS/USCIS–016 Electronic Immigration System-2 Account and Case Management System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/USCIS–016 Electronic Immigration System-2 Account and Case Management is a repository of information held by USCIS to serve its mission of processing immigration benefits. This system also supports certain other DHS programs whose functions include, but are not limited to, the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/USCIS–016 Electronic Immigration System-2 Account and Case Management System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, state, local, Tribal, foreign, or international government agencies. This system is exempted from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Additionally, many of the functions in this system require retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule. Exemptions from these particular subsections are justified, on a case-by-case basis determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and/or reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records, or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system, would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: September 15, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–24857 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 216 and 245

[CIS No. 2484–09; DHS Docket No. DHS–2009–0029]

RIN 1615–AA90

Treatment of Aliens Whose Employment Creation Immigrant (EB–5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) is proposing to amend its regulations governing the employment creation (EB–5) immigrant classification. This rule only proposes requirements and procedures for special determinations on the applications and petitions of qualifying aliens whose employment-creation immigrant petitions were approved by the former Immigration and Naturalization Service (INS) after January 1, 1995 and before August 31, 1998. This rule would implement provisions of the 21st Century Department of Justice Appropriations Authorization Act.

DATES: You must submit written comments on or before November 28, 2011.

ADDRESSES: You may submit comments, identified by DHS Docket No. DHS–2009–0029, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. To ensure proper handling, please reference DHS Docket No. DHS 2009–0029 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Contact Telephone Number (202) 272–8377.

FOR FURTHER INFORMATION CONTACT: Alexandra Haskell, Adjudications Officer, Business, Employment and Trade Services, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Mailstop 2060, Washington, DC 20529–2060, telephone: (202) 272–8410.

SUPPLEMENTARY INFORMATION:

Table of Contents

List of Abbreviations

BIA Board of Immigration Appeals
DHS Department of Homeland Security
DOS Department of State
DOJ Department of Justice
ICE U.S. Immigration and Customs Enforcement
INA Immigration and Nationality Act
LPR Lawful Permanent Resident
NTA Notice to Appear
RA Rural Area
TEA Targeted Employment Area
Public Law 107–273 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273, 116 Stat. 1758 (2002)
USCIS U.S. Citizenship and Immigration Services

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. The Department of Homeland Security (DHS) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions should include the agency name and DHS Docket No. DHS–2009–0029. U.S. Citizenship and Immigration Services (USCIS) will post all comments received 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.*

II. Background

A. Employment Creation Immigrant Classification

The employment creation immigrant classification is one of five employment-related bases for obtaining permanent residence in the United States. *See* Immigration and Nationality Act (INA) section 203(b)(1)–(5), 8 U.S.C. 1153(b)(1)–(5). DHS and the affected community commonly refer to this category as the ''EB–5'' immigrant classification because it is the fifth employment-related basis listed in the INA. The EB–5 immigrant classification allows qualifying aliens, and any accompanying or following to join spouses and children, to obtain lawful permanent resident (LPR) status if the qualifying aliens have invested, or are actively in the process of investing, $1 million in a new commercial enterprise. *See* INA sections 203(b)(5)(A) and (C), 8 U.S.C. 1153(b)(5)(A) and (C). To qualify, the alien's investment must benefit the U.S. economy and create full-time jobs for 10 or more qualifying employees. INA section 203(b)(5)(A)(ii), 8 U.S.C. 1153(B)(5)(A)(ii). If the investment is in a Rural Area (RA) or an area that has experienced high unemployment (*i.e.,* a Targeted Employment Area (TEA)), the required capital investment amount is $500,000 rather than $1 million. INA section 203(b)(5)(C)(ii), 8 U.S.C. 1153(b)(5)(C)(ii); 8 CFR 204.6(f)(2). In addition, under a pilot program established by statute, qualifying aliens may meet the job creation requirement through the creation of 10 direct or indirect jobs. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610(c), Public Law 102–395, 106 Stat. 1828 (1992), 8 U.S.C. 1153 note. To get the benefit of the indirect job creation requirement, an alien must make a qualifying investment within a regional center (defined in 8 CFR 204.6(e)) approved by USCIS for participation in the pilot program. This pilot program is set to expire on September 30, 2012. *See* Department of Homeland Security Appropriations Act, 2010, section 548, Public Law 111–83, 123 Stat. 2142, 2177 (2009), 8 U.S.C. 1153 note.

Obtaining lawful permanent residence under the EB–5 immigrant classification is a multi-step process. First, the alien must file and obtain approval of an Immigrant Petition by Alien Entrepreneur, Form I–526 (or successor form). *See* 8 CFR 204.6(a). Second, the alien must obtain conditional permanent resident status on the basis of the approved Form I–526 petition. If the alien resides in the United States, he

or she may apply to become a lawful permanent resident by submitting an Application to Register Permanent Residence or Adjust Status, Form I–485 (or successor form). *See* 8 CFR 245.1(a). If the alien resides outside of the United States or is ineligible for lawful permanent residence through the filing of a Form I–485, then he or she must obtain a Department of State (DOS) issued immigrant visa to gain admission to the United States as a permanent resident on a conditional basis. *See* INA section 211(a)(1), 8 U.S.C. 1181(a)(1). Once an alien has obtained conditional resident status, the alien is called an ''alien entrepreneur.'' INA section 216A(f)(1), 8 U.S.C. 1186b(f)(1).

The last procedural step is triggered 90 days before the second anniversary of the alien entrepreneur's conditional resident status. INA section 216A(d)(2), 8 U.S.C. 1186b(d)(2). During this 90-day period, the alien entrepreneur must submit to USCIS a Petition by Entrepreneur to Remove Conditions, Form I–829 (or successor form). *See* 8 CFR 216.6(a)(1). Failure to timely submit Form I–829, or to obtain a removal of conditions through the approval of a Form I–829, results in termination of conditional resident status and placement of the alien and any accompanying dependents in removal proceedings. *See* 8 CFR 216.6(a)(5). Determinations by USCIS on Form I–829 are not appealable; however, an immigration judge may review the determinations in removal proceedings. *See* INA section 216A(c)(3)(D), 8 U.S.C. 1186b(c)(3)(D). The Board of Immigration Appeals (BIA) hears appeals from immigration judge decisions. *See* 8 CFR 1003.1(b).

B. Overview of the Public Law 107–273 EB–5 Provisions

In 1998, the Immigration and Naturalization Service (INS), the predecessor agency to USCIS, issued four precedent decisions addressing the eligibility requirements for EB–5 petitions.[1] The publication of these precedent decisions resulted in litigation over their applicability to cases at various stages of adjudication.[2] Some of this litigation continues today.

In 2002, Congress enacted special legislation to provide a small group of aliens whose EB–5-related petitions or applications were pending at the time of the precedent decisions with an opportunity to perfect their original investments or make additional business investments in the United States and create the requisite jobs so that they can remain in the United States as lawful permanent residents. *See* 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273, div. C, tit. I, §§ 11031–11034, 116 Stat. 1758 (2002) (8 U.S.C. 1186b note) (Pub. L. 107–273). This special legislation only applies to ''eligible aliens'' for whom the INS approved a Form I–526 between January 1, 1995 and August 31, 1998, and who pursuant to such approval either: (1) Obtained permanent resident status on a conditional basis and filed a timely Form I–829 before November 2, 2002; or (2) filed an application for adjustment of status or an application for an immigrant visa before November 2, 2002. Public Law 107–273 does not apply to any other aliens who are admitted or have been admitted to the United States pursuant to the EB–5 visa program.

Public Law 107–273 requires publication of implementing regulations. Until implementing regulations are effective, USCIS may not take adverse action against ''eligible aliens.'' *See* Public Law 107–273 at section 11033. Accordingly, DHS is proposing implementing regulations, but only as applied to the adjudicatory and prosecutory functions of USCIS and U.S. Immigration and Customs Enforcement (ICE).

C. Summary of the Adjudications Required by Public Law 107–273

Public Law 107–273 contains very detailed requirements for the review and adjudication of pending applications and petitions for eligible aliens. Section 11031 describes the procedures applicable to eligible aliens who obtained lawful permanent resident status on a conditional basis but who have not had their conditions removed. Section 11032 describes the procedures applicable to eligible aliens whose applications for permanent residence on a conditional basis had not been approved at the time of enactment of Public Law 107–273.

For eligible aliens with pending I–829 petitions, section 11031 of Public Law 107–273 requires the Secretary of Homeland Security (Secretary) to make an initial determination whether the Form I–829 as filed by the eligible alien is approvable. If the petition is approvable, the conditions on the alien's permanent residence will be removed. If the petition is determined to be deficient following the initial determination, the eligible alien and the accompanying spouse and children of the alien will be granted a second two-year period of conditional residence unless the adverse determination is based on a finding of material misrepresentation. During this period of conditional residence, the eligible alien has an opportunity to remedy the deficiencies in his or her petition and make additional investments in the commercial enterprise listed on the pending Form I–829 and/or in other commercial enterprises to comply with the capital investment and job creation requirements of the EB–5 program. At the end of this two-year period, the eligible alien must file a new Form I–829 petition with the Secretary of Homeland Security seeking to remove the conditions from his or her permanent residence. If the eligible alien's second petition is approvable, the conditional basis of the alien's permanent residence and that of the alien's accompanying spouse and children will be removed. If an eligible alien's second petition is determined to be deficient, the eligible alien's permanent resident status and that of the alien's accompanying spouse and children will be terminated. If, at any stage of the process, it is determined that an eligible alien has made a material misrepresentation on any of the petitions, the alien's status and that of the alien's accompanying spouse or children may be terminated. Finally, section 11031 provides for administrative and judicial review of each of the statutory determinations.

Section 11032 of Public Law 107–273 provides for the approval of an eligible alien's application for adjustment of status or an immigrant visa and the grant of a two-year period of conditional residence. At the completion of the two-year period of conditional residence, eligible aliens must file Form I–829 to remove the conditions from their permanent residence and that of their accompanying spouse and children. Although the procedures used to adjudicate the petitions filed by eligible aliens under section 11032 of Public Law 107–273 are governed by INA section 216A, substantial compliance with the capital investment and job creation requirements need not be related to the commercial enterprise described in their Forms I–526. Rather, eligible aliens may submit evidence related to capital investment and job creation in any commercial enterprise in the United States. If an eligible alien is determined to have complied with the capital investment and job creation

[1] *Matter of Soffici,* 22 I&N Dec. 158 (INS Assoc. Comm'r 1998); *Matter of Izummi,* 22 I&N Dec. 169 (INS Assoc. Comm'r 1998); *Matter of Hsiung,* 22 I&N Dec. 201 (INS Assoc. Comm'r 1998); *Matter of Ho,* 22 I&N Dec. 206 (INS Assoc. Comm'r 1998).

[2] *E.g., Am. Exp. Group Ltd. P'ship* v. *United States,* No. 02:06–02199 (D. S.C.); *Chang* v. *United States,* No. 02:99–cv–10518–GHK–AJW (C.D. Cal.); *Sang Geun An* v. *United States,* No. C03–3184p (W.D. Wash.).

requirements of the EB–5 program, the conditional basis of the alien's permanent residence and that of the alien's accompanying spouse and children will be removed. If it is determined that an eligible alien has made a material misrepresentation or has failed to satisfy the capital investment and/or job creation requirements of the EB–5 program, the alien's status and that of his or her accompanying spouse and children will be terminated, subject to review in removal proceedings.

The remainder of the Supplementary Information describes sections 11031 and 11032 of Public Law 107–273 in more detail and explains the corresponding proposed amendments to DHS regulations.

III. Aliens Eligible To Receive Special Determinations on Their Petitions To Remove Conditions Under Section 11031 of Public Law 107–273

A. ''Eligible Alien'' Under Section 11031

As summarized above, a conditional resident must fall within the statutory definition of ''eligible alien'' under sections 11031(b)(1) and (2) of Public Law 107–273 to receive the determinations on a previously denied or currently pending Form I–829 required by section 11031(c) of Public Law 107–273. The determinations required by section 11031(c) of Public Law 107–273 (hereinafter ''section 11031(c) determinations'') are comprised of an initial determination and a second determination. Public Law 107–273 at section 11031(c). An ''eligible alien'' is an alien who obtained LPR status on a conditional basis as a result of filing a Form I–526 petition pursuant to section 203(b)(5) of the INA, 8 U.S.C. 1153(b)(5), that was approved after January 1, 1995 and before August 31, 1998. *See* Public Law 107–273 at sections 11031(b)(1)(A)&(B). Such alien must also have timely filed a Form I–829 pursuant to section 216A of the INA prior to November 2, 2002, the date of enactment of Public Law 107–273. *See* Public Law 107–273 at section 11031(b)(1)(C). A ''timely-filed'' Form I–829 is one that an alien filed during the 90-day period before the second anniversary of the alien's lawful admission for permanent residence. *See* INA section 216A(d)(2)(A), 8 U.S.C. 1186b(d)(2)(A); 8 CFR 216.6(a)(1).

In the event that an otherwise eligible alien's timely filed Form I–829 was denied prior to November 2, 2002, the alien still may be deemed to be eligible if he or she filed a motion to reopen not later than January 1, 2003. Public Law 107–273 at section 11031(b)(2)(A). If such an eligible alien is no longer physically present in the United States, the Secretary of Homeland Security, if necessary, may parole the alien into the United States to obtain the section 11031(c) determinations. Public Law 107–273 at section 11031(b)(2)(B). The Secretary of Homeland Security, however, may not parole any alien into the United States who is inadmissible or deportable on any grounds, or if the alien's Form I–829 was denied due to a material misrepresentation of any of the facts and information described in INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1), and alleged in the Form I–829 petition with respect to a commercial enterprise. Public Law 107–273 at section 11031(b)(2)(B)(i)–(ii). Under these circumstances, USCIS does not consider such alien ''eligible'' for the section 11031(c) determinations. In making the material misrepresentation determination, the applicable ''facts and information'' include, but are not limited to:

(A) Whether the alien established the commercial enterprise(s) under consideration; and

(B) Whether the alien invested or was actively in the process of investing the requisite capital.

(C) The alien sustained the actions described in (A) and (B) throughout the period of the alien's residence in the United States. *See* INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1) (as in effect prior to the enactment of Public Law 107–273 on Nov. 2, 2002).

A motion to reopen filed pursuant to Public Law 107–273 by otherwise eligible aliens who are in deportation or removal proceedings by reason of the denial of the I–829 petition also constitutes a motion to reopen proceedings. *See* Public Law 107–273 at section 11031(b)(2)(C). The scope of deportation or removal proceedings reopened under Public Law 107–273 is limited to whether:

- Any order of deportation or removal should be vacated, and
- The alien should be granted the status of an alien lawfully admitted for permanent residence unconditionally or on a conditional basis, by reason of the section 11031(c) determinations made by the Secretary of Homeland Security.

See Public Law 107–273 at section 1131(b)(2)(C).

B. Proposed Regulations

The statutory provisions of Public Law 107–273 are detailed; therefore, this proposed rule does not restate them. This proposed rule focuses primarily on limitations on eligibility and eligibility of aliens with denied petitions.

1. Limitations on Eligibility

Under this rulemaking, in accordance with section 11031(b)(2)(C) of Public Law 107–273, aliens who are in deportation or removal proceedings and who are deportable or removable on grounds other than the denied Form I–829 would be ineligible for special determinations on their Form I–829 applications under Public Law 107–273. Proposed 8 CFR 216.7(a)(2)(i). Such aliens are statutorily barred from obtaining benefits under this law pursuant to section 11031(b)(2)(C) of Public Law 107–273.

Since the enactment of Public Law 107–273, DHS has received and acknowledged requests from several aliens eligible to receive section 11031(c) determinations to withdraw their Forms I–829. In other instances, some aliens have executed Abandonment of Lawful Permanent Residence Status, Form I–407 (or successor form). Either the withdrawal of the Form I–829 or the execution of the Form I–407 constitutes the voluntary abandonment of the alien's conditional lawful residence status. In addition, some aliens may have since acquired lawful permanent residence or another immigration status on a different basis. Public Law 107–273 does not address these scenarios. This rule proposes to exclude such aliens from ''eligibility'' for section 11031(c) determinations. Proposed 8 CFR 216.7(a)(2)(ii) and (iii). The actions of such aliens demonstrate that these aliens are no longer interested in pursuing LPR status based on the EB–5 immigrant classification under the provisions of Public Law 107–273. In order to be eligible to obtain status by another means, an eligible alien would have had to abandon status as an alien admitted for permanent residence on a conditional basis or have had such status terminated by USCIS. *See* INA section 245(f), 8 U.S.C. 1255(f); 8 CFR 245.1(c)(5); *see also Matter of Stockwell,* 20 I&N Dec. 309, 311–12 (BIA 1991) (bar to adjustment of status applicable to marriage-based conditional residents inapplicable if conditional resident status has been terminated).

For these reasons, DHS deems otherwise eligible aliens who have withdrawn their Forms I–829, executed Form I–407, or adjusted to LPR status on other grounds to have abandoned any claim to benefits under Public Law 107–273. DHS is proposing in this rule to exclude these aliens from the definition of eligible alien.

2. Aliens With Denied Petitions

Aliens who timely filed a Form I–829 petition that was denied on the merits prior to November 2, 2002, may still be deemed an ''eligible alien.'' *See* Public Law 107–273 at section 11031(b)(2)(A) (referencing INA section 216A(c)(3)(C), 8 U.S.C. 1186b(c)(3)(C) (discussing adverse determinations on petitions to remove conditions)). DHS proposes to define a denied petition as the decision by an INS director to deny the petition on the merits, and not denials resulting from review of a director's decision in deportation or removal proceedings. *See* proposed 8 CFR 216.7(a)(1). This interpretation is supported by section 11031(b)(2)(C) of Public Law 107–273, which governs treatment of eligible aliens in deportation or removal proceedings. That provision refers to a denied petition as one that was made prior to the initiation of deportation or removal proceedings, which necessarily means a denial made by INS. *See* Public Law 107–273 at section 11031(b)(2)(C).

Note that an alien whose Form I–829 was denied on procedural grounds does not qualify as an ''eligible alien.'' *See* Public Law 107–273 section 11031(b)(2)(A) (limiting qualifying denied petitions that are reopened to those denied on the merits). Procedural grounds for denying Form I–829 include failure to file Form I–829 timely and the failure of the alien to appear for an interview. *See* 8 CFR 216.6(a)(5) and (b)(3). If an alien's failure to timely file Form I–829 has been excused by INS or USCIS based on his or her showing that the failure was for good cause and due to extenuating circumstances or an alien's failure to appear for an interview has been excused by INS or USCIS based on his or her showing of good cause, then the limitations on eligibility will not apply. Once excused, the alien resumes status as a conditional resident with a pending Form I–829, and is an ''eligible alien'' under Public Law 107–273.

Section 11031(b)(2)(A) of Public Law 107–273 required aliens with denied petitions to file a motion to reopen by January 1, 2003 to obtain the benefits offered by the statute. DHS has identified 31 such motions to reopen. DHS has granted such motions and the petitions are now considered to be pending. This rule does not further address motions to reopen since the statutory time period for filing such motions has expired.

Of the 31 motions to reopen that DHS received, none appear to have been filed by aliens who were not physically present in the United States. Moreover, in its review of all Public Law 107–273 petitions, DHS has not found that physical presence of the alien is necessary in order for USCIS to make its initial determinations. Therefore, this rule does not propose provisions governing the parole of overseas aliens with denied Forms I–829.

DHS considers a motion to reopen a denied Form I–829 pursuant to section 11031(b)(2)(A) of Public Law 107–273 to be the same as a motion to reopen deportation or removal proceedings. Public Law 107–273 at section 11031(b)(2)(C). Immigration courts have terminated or administratively closed deportation or removal proceedings in these cases to give USCIS the opportunity to make its section 11031(c) determinations After USCIS makes these determinations, section 11031(b)(2)(C) of Public Law 107–273 requires that the Attorney General must make the decision to grant LPR status conditionally or unconditionally in proceedings. Therefore, after USCIS makes the initial 11031(c) determination, DHS must file a motion to re-calendar the proceedings. Proposed 8 CFR 216.7(a)(3). The immigration judge will take further action on the alien's status in deportation or removal proceedings, including, as appropriate:

- Removal of the conditions and termination of proceedings,
- Extension of conditional resident status pursuant to section 11031(c)(1)(F)(ii), and
- Administrative closure so that jurisdiction shifts back to DHS for the second 11031(c) determination.

IV. Determinations on Petitions To Remove Conditions Under Section 11031 of Public Law 107–273

Public Law 107–273 requires the Secretary of Homeland Security to make an ''initial determination'' on the pending Forms I–829 of eligible aliens. The Secretary also must make a ''second determination'' for certain eligible aliens who file new petitions to remove conditions 2 years later. *See* Public Law 107–273 at sections 11031(a) and 11031(c).

A. Initial Determinations

Under section 11031(c)(1)(A) of Public Law 107–273, the Secretary of Homeland Security must make an initial determination on each eligible alien's Form I–829 regarding three issues. First, the Secretary must determine whether the Form I–829 contains any material misrepresentation in the facts and information described in INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1), and alleged in the Form I–829 with respect to a commercial enterprise. The facts and information described in INA section 216A(d)(1), 8 U.S.C. 1186b(d)(1), pertain to the establishment of an investment in the commercial enterprise for the duration of the conditional resident period. This determination regarding material misrepresentation must be made without regard to whether such enterprise is a limited partnership, or whether the alien entered the enterprise after its formation.

Second, the Secretary must determine whether the commercial enterprise created full-time jobs for 10 or more qualifying employees. The jobs have to exist or existed on any of the following dates:

- The date on which the Form I–829 was filed;
- Six months after that date; or
- The date on which DHS makes the determination.

The creation of 10 or more direct or indirect jobs will satisfy this requirement if the alien has made the required investment within an approved regional center. *See* Public Law 107–273 at section 11031(c)(1)(B). If the new commercial enterprise is a troubled business, then the law provides that the Secretary of Homeland Security instead must determine whether, on any of the three dates described above, the number of employees of the business is no fewer than the number of employees that existed before the alien made his or her capital investment in the business. *Id.* at section 11031(c)(1)(C).

Third, the Secretary must determine whether the eligible alien is in substantial compliance with the capital investment requirement described in INA section 216A(d)(1)(B), 8 U.S.C. 1186b(d)(1)(B), on any of the three dates listed above.

If the Secretary determines that the alien has met the job creation and capital investment requirements outlined by Public Law 107–273, and there is no material misrepresentation with respect to Form I–829, the Secretary of Homeland Security must notify the alien and, if the alien is not in deportation or removal proceedings, remove the conditional basis of the alien's status as of the second anniversary of the alien's lawful admission for permanent residence. The Secretary of Homeland Security will also remove the conditional status of the alien's accompanying spouse and children as of that same date. *See* Public Law 107–273 at section 11031(c)(1)(E); *see also* proposed 8 CFR 216.7(a)(4)(i). For aliens in deportation or removal proceedings, further action will be taken in deportation or removal proceedings. *See* Public Law 107–273 at section 11031(b)(2)(C).

If the Secretary of Homeland Security makes an adverse determination regarding material misrepresentation, job creation, or capital investment, the Secretary must provide the alien with notice of this adverse determination and an opportunity to submit evidence to rebut the adverse determination. *Id.* at section 11031(c)(1)(F)(i). If the Secretary reverses all adverse determinations, the Secretary will notify the alien and his or her accompanying spouse and children that the adverse determination has been reversed. The Secretary will then remove the conditions of the alien, accompanying spouse, and children, effective as of the second anniversary of the alien's lawful admission for permanent residence if the alien is not in removal proceedings. *Id.* at sections 11031(c)(1)(F)(i) and 11031(b)(2)(C); *see also* proposed 8 CFR 216.7(a)(4)(i) and (iii). If the alien is in removal proceedings, DHS will move to recalendar the removal proceedings for appropriate action. *Id.*

If no such reversal takes place, the Secretary of Homeland Security (or the Attorney General if the alien is in deportation or removal proceedings) must continue the conditional basis of the alien's permanent resident status and that of the alien's spouse and children for a two-year period, but only if the adverse determination is based upon the capital investment or job creation requirements and does not involve a finding of material misrepresentation. Public Law 107–273 at sections 11031(c)(1)(F)(ii) and 11031(b)(2)(C). When an adverse determination is based upon the existence of a material misrepresentation, and the alien's rebuttal does not lead to reversal of that determination, the alien's conditional resident status and that of the alien's spouse and children must be terminated, subject to review of the adverse determination in deportation or removal proceedings. *Id.* at sections 11031(c)(1)(F)(iii) and 11031(d); *see also* proposed 8 CFR 216.7(a)(4)(vi)(A).

For any adverse determination, and prior to a subsequent decision regarding the alien's status, the alien may seek administrative review of the determination by the BIA. If the BIA denies the petition, the alien may seek judicial review. During any period of administrative or judicial review, the alien's conditional residence, along with the conditional residence of the alien's accompanying spouse and children, would continue. Public Law 107–273 at section 11031(c)(1)(F)(iv). The law provides that the procedures for judicial review are the same as the procedures for the judicial review of a final order of removal. *See* INA section 242(a)(1), 8 U.S.C. 1252(a)(1).

In this rule, USCIS is proposing several steps leading up to its initial determination. USCIS would first make a determination on the initial Form I–829 pursuant to section 11031(c)(1) of Public Law 107–273 based on the evidence previously submitted with Form I–829. USCIS would not request additional evidence or an interview. *See* proposed 8 CFR 216.7(a)(4). While much time has passed since the passage of Public Law 107–273 in November of 2002, USCIS will be able to process these cases more efficiently if it first makes determinations on the evidence in the record rather than implementing a time-consuming request for evidence process before making a decision. Because Public Law 107–273 requires a rebuttal process in case of an adverse determination, USCIS believes that this rebuttal process is the most efficient and appropriate means to allow for the updating of information in the record.

If USCIS makes a favorable determination such that the conditions on permanent resident status should be removed, USCIS would provide written notice to the alien and, unless the alien is in removal or deportation proceedings, remove conditions. Proposed 8 CFR 216.7(a)(4)(i). If USCIS makes an adverse determination, the alien will be afforded an opportunity for the alien to update the evidence in the record. Following is a discussion of USCIS's specific proposals in this rulemaking.

1. Favorable Initial Determinations

Eligible aliens may receive removal of the conditions on their permanent resident status if the Secretary of Homeland Security determines that there was no material misrepresentation on the Form I–829 and that the job creation and capital investment requirements have been met. Public Law 107–273 at section 11031(c)(1)(E). For eligible aliens who are in deportation or removal proceedings or who are overseas, additional steps may apply to effect the removal of conditions.

a. Aliens in Deportation or Removal Proceedings

For aliens in deportation or removal proceedings, the decision to remove conditions must take place in those proceedings. Public Law 107–273 at section 11031(b)(2)(C). Therefore, after the Secretary of Homeland Security makes a favorable determination on an eligible alien's Form I–829, jurisdiction shifts back to the immigration judge for a decision on whether the alien's conditions may be removed. To shift jurisdiction back to the immigration judge, this rule provides that DHS must file a motion to re-calendar proceedings with the immigration judge. Proposed 8 CFR 216.7(a)(4)(i). The motion to re-calendar serves to reopen the proceedings, which previously were administratively closed. The immigration judge will issue an order terminating proceedings or vacating the order of deportation or removal and remove the conditions from an eligible alien's permanent resident status where the alien is not inadmissible or deportable on other grounds. Public Law 107–273 at section 11031(b)(2)(C). If the immigration judge determines that removal of conditions is not warranted, such as when the alien is found to be inadmissible, then deportation or removal proceedings will continue.

b. Overseas Aliens Who Were Not Paroled

Public Law 107–273 is silent with respect to the procedures for removing the conditions on the permanent status of overseas aliens who were not paroled into the United States for the special determination process. DHS is not aware of any potential eligible aliens currently residing abroad and has not, therefore, included any procedures for parole in this rulemaking. Should such a case arise, USCIS will notify the overseas alien of the favorable determination and removal of conditions and direct such alien to the appropriate U.S. consular office for the procedures by which he or she can secure documentation for admission to the United States. Note that if an alien with conditional resident status has been absent from the United States for 180 days or more or departed from the United States while in removal proceedings, he or she will be subject to inspection and, therefore, a determination of admissibility. INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

2. Adverse Initial Determinations

a. Opportunity To Provide Rebuttal Evidence

USCIS is proposing in this rule a 12-week period within which an alien may submit evidence to disprove the adverse determination(s). Proposed 8 CFR 216.7(a)(4)(ii). In rebuttal, aliens would be able to submit evidence of investments in and job creation resulting from enterprises other than the commercial enterprise named in the initial Form I–829 and qualifying Form I–526. *Id.* USCIS would require such aliens to request consideration of investments in and job creation

resulting from additional commercial enterprises by filing a new Supplement to the Petition to Remove Conditions. *Id.*

Public Law 107–273 represents a significant departure from the strict rules normally applicable to the removal of conditions from an alien entrepreneur's permanent resident status. This legislation applies to a very limited group of individuals whose Form I–829 petitions were either pending at the time of the enactment of Public Law 107–273 or were reopened pursuant to the terms of that law. It was intended to redefine the standards applicable to this limited group and provide these eligible aliens who had failed to comply with these strict requirements of the existing EB–5 statutes and regulations an opportunity to cure the deficiencies of their initial petitions. Section 11031(c)(1)(A) does not preclude the consideration of capital investment in or job creation from commercial enterprises not identified in the initial Form I–829. Accordingly, consistent with the unique provisions and ameliorative purpose of Public Law 107–273, DHS will consider evidence of additional, qualifying investments and resulting job creation at the initial determination stage under section 11031(c)(1)(A), an option that ordinarily is not available to EB–5 conditional resident aliens. Additional investments and resulting job creation must be documented by completing a new supplement to Form I–829 and providing the evidence described in proposed 8 CFR 216.7(a)(5)(i)(C). *See* proposed 8 CFR 216.7(a)(4)(ii).

As more fully described below, permitting consideration of evidence of investment in commercial enterprises that are not listed in the initial Form I–829 could create instances where an eligible alien has made capital investments in commercial enterprises that are located within a targeted employment area (TEA), while also making capital investments in commercial enterprises not located in a TEA which require at least $1,000,000 in capital investment. Under these circumstances, the pro-rating process described at proposed 8 CFR 216.7(a)(5)(iii) will be applied to determine the total amount of capital that must be invested in such instances.

The 12-week period for submitting rebuttal evidence, including the Supplement for investments in additional commercial enterprises (if applicable), would run from the date of an adverse determination notice. *Id.* The proposed timeframe would provide a substantial amount of time in which eligible aliens may submit rebuttal evidence. It also is consistent with the timeframe for submitting additional evidence currently prescribed in 8 CFR 103.2(b)(8)(iv) and that is generally applicable to petitions and applications for immigration benefits.

Whether or not the alien submits rebuttal evidence during the 12-week period, USCIS would render a decision on whether to reverse its adverse determination(s). Proposed 8 CFR 216.7(a)(4)(ii). DHS is proposing this requirement given the age of the petitions and evidence that USCIS will be reviewing and because treatment of the alien's conditional resident status (if USCIS determines that it will not reverse the adverse determination(s)) depends on the basis of the adverse determination. If the adverse determination is based on material misrepresentation, Public Law 107–273 requires termination of conditional resident status. Public Law 107–273 at section 11031(c)(1)(F)(iii). If the adverse determination(s) is based on failure to meet the job creation or capital investment requirements, Public Law 107–273 requires continuation of conditional resident status. Public Law 107–273 at section 11031(c)(1)(F)(ii). Given these considerations, DHS prefers to proceed with its initial determination cautiously.

Public Law 107–273 requires that if all adverse determination(s) are reversed based on the rebuttal, then the alien must receive notice of this reversal. Public Law 107–273 at section 11031(c)(1)(F)(i). This rule proposes that USCIS must send written notice of its decision whether USCIS reverses the adverse determination or does not reverse the adverse determinations. Proposed 8 CFR 216.7(a)(4)(iii). The date of the notice would determine the period for administrative or judicial appeal of USCIS' adverse determinations, and when the continuation of conditional residence begins for purposes of a second determination.

If USCIS determines that reversal of adverse determinations is appropriate, then the procedures proposed for favorable determinations at proposed 8 CFR 216.7(a)(4)(i) would apply. If USCIS determines that reversal of adverse determination is not appropriate, then the procedures that apply would depend on whether the alien is or is not in deportation or removal proceedings. *Id.* If the alien is in deportation or removal proceedings, the decision on the alien's conditional resident status must be made by the immigration judge in proceedings. Proposed 8 CFR 216.7(a)(4)(iv). Therefore, DHS would need to file a motion to re-calendar proceedings. *Id.* If the alien is not in deportation or removal proceedings, USCIS would extend the conditional residence of an eligible alien (and that of the alien's spouse and/or children if their status was obtained under section 216A of the Act) for a two-year period upon an adverse determination that is not based on a material misrepresentation. Proposed 8 CFR 216.7(a)(4)(v)(B).

Regardless of whether the alien is in proceedings or not, DHS is proposing to require that the notice affirming the adverse determinations must contain the reasons for the decision, as well as USCIS's determination (if applicable) regarding the number of qualifying jobs created, amount of capital investment made, and the date described in section 11031(c)(1)(D) of Public Law 107–273 that USCIS applied to each determination. Proposed 8 CFR 216.7(a)(4)(iii). In the case of multiple investors, jobs would be allocated among the investors. *Id.*

b. Appellate Review of Adverse Determinations

As required by section 11031(c)(1)(F)(iv) of Public Law 107–273, an alien may seek administrative review with the BIA of an adverse determination, and during the period in which the adverse determinations are pending with the BIA or circuit court, this rule provides that the conditional basis of the alien's permanent resident status and that of any accompanying spouse and/or children be continued automatically. *See* proposed 8 CFR 216.7(a)(4)(vi). This rule implements the authority of both DHS and the Department of Justice (DOJ) to continue status most efficiently by granting continued status automatically. To receive evidence of the continuation of status, however, aliens would need to appear at a USCIS office as they do now in keeping with current USCIS policies applicable to conditional residents. *See* Chapter 25.2(c) of the Adjudicator's Field Manual.[3]

c. Continuation of Conditional Residence

Section 11031(c)(1)(F)(ii) of Public Law 107–273 provides for the continuation of conditional resident status for an additional two-year period after an adverse determination based on failure of the alien to meet the job

[3] The USCIS Adjudicator's Field Manual is available at *http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm.*

creation and capital investment requirements if rebuttal evidence does not result in reversal of the adverse determination. Reversal may also occur following review by the BIA or the federal courts. *See* Public Law 107–243 section 11031(c)(1)(F)(iv).

Consistent with removal of conditions following favorable determinations, this rule proposes that either USCIS or an immigration judge (if the alien is in deportation or removal proceedings) may continue conditional residence for a new two-year period. *See* proposed 8 CFR 216.7(a)(4)(v). For aliens who are not in deportation or removal proceedings, this rule proposes that USCIS would continue conditional resident status and send notice of the continuation of status. *See* proposed 8 CFR 216.7(a)(4)(v)(B). For aliens in deportation or removal proceedings, proceedings would have been administratively closed pursuant to proposed 8 CFR 216.7(a)(3) in order for USCIS to have jurisdiction to render its determinations. Therefore, to shift jurisdiction from USCIS back to the immigration judge for a decision on whether continuation of conditional residence is appropriate, the rule proposes that DHS (USCIS or ICE) file a motion to re-calendar proceedings with the immigration judge. Proposed 8 CFR 216.7(a)(4)(iv).

The starting date for the new two-year period of conditional residence will vary, depending upon several factors. This rule proposes that if the alien is not in deportation or removal proceedings, the date of USCIS's decision following receipt of rebuttal evidence, or, if no evidence is submitted, the date of the close of the rebuttal period, would trigger the new two-year period. Proposed 8 CFR 216.7(a)(4)(v)(C). However, if the alien seeks review of the adverse USCIS determinations by the BIA or the federal courts, DHS does not believe the two-year period should begin until after there is a final decision by the highest appellate body. Therefore, this rule proposes that the two-year period should begin after the alien has exhausted the avenues for appellate review by the BIA or the federal courts. *See* proposed 8 CFR 216.7(a)(4)(v)(C).

d. Termination of Status

Section 11031(c)(1)(F)(iii) of Public Law 107–273 provides for the termination of conditional resident status upon an adverse determination based on material misrepresentation if rebuttal evidence does not result in reversal of the adverse determination. After termination of status, the underlying adverse determination is subject to review in removal proceedings. Public Law 107–273 at section 11031(d). Since, in addition to the rebuttal review process following an adverse determination, section 11031(c)(1)(F)(iv) of Public Law 107–273 also provides for a review process by the BIA and the federal courts, this proposed rule provides that termination of conditional resident status is appropriate after completion of both the rebuttal process and any BIA or judicial review, if such review is sought. *See* proposed 8 CFR 216.7(a)(4)(v)(A).

This proposed rule maintains the same distinction made in section 11031(b)(2)(C) of Public Law 107–273 regarding the division of authority to terminate conditional resident status for aliens who are in deportation or removal proceedings and those who are not. Only the Attorney General has authority to terminate status for aliens who are in deportation or removal proceedings. For aliens who are not in such proceedings, this rule is consistent with the procedures for terminating status under the normal process described in 8 CFR 216.6(d)(2). This rule proposes that if the alien is not in deportation or removal proceedings and receives an adverse determination based upon material misrepresentation, status will be terminated automatically, effective on the date of the notice of decision following the rebuttal period. *See* proposed 8 CFR 216.7(a)(4)(v)(A). If the adverse determination is appealed to the BIA or federal courts pursuant to proposed 8 CFR 216.7(a)(4)(vi), then termination is effective the date of the highest appellate body's decision. *Id.* The effective dates provided in this rule ensure that termination of status does not occur before a final decision on the adverse determination is made.

Following automatic termination, DHS (USCIS or ICE) will issue a Notice to Appear (NTA) to commence removal proceedings. An alien can seek review of the adverse determinations in those proceedings. Since status has been terminated, the rule requires the alien and the accompanying spouse and/or children to surrender their evidence of conditional resident status (Form I–551, Permanent Resident Card, formerly known as an Alien Registration Receipt Card) to DHS. While there is no appeal following automatic termination of status, aliens whose status has been terminated may seek review of the adverse USCIS determination in removal proceedings. *Id.; see also* Public Law 107–273 at section 11031(d).

For aliens who are already in deportation or removal proceedings, termination of status under section 11031(c)(1)(F)(iii) of Public Law 107–273 is not automatic since section 11031(b)(2)(C) of Public Law 107–273 requires such decisions to be made in proceedings. So that jurisdiction over such aliens rests with the immigration judge following the USCIS adverse determination process, this rule provides that DHS file a motion to re-calendar proceedings. *Id.*

B. Second Stage Determinations

For eligible aliens whose conditional residence was continued for a new two-year period due to an adverse determination relating to the job creation or capital investment requirements, section 11031(c)(2) of Public Law 107–273 provides a process for removing those conditions. To remove conditions, the eligible immigrant investor must file a petition within the 90-day period before the second anniversary of the continuation of conditional resident status. Public Law 107–273 at section 11031(c)(2)(B) and (C). If a petition is filed after the 90-day period, the law provides that, with good cause and extenuating circumstances, this late filing may be excused by the Secretary of Homeland Security. *Id.* at section 11031(c)(2)(C)(ii). Where a petition is timely filed, Public Law 107–273 requires the following determinations to be made by the Secretary of Homeland Security:

- Whether the petition contains any material misrepresentation in the facts and information alleged in the petition with respect to the commercial enterprises included in the petition.
- If the initial determination was adverse with respect to the job creation requirement, whether all the enterprises considered together, including the number of jobs found to have been created at the initial determination stage, created 10 or more full-time jobs for qualifying individuals, and whether those jobs exist on the date of the determination. *See* Public Law 107–273 at section 11031(c)(2)(E)(ii).
- If the initial determination was adverse with respect to the capital investment requirement, whether the eligible alien is in substantial compliance with the capital investment requirement described in INA section 216A(d)(1)(B), 8 U.S.C. 1186b(d)(1)(B), on the date that the determination is made. Any capital amount that was determined to have been invested in the initial determination must be subtracted from the required capital amount at the time of the second determination. *See* Public Law 107–273 at section 11031(c)(2)(E)(iii)(II). In addition, the determinations must include consideration of any capital investment made by the alien in a commercial

enterprise, regardless of whether the enterprise is a limited partnership, the alien entered the enterprise after its formation, the investment was made before or after the initial determination was made, or the commercial enterprise is the same one considered in the initial determination, so long as such facts and information are included in the petition. *Id.* at section 11031(c)(2)(A).

Consistent with the initial determination process, a favorable determination at the second stage of review results in the removal of the conditions on permanent resident status for the alien and any accompanying spouse and child. *Id.* at section 11031(c)(2)(F). The removal of conditions is effective on the second anniversary of the continuation of conditional resident status. *Id.* at section 11031(c)(2)(F). If the Secretary of Homeland Security renders an adverse determination, the alien must be so notified and provided an opportunity to submit rebuttal evidence. *Id.* at section 11031(c)(2)(G)(i). Reversal of an adverse determination based upon the rebuttal evidence results in the removal of conditions. *Id.* If the adverse determination is not reversed, conditional resident status of the alien and any accompanying spouse and children is terminated, subject to review of the determination in removal proceedings. *Id.* at section 11031(c)(2)(G)(ii).

This rule proposes to implement section 11031(c)(2) of Public Law 107–273 by:

- Establishing procedures for filing the second petition to remove conditions;
- Describing supporting evidence;
- Defining the scope of the determination; and
- Describing DHS favorable and adverse determinations.

These proposals are discussed below and are proposed in 8 CFR 216.7(a)(5).

1. Filing the Petition to Remove Conditions From Second Period of Conditional Residence

This rule proposes that the alien's petition to remove conditions from the second period of conditional residence must be filed on Form I–829 in accordance with the form instructions and with appropriate fee as stated in those instructions. Proposed 8 CFR 216.7(a)(5)(i). DHS has determined that the Form I–829 remains an appropriate form to remove conditions at the end of the second two-year period because the same action—removal of conditions—is being requested by the alien. DHS also is proposing that the alien file a supplement to Form I–829 with the second Form I–829. The purpose of the supplement to Form I–829 would be to provide a means within the petition for the eligible alien to state the facts and information described in sections 216A(d)(1)(A) and (B) of the INA with respect to any commercial enterprise which the alien wants to have considered, regardless of whether the enterprise is a limited partnership, the alien entered the enterprise after its formation, or the enterprise was created before or after the initial determination was made. This is the same supplement proposed for the initial determination stage.

2. Failure To File the Petition To Remove Conditions

Failure to timely file the second Form I–829 results in termination of conditional resident status and the institution of removal proceedings. *See* Public Law 107–273 at section 11031(c)(2)(D). However, a late filing can be deemed timely if the alien establishes good cause and extenuating circumstances. *Id.* at section 11031(c)(2)(C)(ii). This exception is the same exception that is applicable to aliens seeking removal of conditions under normal procedures. *See* INA section 216A(d)(2)(B), 8 U.S.C. 1186b(d)(2)(B). To maintain consistency, this rule parallels the regulations applicable to aliens seeking removal of conditions under normal procedures. *See* 8 CFR 216.6(a)(5).

This rule proposes that failure to timely file the Form I–829 results in the automatic termination of conditional resident status. Proposed 8 CFR 216.7(a)(5)(ii). DHS will provide the alien with notice of termination and issue and serve an NTA to aliens to institute removal proceedings or DHS will move to re-calendar administratively closed deportation or removal proceedings for aliens already in deportation or removal proceedings. *Id.* USCIS could accept a late filing, but only if USCIS is satisfied in its discretion that the alien has established good cause and extenuating circumstances. *Id.* If USCIS accepts a late filing before the immigration judge has jurisdiction over the case, this rule proposes that USCIS must restore conditional resident status and adjudicate the petition on the merits. *Id.* If USCIS accepts a late filed Form I–829 after the immigration judge has jurisdiction, this rule proposes that DHS and the alien file a joint motion to terminate proceedings with the immigration judge and that conditional resident status will be restored after proceedings are administratively closed or terminated and the petition is adjudicated on the merits. *Id.*

3. Evidence Supporting the Second Form I–829

In order for DHS to be equipped to make determinations on the second Form I–829, USCIS must examine the evidence supporting the petition as it does for Forms I–829 filed by aliens under the normal (non-Pub. L. 107–273) process. This rule proposes to require the alien to submit any documentation in support of the second Form I–829 that is necessary for meeting the requirements of section 11031(c)(2) of Public Law 107–273 and the implementing regulations. The proposed rule also specifies particular documentary evidence that the alien must submit with the petition. Proposed 8 CFR 216.7(a)(5)(i)(A)–(D). DHS bases the proposed list of required evidence on the evidence that EB–5 aliens are required to submit with their petitions to remove conditions under the normal (non-Pub. L. 107–273) process. This evidence includes:

- Evidence that the alien invested or was actively in the process of investing the requisite capital, such as an audited financial statement or other probative evidence; and
- Evidence that the alien created, or can be expected to create within a reasonable time, ten full-time jobs for qualifying employees.

See 8 CFR 216.6(a)(4).

In the case of a ''troubled business'' as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur would be required to submit evidence that the commercial enterprise maintained the number of existing employees at no fewer than the pre-investment level for the period of conditional permanent residence commencing on the effective date of the initial determination. Such evidence could include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Form I–9 or successor form).

To make determinations on the second Form I–829, USCIS must consider in particular: The scope of the second determination, as authorized by Public Laws 107–273; the commercial enterprises and investments that the alien wants USCIS to consider; qualifying jobs; and substantial compliance with the capital investment requirement.

a. Limited Scope of the Second Determination

At the second determination stage, Public Law 107–273 requires consideration of material misrepresentation in the petition and

limits consideration of the job creation and capital investment requirements to the requirement or requirements that formed the basis for the initial adverse determination. Public Law 107–273 at section 11031(c)(2)(E). Public Law 107–273 further requires the Secretary of Homeland Security to credit the alien for the number of jobs determined to be created or the amount of capital determined to be invested at the initial determination stage by subtracting this amount from the number or amount needed to satisfy the overall EB–5 job creation and capital investment requirements. *Id.* at section 11031(c)(2)(E)(ii)(III) and (iii)(II); proposed 8 CFR 216.7(a)(5)(iv).

With respect to the types of evidence DHS is proposing for the second determination stage, if the adverse determination at the initial stage was based on failure to meet the job creation requirement, the rule proposes to require the alien to submit evidence of the number of qualifying jobs created since conditional resident status was continued and the beginning and ending dates of when the jobs existed. Proposed 8 CFR 216.7(a)(5)(i)(A). For example, the alien may include with the petition payroll records, tax documents, and Forms I–9 to evidence the additional qualifying jobs that were created.

Note that if the eligible alien has invested in a troubled business, documentation would be necessary to accompany the Form I–829 demonstrating that the level of employment on the date of the second determination was maintained at no less than the pre-employment level. Public Law 107–273 at section 11031(c)(2)(E)(ii)(II) (cross referencing section 11031(c)(1)(C)). If the eligible alien's qualifying investment is within an approved regional center, the eligible alien would need to submit evidence of indirect job creation if the alien is relying on indirect jobs to demonstrate that he or she has met the job creation requirement. *Id.* (cross-referencing section 11031(c)(1)(B)). Because section 11031(c)(2)(E)(ii)(II) of Public Law 107–273 sufficiently covers the requirements with respect to investments in troubled business and within an approved regional center, DHS has determined that it is not necessary to repeat the requirements in this proposed rule.

If the adverse determination at the initial stage was based on failure to meet the capital investment requirement, this rule proposes to require the alien to provide evidence of his or her capital investment in one or more commercial enterprises since conditional resident status was continued. Proposed 8 CFR 216.7(a)(5)(i)(B). Such evidence could include audited financial statements, federal tax returns, bank statements, bank wire transfers, or escrow agreements.

b. *Additional commercial enterprises and investments.*

Regardless of whether the initial adverse determinations were based on only the job creation or capital investment requirements, Public Law 107–273 requires the Secretary of Homeland Security to consider for the second determination any capital investments in commercial enterprises in the United States. Public Law 107–273 at section 11031(c)(2)(A) and (B). Such investments include those that were made before or after the initial adverse determination and in commercial enterprises other than the one considered for the initial determination that were created at any time before or after the initial adverse determination and regardless of whether the alien entered the enterprise after its formation. *Id.* at section 11031(c)(2)(A) and (B).

To implement section 11031(c)(2)(A) and (B) of Public Law 107–273, DHS is proposing to require the alien to provide evidence of the capital investments and corresponding commercial enterprises that he or she wants USCIS to consider for its second determination. *See* proposed 8 CFR 216.7(a)(5)(i)(C). Evidence of the capital investment made in the commercial enterprise and considered at the initial determination would not be required. *Id.* DHS has determined that to require aliens to present such documentation would be duplicative and, therefore, unnecessary.

The type of evidence of the alien's capital investments that DHS is proposing to require is based on the type of evidence that was required to be submitted with the initial Form I–829 pursuant to 8 CFR 216.6(a)(4). The evidence that this proposed rule would require for each commercial enterprise which the alien desires to have considered includes:

- Audited financial statements, or other probative evidence of the alien's capital investment for each commercial enterprise to be considered; and
- Evidence of each commercial enterprise's formation and current ownership structure including, but not limited to: Articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the commercial enterprise; and a certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require such a certificate, a statement to that effect. *See* proposed 8 CFR 216.7(a)(5)(i)(C).

c. Treatment of Capital Investments in Different Types of Commercial Enterprises

There may be instances where an eligible alien has made capital investments in commercial enterprises that are located within a targeted employment area (TEA) which require at least $500,000 in capital investment, while also making capital investments in commercial enterprises not located in a TEA which require at least $1,000,000 in capital investment. Section 203(b)(5)(C) of the INA, 8 U.S.C. 1153(b)(5)(C), and 8 CFR 204.6(f) define and describe the amount of investment capital required in both targeted (TEA) and non-targeted locations within the United States. These provisions, however, contemplate the consideration of capital investments in only one commercial enterprise. Sections 11031(c)(2)(A) & (B) of Public Law 107–273 do not discuss how capital investments in commercial enterprises located both within and without a TEA must be evaluated in total at the time of the second determination to meet the capital investment requirements. This rule describes at 8 CFR 216.7(a)(5)(iii) the prorating approach that DHS proposes to use to determine the total amount of capital that must be invested in such instances. DHS proposes to utilize a multi-step process as follows to make such determinations:

- The creditable amount of an eligible alien's capital investments in all of the commercial enterprises located within a TEA would be determined by USCIS. If the eligible alien has complied with the $500,000 capital investment requirement, then the capital investment requirement under Public Law 107–273 will be met. If the eligible alien has not complied with the $500,000 capital investment requirement, then the amount of the eligible alien's creditable capital investment in all commercial enterprises located within a TEA would be divided by 500,000 to determine the prorated percentage of the eligible alien's capital investment based on capital investments in commercial enterprises located in a TEA.
- The creditable amount of an eligible alien's capital investments in all of the commercial enterprises that are not located within a TEA would be determined by USCIS. If the eligible alien has complied with the $1,000,000 capital investment requirement, then the capital investment requirement under Public Law 107–273 will be met. If the eligible alien has not complied

with the $1,000,000 capital investment requirement, then the amount of the eligible alien's creditable capital investment in all commercial enterprises not located in a TEA would be divided by 1,000,000 to determine the prorated percentage of the eligible alien's capital investment based on capital investments in commercial enterprises that are not located in a TEA.

• The prorated percentage of the eligible alien's capital investment in commercial enterprises located in a TEA would be combined with the prorated percentage of the eligible alien's capital investment in commercial enterprises that are not located within a TEA to arrive at the eligible alien's total creditable capital investment. This total creditable capital investment will be represented as a percentage, and the percentage must equal or exceed 100% in order for the alien to meet the statutory capital investment requirement.

As an example, if an eligible alien's creditable capital investment in a commercial enterprise located within a TEA was $300,000, then the prorated percentage of the eligible alien's capital investment in the commercial enterprise would be 60% ($300,000/500,000 × 100 = 60%). In order for that eligible alien to meet the statutory capital investment requirements based upon an additional capital investment in a commercial enterprise that is not located within a TEA, he or she would have to be credited with an additional capital investment of $400,000 ($400,000/1,000,000 × 100 = 40%). In this example, the $300,000 capital investment and the additional $400,000 capital investment would constitute 100% of the capital investment requirement by utilizing a combination of capital investments in commercial enterprises located both within and without a TEA.

d. Substantial Compliance With the Capital Investment Requirement

If the failure to meet the capital investment requirement was the basis for the initial adverse determination, eligible aliens must demonstrate that, on the date of the second determination, they are in substantial compliance with the capital investment requirement for the second determination. *See* Public Law 107–273 at section 11031(c)(2)(E)(iii). This rule proposes to utilize the same definition of substantial compliance for the initial and second determinations, discussed in detail later in this **SUPPLEMENTARY INFORMATION**. See proposed 8 CFR 216.7(c)(2).

4. Favorable Determinations on the Second Form I–829

Favorable determinations on the second Form I–829 result in the removal of conditions for the alien and accompanying spouse and children as of the second anniversary of the continuation of conditional resident status. Public Law 107–273 at section 11031(c)(2)(F). This rule proposes that upon a favorable determination by USCIS warranting removal of conditions, USCIS will remove the conditions on the alien's permanent resident status if the alien is not in deportation or removal proceedings, and will send the alien written notice of these decisions. Proposed 8 CFR 216.7(a)(5)(v). Removal of conditions would be effective on the second anniversary of the continuation of conditional residence. *Id.* Because Public Law 107–273 requires status determinations for aliens in deportation or removal proceedings to take place within those proceedings, this rule would require USCIS to provide written notice of the favorable determinations to those aliens in proceedings and to take no action on removing conditions. *Id.* DHS also would be required to file a motion to re-calendar proceedings so that the status determinations can take place within proceedings. *Id.* These procedures parallel those applied to favorable determinations made at the initial determination stage of the process.

5. Adverse Determinations on the Second Form I–829

An adverse determination on the alien's second Form I–829 leads to termination of conditional resident status. Public Law 107–273 at section 11031(c)(2)(G)(ii). However, prior to termination, the alien may submit evidence to rebut the adverse determinations so that the adverse determinations are reversed. *Id.* at section 11031(c)(2)(G)(i). This rule proposes a process for rebutting adverse determinations made by USCIS and terminating conditional residence status if no rebuttal is submitted or the rebuttal evidence does not result in a reversal of the adverse determinations.

Similar to the process for rebutting initial adverse determinations, this rule proposes a 12-week period within which the alien may submit a written rebuttal to USCIS after receiving written notice from USCIS of the adverse determinations. Proposed 8 CFR 216.7(a)(5)(vi)(A). USCIS would render a decision on the rebuttal evidence after receiving the rebuttal evidence. If USCIS determines that the rebuttal evidence is not sufficient to reverse its adverse determinations, USCIS would terminate the alien's conditional status and that of his or her accompanying spouse and/or children. If the alien is not already in deportation or removal proceedings, USCIS would issue an NTA to commence removal proceedings regardless of the ground on which the adverse determinations were based. Proposed 8 CFR 216.7(a)(5)(vi)(B)(*2*). If the alien is in deportation or removal proceedings, USCIS would notify the alien of the adverse determination and file a motion to re-calendar with EOIR so that the termination of the alien's conditional resident status would be made in proceedings. On the other hand, if USCIS determines that the rebuttal evidence is sufficient to reverse the adverse determinations, removal of conditions would result, either by USCIS or the immigration judge (or the BIA) as appropriate. Proposed 8 CFR 216.7(a)(5)(vi)(A).

If USCIS does not receive rebuttal evidence during the 12-week period, this rule proposes that the alien's conditional resident status and that of his or her accompanying spouse and/or children will be automatically terminated, even if the alien is in deportation or removal proceedings. Proposed 8 CFR 216.7(a)(5)(vi)(B)(*1*). This procedure contrasts with the procedure DHS is proposing for the rebuttal period following the initial determination. As discussed previously, if USCIS does not receive rebuttal evidence during the 12-week period following notice of adverse determinations at the initial determination stage, no automatic consequences result. *See* proposed 8 CFR 216.7(a)(4)(ii). DHS is proposing differing procedures following the rebuttal period for initial determinations and second determinations because, unlike at the second determination stage, USCIS's consideration of the alien's petition at the initial determination is complicated by two additional considerations: (1) Public Law 107–273 requires differing treatment of an alien's status depending on the basis for the adverse determination; and (2) USCIS's determinations at the initial determination stage would be based on facts and evidence that are dated.

At the initial determination stage, Public Law 107–273 requires termination of conditional resident status only if the adverse determination is based on material misrepresentation. Public Law 107–273 at section 11031(c)(1)(F)(iii). Public Law 107–273 requires continuation of conditional resident status if the adverse

determination is based on a failure to meet the job creation or capital investment requirements. Public Law 107–273 at section 11031(c)(1)(F)(ii). By contrast, at the second determination stage, Public Law 107–273 provides for termination of conditional resident status regardless of the basis for the adverse determination. Public Law 107–273 at section 11031(c)(2)(G)(ii). An additional complication at the initial determination stage is that the petitions and supporting documentation reviewed by USCIS for its initial determination date from the late 1990s and, therefore, may no longer provide USCIS with a complete picture of the alien's eligibility. DHS has determined that USCIS should approach these cases cautiously, and provide every opportunity in the decision-making process for USCIS to revisit the evidence before it. At the second determination stage, on the other hand, the petition will be based on contemporary information and evidence. Therefore, USCIS should be able to proceed with its second determination as it would a non-Public Law 107–273 EB–5 petition.

The termination of conditional resident status under proposed 8 CFR 216.7(a)(5)(vi)(B)(*1*) or (*2*) would not be subject to appeal but would be reviewable in subsequent removal proceedings. Public Law 107–273 at section 11031(d); proposed 8 CFR 216.7(a)(5)(vi)(B)(*1*) or (*2*). If the alien's status (and that of his or her spouse and children) is terminated under proposed 8 CFR 216.7(a)(5)(vi)(B)(*1*) or (*2*), the alien and spouse and children would be required to surrender any Form I–551 previously issued.

C. Common Definitions Applicable to Removal of Condition Determinations

The rule proposes to define several statutory terms, in some cases for ease of reference and, in other cases, to better explain the statutory terms. The rule proposes to define the following terms for ease of reference and it relieves the regulations from cumbersome descriptions or cross-references to Public Law 107–273 each time the regulations refer to these terms:

- Denied initial Form I–829: an initial Form I–829 that was denied by an INS director on the merits of the petition.
- Initial Form I–829: a Form I–829 that was timely filed before November 2, 2002 by an eligible alien.
- Qualifying Form I–526: a Form I–526 that was approved after January 1, 1995 and before August 31, 1998.
- Second petition to remove conditions: a petition to remove conditions (Form I–829 or successor form) timely filed by an eligible alien following an initial adverse determination.

See proposed 8 CFR 216.7(a)(1).

DHS also is proposing to define the following substantive terms relating to petitions to remove conditions (either under section 11031 or 11032(e) of Pub. L. 107–273):

1. Material Misrepresentation

An adverse determination made on a petition to remove conditions based on ''material misrepresentation'' leads to termination of conditional resident status. Public Law 107–273 sections 11031(c)(1)(F)(iii), 11031(c)(2)(G)(2), and 11032(e). DHS is proposing in this rule to define material misrepresentation to mean a statement or representation in a petition to remove conditions, as originally filed or supplemented, or in any accompanying documentation, which, as a matter of discretion, is determined to be both false and one to which importance would reasonably be attached for determining whether to grant the petition, without regard to the petitioner's or any other person's intent or to whether or not there was detrimental reliance upon the statement or representation. Proposed 8 CFR 216.7(c)(1); *see Kungys* v. *United States,* 485 U.S. 759, 771–772 (1988) (holding that the materiality test is whether the concealments or misrepresentations had a natural tendency to influence the decision of the immigration agency). Material misrepresentation also includes an omission that has the effect of making any material representation in the Form I–829 or accompanying documentation false. For example, if the alien failed to mention in the initial Form I–829 that he or she received his or her capital investment back since becoming a conditional resident, then this omission would constitute a material misrepresentation.

2. Substantial Compliance With the Capital Investment Requirement

Public Law 107–273 requires DHS to consider whether the eligible alien is in ''substantial compliance'' with the capital investment requirement. Public Law 107–273 sections 11031(c)(1)(A)(iii), 11031(c)(2)(E)(iii), and 11032(e)(2)(C). By contrast, removing the conditions from permanent resident status of an alien entrepreneur typically requires aliens to demonstrate that they invested, or were actively in the process of investing, the requisite amount of capital. *See* INA section 216A(d)(1)(A)(i), 8 U.S.C. 1186b(d)(1)(A)(i). The requirement to be ''actively in the process of investing'' capital has no quantitative aspect with respect to the amount of the investment. Instead, it focuses on the process of investing the required capital, and could be satisfied by showing that the process of investing the capital has been commenced and is continuing. Substantial compliance suggests that the substance of the capital investment has in fact been made.

Accordingly, this rule defines substantial compliance as meaning that that the alien has invested nearly all the requisite amount (*i.e.,* $1 million or $500,000). 8 CFR 216.7(c)(2). If the remaining amount has not been invested, the alien must provide evidence that the balance is legally obligated for final disbursement within a reasonable period of time after any one of the three dates specified in sections 11031(c)(1)(D) and 11032(e)(3) of Public Law 107–273, as applicable:

(1) The date on which the Form I–829 was filed (not applicable to petitions to remove conditions considered under section 11031(c)(2) of Public Law 107–273, relating to the second determination;

(2) Six months after that date (limited to petitions to remove conditions considered under section 11031(c)(1) of Pub. L. 107–273); or

(3) The date upon which the determinations are made (applicable to petitions to remove conditions considered under sections 11031(c)(1) and (2) and 11032).

DHS has determined that assigning a rigid numerical standard to define ''substantial compliance'' would not fairly take into account the unique circumstances of each investment. Because several years have passed since the enactment of Public Law 107–273 and the law's deadline for completing the initial determinations, DHS believes that requiring eligible aliens to demonstrate that they have made ''nearly all'' the required capital investment is reasonable.

This rule proposes to exclude from consideration any funds returned to the alien or required to be returned to the alien (provided by legally enforceable documents or contracts relating to the enterprise) in the form of guaranteed interest payments or as redemption for his or her capital investment interest, or otherwise diverted. Returned funds would not have been made available to the commercial enterprise for the purposes of creating qualifying jobs.

3. Full-time Employment

In making its initial and second determinations on petitions to remove conditions under section 11031(c) of Public Law 107–273, the Secretary of

Homeland Security must consider whether the commercial enterprise created full-time positions for 10 or more qualifying employees. Public Law 107–273 at section 11031(c)(1)(A)(ii); *see also* Public Law 107–273 at section 11031(c)(2)(E)(ii)(III). Section 11031(f) of Public Law 107–273 defines ''full-time'' as ''a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.'' This rule adopts the statutory definition for ''full-time,'' but also further describes what is meant by the term ''position.'' *See* proposed 8 CFR 216.7(c)(3). This rule provides that a qualifying ''position'' is one that is required by the commercial enterprise at all times. DHS believes that such a clarification is necessary to ensure that the term full-time employment is given consistent treatment with the interpretation used by DHS in other EB–5 contexts and creates the type of permanent employment contemplated by the EB–5 program. The proposed definition ensures that only continuous full-time employment, rather than intermittent, temporary, seasonal, or transient employment, is considered. Such definition does not, however, require that the position be filled by a specific employee.

D. Treatment of Spouses and Children Where Eligible Alien Is Deceased

If the eligible alien is deceased, this rule proposes that the accompanying spouse and/or children will qualify as eligible aliens provided they meet the requirements of section 11031 of Public Law 107–273 for the removal of conditions in place of the principal. *See* proposed 8 CFR 216.7(a)(6). This provision is similar to current regulations which permit the spouse and children of a deceased alien entrepreneur to remain eligible for the removal of the conditions. 8 CFR 216.6(a)(6). The basis for this approach is that the alien entrepreneur has not become ineligible to remove conditions due to failure to meet the substantive or procedural requirements, but, instead, because of an outside event. In order to remain eligible for the removal of conditions, the spouse and children can ''step into the shoes'' of the eligible alien and demonstrate eligibility just as the eligible alien could have done. This rule would clarify that in order to ''step into the shoes'' of the eligible alien, eligibility can be demonstrated individually or by the alien, spouse and children collectively.

V. Adjustment of Status Applications Under Section 11032 of Public Law 107–273

In addition to providing special treatment for certain aliens who previously attained conditional resident status, Public Law 107–273 also provides for the special treatment of ''eligible aliens'' who have not yet become conditional residents. Specifically, section 11032(a) of Public Law 107–273 requires DHS or the Secretary of State to grant conditional residence status to eligible aliens meeting the following criteria:

- The alien filed a Form I–526 that was approved after January 1, 1995 and before August 31, 1998;
- Pursuant to this approval, the alien timely filed a Form I–485 or an application for an immigrant visa (DS–230) prior to the date of enactment of Public Law 107–273, November 2, 2002; and
- The alien is not inadmissible or deportable.

See Public Law 107–273 at section 11032(b).

If the qualifying Form I–526 was revoked following approval, the alien may still be eligible for conditional resident status if the basis for the revocation was failure to meet the job creation requirement in INA section 203(b)(5)(A)(ii), 8 U.S.C. 1153(b)(5)(A)(ii). *See* Public Law 107–273 at section 11032(c)(1). If the qualifying Form I–485 or application for immigrant visa was denied or terminated on or before November 2, 2002, the alien may still be eligible for conditional resident status if the basis for the denial or termination was the alien's failure to meet the job creation requirement or the alien's departure from the United States without permission (''advance parole''). *See id.* at section 11032(c)(2)(A). If an eligible alien is no longer in the United States, such alien may be paroled into the United States if necessary to obtain adjustment of status to that of a conditional resident. *See id.* at section 11032(c)(2)(B).

As the authority of DHS only extends to the adjudication of Form I–485 adjustment applications filed by aliens physically present in the United States, this rule only discusses the applicability of section 11032(c) of Public Law 107–273 to eligible aliens who filed such applications. This rule does not extend to applications for immigrant visas, since such applications are processed by the Department of State.

In this rule, DHS is proposing procedures eligible aliens must follow to request USCIS to consider them for conditional residence under Public Law 107–273. DHS also is proposing to describe how USCIS will make eligibility determinations, including determinations for special cases involving overseas aliens. Finally, DHS is proposing the approval and denial processes.

A. Definitions

Before outlining the required procedures, this rule proposes several definitions of terms used in the proposed provisions to avoid repeated cross-references to section 11032(c) of Public Law 107–273 or lengthy descriptions. At proposed 8 CFR 245.25(a), DHS is proposing definitions for the following terms: application for adjustment of status; qualifying Form I–485; qualifying Form I–526; and Form I–485 that is no longer pending. The definitions track the statutory language in Public Law 107–273. For the term, ''Form I–485 that is no longer pending,'' DHS is proposing an additional clarification. Under this rule, the phrase ''no longer pending'' would mean that DHS terminated for reasons of abandonment or denied the alien's Form I–485 on or before November 2, 2002, the date of enactment of Public Law 107–273. DHS will disregard the denial or termination without the need for the alien to file a motion to reopen or take other procedural steps.

B. Procedures for Requesting Consideration for Conditional Resident Status

1. Filing a New Application for Adjustment of Status

DHS is proposing in this rule that aliens seeking to qualify for conditional resident status under section 11032 of Public Law 107–273 must, in accordance with the form instructions, file with USCIS a newly completed Form I–485 or succeeding form, without fee, and with any documentary evidence of continued eligibility that is signed and dated after the date that a final rule is effective and on or before the date that is 180 days from date of such effective date. Proposed 8 CFR 245.25(b). The alien would be required to subsequently appear when requested by USCIS to submit certain biometric information (with fee) and for an interview as part of the determination process if USCIS determines that an interview is necessary. Proposed 8 CFR 245.25(b)(1)(iii).

DHS is also proposing the submission of additional documentation with the new Form I–485 in cases where:

- The alien's qualifying Form I–485 is no longer pending or

• The alien's qualifying Form I–526 was revoked.

Without this information, USCIS would not be equipped to make a determination on whether a revoked petition should be disregarded or a denied or terminated application for adjustment of status should be reopened.

a. Forms I–485 That Are No Longer Pending

If the alien's Form I–485 was no longer pending as of November 2, 2003, DHS is proposing to require the alien to submit evidence to show the reasons why the Form I–485 is no longer pending. To qualify for benefits under section 11032 of Public Law 107–273, the alien must demonstrate that his or her I–485 is no longer pending due to a determination by INS that the alien either failed to satisfy the job creation requirement or departed the United States without advance parole while the Form I–485 was pending. Proposed 8 CFR 245.25(b)(3). The primary evidence would be a decision from INS denying or terminating the Form I–485. However, USCIS would accept secondary evidence, including a sworn statement from the alien regarding the basis for the denial, termination, withdrawal, or abandonment.

b. Forms I–526 That Have Been Revoked

Otherwise eligible aliens whose qualifying Forms I–526 were revoked may still be able to receive the benefits of Public Law 107–273 and obtain conditional resident status. *See* Public Law 107–273 at section 11032(c)(1). USCIS may not grant a request for adjustment of status on Form I–485 based on a revoked Form I–526 because of INA section 245(a)(3), 8 U.S.C. 1255(a)(3), requires that an alien must have an immigrant visa immediately available in order to adjust status. A petition that USCIS revokes based on a finding of ineligibility nullifies the previous USCIS decision to approve the petition. However, under Public Law 107–273, if INS or USCIS revoked the approval of the alien's Form I–526 petition based on a determination that the alien failed to meet the job creation requirement, USCIS must disregard the revocation for purposes of approving the alien's Form I–485. *See* Public Law 107–273 at section 11032(c)(1). If USCIS revoked the Form I–526 due to other grounds of ineligibility, then USCIS will not disregard the revocation since Public Law 107–273 only authorizes the one basis for disregarding revocations. This rule proposes that in cases where revocation is not authorized, USCIS will deny the Form I–485 if it is still pending. Proposed 8 CFR 245.25(f). Aliens whose Forms I–526 were revoked on other grounds of ineligibility would not be able to establish eligibility for adjustment of status under section 11032 of Public Law 107–273 to file the new Form I–485.

In order for USCIS to be equipped to make determinations regarding the revoked petition, USCIS would need information regarding the revocation. Therefore, if the alien is seeking consideration for conditional residence under section 11032 of Public Law 107–273 notwithstanding the revocation of his or her qualifying Form I–526, DHS is proposing to require the alien to submit evidence demonstrating that USCIS should disregard the revocation. Proposed 8 CFR 245.25(b)(4). The primary evidence would be a copy of the revocation decision where the sole stated reason for the decision is failure of the alien to meet the job creation requirement. However, if the alien lost the decision or no longer has the decision for some other reason, USCIS would accept secondary evidence including a sworn statement of the alien regarding the reasons for the revocation and additional supporting evidence. Using the information submitted by the alien, USCIS would be able to confirm the information contained in its own records.

c. Reasons for Requiring Additional Submissions

The procedures and requirements in proposed 8 CFR 245.25(b)(1) would provide USCIS with up-to-date information regarding the alien so that USCIS can make a determination on whether such aliens are currently inadmissible or deportable and, in turn, ineligible for conditional resident status under section 11032(b)(3) of Public Law 107–273. Therefore, failure to follow these requirements would result in denial of the alien's qualifying Form I–485 because USCIS would not be able to determine whether the alien qualifies for conditional residence under Public Law 107–273. Proposed 8 CFR 245.25(b). The requirements would also provide USCIS with information regarding which aliens with qualifying EB–5 petitions are still interested in pursuing conditional residence through the EB–5 program on the basis of such petitions.

2. Aliens Not Physically Present in the United States

Under this rule, aliens who are not physically present in the United States may still qualify for conditional residence under section 11032(c)(2)(B) of Public Law 107–273. Proposed 8 CFR 245.25(b)(2). DHS is proposing that such aliens follow the procedures in proposed 8 CFR 245.25 and timely file a new Form I–485 and any supporting documentation in order for USCIS to consider their cases. However, with respect to the requirement to appear for biometric information capture and an interview, DHS is proposing that USCIS would notify aliens who are not physically present in the United States following receipt of the new Form I–485 to make any required appearances at the DHS office located outside the United States having jurisdiction over the alien's foreign residence. Proposed 8 CFR 245.25(b)(2). After considering the new Form I–485 and information obtained through the biometric capture and interview at the DHS office overseas, USCIS would be better able to make a determination as to whether it is necessary to parole the alien for adjustment of status pursuant to section 11032(c)(2)(B).

3. Spouses and Children

At proposed 8 CFR 245.25(b)(5), DHS is proposing to require spouses and children accompanying or following to join principal EB–5 aliens pursuant to section 203(d) of the INA, 8 U.S.C. 1153(d), as permitted under Public Law 107–273, to each file an application for adjustment of status. Applications should be filed with the principal EB–5 alien's application for adjustment of status. However, in case circumstances change between the time that the principal alien files his or her own application for adjustment of status and the date USCIS makes a decision on the principal's application, this rule would permit applications for accompanying and following to join spouses and children to be filed up until the date of decision. Applications filed for accompanying or following to join spouses and children would be required to include evidence of eligibility and, in particular, evidence of the qualifying relationship, such as marriage and birth certificates. For spouses and children who are overseas and seeking to join the principal EB–5 alien *after* such alien has received conditional resident status (*i.e.,* ''following to join'' the principal alien), USCIS cannot grant the adjustment of status application while they are overseas. Therefore, following a determination of eligibility, DHS is proposing to require that these dependents appear at a DHS office abroad to request parole by filing an Application for Travel Document, Form I–131 or successor form, in accordance with the instructions to the form to return to the United States for

adjustment of status. Proposed 8 CFR 245.25(c)(3).

C. Determinations on Eligibility

DHS is proposing that prior to approving or denying the qualifying Form I–485 under section 11032 of Public Law 107–273, USCIS would make determinations on whether the alien qualifies as an eligible alien. Proposed 8 CFR 245.25(c). DHS is further proposing to create an intermediate step, described more fully below, to accommodate eligible aliens and their spouses and children who are overseas and may need to be paroled into the United States to be granted conditional resident status.

To determine whether an alien qualifies for conditional resident status, USCIS would review the qualifying Form I–485, the new Form I–485, and any information based on the recent collection of biometric information, interview, any Form I–526 revocation proceedings, and any previous denial of Form I–485 if no longer pending. At this stage, USCIS would determine whether all of the requirements in section 11032(a), (b), and (c) are met, such as:

- Whether the revocation of the alien's qualifying Form I–526 was based on failure of the alien to meet the job creation requirement and, therefore, should be disregarded;
- Whether a ground of inadmissibility or deportability applies to the alien; and
- Whether the alien's denied or terminated Form I–485 should be reopened because the denial was based on failure to meet the job creation requirement.

An additional consideration would be whether the alien obtained permanent residence on other grounds. In such a case, there would be no need for USCIS to apply section 11032 of Public Law 107–273 and grant conditional residence. Proposed 8 CFR 245.25(c)(1). Another consideration would be whether the eligible alien departed the United States while his or her qualifying Form I–485 was pending. An alien would not qualify for conditional residence under section 11032 of Public Law 107–273 if he or she departed without advance parole. Proposed 8 CFR 245.25(c)(2). This consequence applies to adjustment of status applicants under regular procedures applicable to Forms I–485. DHS does not believe that a different rule should apply to adjustment applicants seeking benefits under section 11032 of Public Law 107–273.

Finally, for principal aliens and their spouses and children who are not physically present in the United States, DHS is proposing that following a determination of eligibility, USCIS would send such aliens a notice requiring them, by a specific date, to apply for parole to return to the United States at a DHS office located in the jurisdiction of their overseas residence. Proposed 8 CFR 245.25(c)(3). Applicants can learn which DHS office services their residence by viewing the USCIS Office and Service Locator at *https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=OS.* Applicants may be requested to appear at the overseas DHS office for capture of biometric information and/or an interview in connection with the parole application. DHS proposes to make physical presence in the United States a requirement for adjudication of the I–485 application because its jurisdiction to grant conditional residence based on adjustment of status is limited to the United States.

If USCIS determines that an alien who is overseas does not qualify as an eligible alien or for conditional resident status under section 11032 of Public Law 107–273, USCIS will terminate processing of the alien's Form I–485 and that of any accompanying spouse and children. Proposed 8 CFR 245.25(c) and (e). Likewise, if USCIS determines that an alien who is overseas does qualify as an eligible alien for conditional residence under section 11032 of Public Law 107–273, but that a spouse or child does not qualify for conditional resident status, USCIS will terminate processing of the respective spouse's or child's Form I–485. Proposed 8 CFR 245.25(c) and (e). There is no administrative appeal of a decision to terminate processing of any application of an alien who is overseas. *See* INA section 245(a), 8 U.S.C. 1255(a). Therefore, under this proposed rule, if the alien fails to obtain parole into the United States, USCIS will deny the alien's Form I–485. In such a case, the alien would not have met the requirements of sections 11032(b)(3) or (c)(2)(B) of Public Law 107–273.

D. Decisions on Granting Conditional Resident Status

1. Approvals

After USCIS makes a determination of eligibility, USCIS would make a decision on the Form I–485. Upon approval of the new Form I–485, USCIS would grant the alien conditional residence under section 216A of the INA, 8 U.S.C. 1186b, as of the date of the approval. USCIS would also approve Forms I–485 filed for the principal alien's accompanying spouse and children, if their Form I–485 is properly filed in accordance with proposed 8 CFR 245.25(b)(5) and the spouse or child is eligible to receive a visa under section 203(d) of the INA, 8 U.S.C. 1153(d). Proposed 8 CFR 245.25(d). USCIS will send written notice of the approval to the eligible alien(s). Note that prior to approval, USCIS must ensure that a visa number is available for each eligible alien from the Department of State under sections 201(d) and 203(b)(5) of the INA. 8 U.S.C. 1151(d) and 1153(b)(5).

2. Denials

Under this proposed rule, USCIS would be required to deny qualifying applications for adjustment of status to conditional residence if it determines that the eligible alien did not meet the requirements in section 11032 of Public Law 107–273 and the regulatory requirements in proposed 8 CFR 245.25. Proposed 8 CFR 245.25(e). In particular, USCIS would deny conditional residence:

- When USCIS cannot disregard the revocation of the eligible alien's qualifying Form I–526;
- When USCIS cannot reopen the eligible alien's Form I–485 that is no longer pending;
- If USCIS determines that the eligible alien is inadmissible or deportable on any ground; or
- If the eligible alien is no longer physically present in the United States and is not timely paroled into the United States if DHS requires such parole.

USCIS would provide the alien with written notice of the denial. It would also initiate removal proceedings if the alien is physically present in the United States. At that time, an immigration judge would have jurisdiction to review USCIS's decision. Proposed 8 CFR 245.25(e).

VI. Determinations on Petitions To Remove Conditions Under Section 11032 of Public Law 107–273

Section 216A of the INA, 8 U.S.C. 1186b, governs the entire removal of condition process for EB–5 aliens who do not fall within the scope of Public Law 107–273. Section 11032(e) of Public Law 107–273 modifies part of the regular process for removing conditions after USCIS grants conditional residence pursuant to Public Law 102–273.

Just as under the regular process, an alien granted conditional resident status under section 11032(a) of Public Law 107–273 must file a petition to remove conditions within 90 days prior to the second anniversary of becoming a conditional resident. Public Law 107–273 at section 11032(e)(1). The petition must demonstrate that:

• The alien invested or is actively in the process of investing the requisite capital of $1 million or $500,000,

• He or she has sustained the investment during the period of residence in the United States, and

• He or she is otherwise conforming to the requirements of the EB–5 visa classification. *See id.;* INA sections 203(b)(5), 216A(d)(1); 8 U.S.C. 1153(b)(5), 1186b(d)(1).

Unlike the regular process, however, section 11032(e) of Public Law 107–273 provides that the petition can be based on any commercial enterprise in the United States in which the alien has made a capital investment at any time. Public Law 107–273 at section 11032(e)(1). In making a determination on the petition to remove conditions, section 11032(e) of Public Law 107–273 requires that three determinations be made. These are similar to the determinations required for eligible aliens seeking removal of conditions under section 11031 of Public Law 107–273:

1. A determination must be made as to whether the petition contains any material misrepresentation in the facts and information alleged in the petition with respect to the commercial enterprises included in the petition. Public Law 107–273 at section 11032(e)(2)(A).

2. A determination must be made as to whether all commercial enterprises included in the petition together created full-time jobs for 10 or more qualifying individuals and that those jobs exist or existed on either of the following dates: The date on which the investor's initial application for adjustment of status or immigrant visa was filed, or the date on which the determination on the Form I–829 is made. *Id.* at sections 11032(e)(2)(B) and (e)(3). If the investment was made within an approved regional center under the EB–5 Pilot Program, then the indirect jobs that were created can be used to meet this requirement. *Id.* at section 11032(e)(2)(B). If the immigrant investor has made an investment in a troubled business, the number of employees of the business cannot be any less than the pre-investment level. *Id.*

3. A determination must be made as to whether, considering the alien's investments in enterprises on either or both of the dates described above, the alien is or was in substantial compliance with the capital investment requirement. *Id.* at section 11032(e)(2)(C).

Because the requirements in section 11032(e) of Public Law 107–273 are based on the requirements applicable to the regular process for removing conditions in section 216A(c) and (d) of the INA, 8 U.S.C. 1186b(c) and (d), DHS is proposing that the regulations governing the regular removal of condition process at 8 CFR 216.6 also apply to section 11032(e) cases, except where specifically covered by the provisions proposed by this rule. *See* proposed 8 CFR 216.7(b)(1). Referring to the current regulations at 8 CFR 216.6(a)(1), DHS is proposing that Form I–829 must be filed to remove conditions for aliens granted conditional residence under section 11032(a) of Public Law 107–273. Proposed 8 CFR 216.7(b)(1). This rule also describes the documentary evidence that eligible aliens would be required to include with the Form I–829. Proposed 8 CFR 216.7(b)(2). This list is different from the list applicable to aliens who fall outside the scope of Public Law 107–273, since section 11032(e) of Public Law 107–273 requires that a different inquiry be made on the petitions to remove conditions of eligible aliens. In particular, this rule requires evidence to be presented regarding:

• The dates on which jobs created by the commercial enterprise existed;

• All commercial enterprises in which the eligible alien invested and upon which a determination will be made; and

• Whether the alien is or was in substantial compliance with the capital investment requirement described in section 216A(d)(1)(B) of the INA, 8 U.S.C. 1186b(d)(1)(B).

If the petition to remove conditions is based upon commercial enterprises located both within and outside of a TEA, the investment amount must comply with proposed 216.7(a)(5)(iii).

The rule does not propose special provisions governing the processes for requiring appearances by the alien, issuing a decision on the petition, granting or terminating status, and providing avenues for review of adverse decisions since the current regulations adequately cover these areas. *See* 8 CFR 216.6.

VII. Treatment of Children

The special benefits of Public Law 107–273 extend to the spouses and children of eligible aliens. In addition, section 11031(e) of Public Law 107–273 provides that an alien who obtained conditional resident status before November 2, 2002 by virtue of being a child of an eligible alien will be considered to be a child for purposes of this section notwithstanding any subsequent change in age or marital status. Likewise, under section 11032(f) of Public Law 107–273, an alien who was a child on the date that Form I–485 or application for an immigrant visa (DS–230) was filed will be considered to be a child for purposes of this section notwithstanding any subsequent change in age or marital status.

DHS has determined that regulations implementing sections 11031(e) and 11032(f) of Public Law 107–273 are not necessary because the statutory provisions are sufficiently detailed. However, DHS invites comments from the public regarding whether there are issues that should be addressed in the regulations.

VIII. Regulatory Requirements

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) mandates that an agency conduct an RFA analysis when an agency is ''required by 5 U.S.C. 553 * * *, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for interpretative rule involving the internal revenue laws of the United States. * * *'' DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule applies to individuals who file petitions and applications under the EB–5 program. The impact is on these persons in their capacity as individuals, so that they are not, for purposes of the RFA, within the definition of small entities established by 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, this rule is not subject to the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based

companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has not been submitted to the Office of Management and Budget for review. DHS has considered the benefits and costs associated with the changes proposed in this rule and has determined that the benefits justify the costs.

The majority of changes being proposed describe how USCIS would apply adjudication practices to the alien investor population covered by Public Law 107–273. The alien investor population covered by Public Law 107–273 filed petitions with USCIS during the period January 1, 1995 thru August 31, 1998. There are two distinct groups of aliens to which this rule applies: Those who have already obtained permanent resident status on a conditional basis are covered by section 11031 of Public Law 107–273, and those who have never obtained permanent resident status are covered by section 11032 of Public Law 107–273.

Pursuant to section 11031, DHS is proposing to reconsider alien investor petitions for removal of conditions filed during the applicable timeframe that meet the statutory eligibility requirements specified in section 11031 Public Law 107–273. Generally, DHS would apply adjudication standards that are similar to current practices in alien investor adjudication, while offering a few flexibilities. DHS estimates that 581 principal alien investors would be covered under this provision. Under the proposed rule, these covered alien investors would have further opportunity to satisfy their investment criteria in order to qualify for the removal of conditions on their lawful permanent residence. Most significantly, these principal alien investors would have the ability to count investment activities beyond the scope of their original investment. These enhanced flexibilities would represent significant qualitative benefits to the alien investor and their qualifying family members.

Principal alien investors seeking to benefit under section 11031 of Public Law 107–273 would be permitted to complete a Supplement to Form I–829 Petition by Entrepreneurs to Remove Conditions. Currently, there is no fee for the Supplement; thus the compliance cost to alien investors is directly attributable to the opportunity cost of completing the Supplement. According to the form instructions, the Supplement takes approximately 22 minutes to complete. Given the importance of the proposed accommodations, DHS assumes that investors will choose to have the form completed by an attorney. The Bureau of Labor Statistics 2009 Occupational Employment Statistics, reports the average hourly wage of an attorney at $62.03.[4] To account for the additional cost of non-wage benefits such as health insurance, vacation time, *etc.,* we use a factor of 1.43 to burden the wage, resulting in a fully burdened average hourly wage rate for attorneys of $88.70.[5] Using the fully burdened wage rate for attorneys and the form completion time, DHS calculates the opportunity cost of completing the Supplement at $32.82.[6] If all 581 principal alien investors to which the proposed rule applies were to file a Supplement, the total cost imposed by this rule would be $19,068.[7]

DHS believes that most cases would be resolved during this initial determination stage. Though unlikely, the highest cost scenario would be if all 581 alien investor cases were not able to be resolved at the initial stage. In this case, the statute provides that these alien investors would be granted a two-year extension or reprieve after which they have the option of petitioning for reconsideration. At the completion of the two-year extension, the investors would have the option of filing a new Petition by Entrepreneur to Remove Conditions, Form I–829, with associated biometrics collection. Additionally, these investors would be permitted to file the optional Supplement, if appropriate, for consideration of investment activities outside the scope of the original petition. DHS assumes that investors that would take advantage of this benefit of the two-year time extension would most likely file the Supplement along with Form I–829.[8] The time burden to complete both Form I–829 and the Supplement combined is 1 hour, 27 minutes. Assuming investors would have an attorney complete both forms, DHS calculates the opportunity cost of completing Form I–829 and the Supplement to be $128.62.[9]

Additionally, investors that choose to take advantage of this benefit by filing Form I–829 would be required to travel to the nearest USCIS Application Support Center (ASC) for the collection of biometrics. While travel times and distances will vary, DHS estimates the average round-trip to an ASC will be 20 miles, and that the average time for that trip will be an hour. It will take an average of one hour for an applicant to wait for service, and to have his or her biometrics collected, for a total of compliance time of 2 hours. According to the Bureau of Labor Statistics, the 2009 average hourly wage for all occupations was $20.90, which results in $29.89 per hour in burdened wages.[10] Using a fully burdened wage rate of $29.89 per hour, USCIS calculates the opportunity cost of complying with the biometric collection to be $59.78. The opportunity costs associated with providing biometrics and completing Forms I–829 and the Supplement for all 581 investors under the second determination stage would total $109,460.[11] Investors seeking to benefit under the two-year extension provision would not have their fees waived for Form I–829. The current fees for Form I–829 and biometrics collection are $3,750 and $85, respectively. Thus, if all alien investors were to avail themselves of the benefits associated with the two-year extension, this rule would impose over $2.2 million in fees.[12]

Under the highest-cost scenario, where all 581 investors covered under section 11031 would have to undergo both the initial and secondary determination to have their conditions on permanent residence removed, the total opportunity cost imposed by this rule is $128,528. Additionally, the rule would impose over $2.2 million in fees, under the highest-cost scenario.

Section 11032 of Public Law 107–273 also provides benefits for certain individuals and their qualifying family members who applied for admission or adjustment of status on an EB–5 visa prior to the enactment of the legislation.

[4] *See http://www.bls.gov/oes/2009/may/oes231011.htm.*

[5] The calculation to burden the wage rate: $62.03 × 1.43 = $88.70. U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, March 2009, viewed online at: *http://www.bls.gov/news.release/ecec.t01.htm.*

[6] 22 minutes/60 minutes = 0.37 hours. 0.37 hours × $88.70 = $32.82.

[7] 581 investors × $32.82 = $19,068.

[8] According to the form instructions, Form I–829 takes approximately 1 hour and 5 minutes to complete.

[9] 1.45 hours × $88.70 = $128.62.

[10] *See* United States Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2009 National Occupational Employment and Wage Estimates. Viewed online at: *http://www.bls.gov/news.release/pdf/ocwage.pdf.*

[11] The opportunity cost for the second determination is calculated as follows: $128.62 for forms + $59.78 for biometrics = $188.40 total opportunity cost per alien investor. $188.40 × 581 = $109,460 in total maximum opportunity cost for second determination.

[12] $3,835 total fees × 581 = $2,228,135.

Principal alien investors and qualifying family members seeking to benefit under section 11032 would be required to complete a new Application to Register Permanent Residence or Adjust Status, Form I–485, even though many of these aliens will have previously completed a Form I–485. Additionally, these covered principal aliens and family members would be required to submit biometric information.[13] DHS estimates 109 aliens would be covered under this provision; 31 principal aliens and approximately 78 dependent family members.[14]

Under these circumstances, the fee for Form I–485 would be waived; thus the compliance cost to alien investors and family members is directly attributable to the opportunity cost of completing Form I–485. According to the form instructions, Form I–485 takes approximately 6 hours and 15 minutes to complete. In addition, applicants will also be required to travel to the nearest ASC for the collection of biometrics. Therefore, the total time for each applicant to comply with Form I–485 filing and biometric collection requirements is 8 hours and 15 minutes. Using a fully burdened wage rate of $29.89 per hour, USCIS calculates the opportunity cost to be $246.59.[15] If all 109 aliens estimated to be covered under section 11032 were to comply with these provisions, the total opportunity cost imposed by completing Form I–485 and submitting biometrics would be $26,878.[16] In keeping with current alien investor petition processes, two years after obtaining LPR status DHS would require the principal alien investors to file Form I–829, which would not be considered a cost of this rule. However, under the provisions of the statute, these investors have the option of submitting the Supplement if the principal alien investors wish to request that USCIS count investment activities beyond the scope of their original investment. DHS does consider the costs associated with filing the Supplement to be a cost of this rule. Again, assuming that an attorney would complete this form, if all 31 principal alien investors were to file the Supplement this rule would impose an additional opportunity cost of $1,017.[17] Therefore, the total opportunity cost imposed by this rule under section 11032 in completing Forms I–485 and the Supplement and submitting biometrics would be $27,895. In addition, all covered aliens would be required to submit biometric fees. The current fee for biometric collection is $85; thus the total fee collection would be $9,265.[18] In summary, the total costs of the proposed rule are represented by the opportunity cost and fees paid by aliens covered under both section 11031 and 11032, $156,423 and $2,237,400, respectively.

In light of the significant qualitative benefits associated with the proposed rule, DHS has determined the benefits justify the compliance costs of the rule. We request public comment on any costs of the rule that we may not have considered.

E. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The information collection requirements (Form I–526, I–829, Form I–485, and Form I–131) contained in this rule have been previously approved for use by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB control numbers for these information collections are: 1615–0026, 1615–0045, 1615–0023, and 1615–0013, respectively.

USCIS will be creating a supplement to the Form I–829 to accommodate special information that eligible aliens under Public Law 107–273 must provide to establish eligibility. The supplement will require the conditional resident to provide information regarding all commercial enterprises in the United States in which he or she has invested, the number of jobs created with respect to each commercial enterprise, and, where applicable, credits for previous investments that were made and jobs that were created.

Accordingly, the Form I–829 is being revised to include the new supplement. This revision is subject to review by the OMB under the Paperwork Reduction Act of 1995. Written comments are encouraged and will be accepted until November 28, 2011. When submitting comments on the information collection, your comments should address one or more of the following four points.

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the 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 the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of information collection:* Revision of currently approved information collection.

(2) *Title of form/collection:* Petition by Entrepreneur to Remove Conditions.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–829 and Supplement, U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals and households. This form provides a uniform petition that enables alien entrepreneurs to request the removal of the conditional basis of their lawful permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1931 respondents for Form I–829 at 1 hour and 5 minutes, and 602 respondents filing the supplement at 22 minutes per response.

(6) *An estimate of the total of public burden (in hours) associated with the collection:* Total reporting burden hours is 2312.

[13] *Note:* Biometric collection is only required for family members who are 14 years of age or older.

[14] DHS assumes average dependents of 2.5 per principal alien based on historical employment-based immigrant petitions. Calculation: 31 principal aliens × 2.5 = 77.50.

[15] The calculation to burden the wage rate: $20.90 × 1.43 = $29.887 per hour. The calculation of opportunity cost: $29.89 × 8.25 = $246.59.

[16] $246.59 × 109 covered aliens = $26,878.31.

[17] $32.82 × 31 investors = $1,017.

[18] $85 × 109 covered aliens = $9,265.

All comments and suggestions or questions regarding the Form I–829 and supplement should be directed to the Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020.

List of Subjects

8 CFR Part 216

Administrative practice and procedure, Aliens.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 216—CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS

1. The authority citation for part 216 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1154, 1184, 1186a, 1186b; and 8 CFR part 2.

2. Section 216.7 is added to read as follows:

§ 216.7 Removal of conditions pursuant to sections 11031 to 11034 of Public Law 107–273.

(a) *Removal of conditional basis of permanent resident status for certain aliens pursuant to section 11031 of Public Law 107–273.*

(1) *Definitions.* As used in paragraph (a) of this section, the term:

Denied initial Form I–829 means an initial Petition by Entrepreneur to Remove Conditions (Form I–829), that the INS or Service director denied on the merits of the petition.

Initial Form I–829 means a Form I–829 that an eligible alien timely filed before November 2, 2002.

Qualifying Form I–526 means an Immigrant Petition by Alien Entrepreneur (Form I–526), that INS approved after January 1, 1995 and before August 31, 1998.

Second petition to remove conditions means a petition to remove conditions (Form I–829 or successor form) and any supporting documentation that an alien must file following an initial adverse determination.

(2) *Eligible Aliens.* Eligible aliens are those aliens described in section 11031(b) of Public Law 107–273 except:

(i) Any otherwise eligible alien who has been placed into deportation or removal proceedings and who is deportable or removable on grounds other than the denial of Form I–829;

(ii) An eligible alien who has obtained lawful permanent resident status (whether subject to conditions or not) on a basis unrelated to the conditional resident status at issue in the initial Form I–829. Such alien's dependent spouse and children will also no longer be deemed eligible aliens;

(iii) An eligible alien who makes or has previously made a written request to withdraw his or her initial Form I–829 will no longer be deemed an eligible alien upon the written notice by USCIS acknowledging the withdrawal request. Such alien's dependent spouse and children will also no longer be deemed eligible aliens. The conditional resident status of such alien(s) will terminate as of the date of the notice; or

(iv) Any alien who has abandoned his or her conditional residence by filing the Abandonment by Alien of Status as Lawful Permanent Resident form (Form I–407 or successor form) or an attestation in writing asserting the alien's abandonment of his or her status, regardless of whether he or she withdrew the petition to remove conditions on lawful permanent resident status or obtained lawful permanent resident status by any other means.

(3) *Treatment of pending deportation or removal proceedings.* DHS has agreed to the administrative closure of any pending deportation or removal proceedings, including proceedings reopened pursuant to section 11031(b)(2) of Public Law 107–273, in order to make the determinations required under this paragraph. DHS will file a motion to re-calendar the proceedings with the Executive Office for Immigration Review after USCIS has issued an initial determination on the eligible alien's denied initial Form I–829 and, if applicable, after USCIS has issued a second determination on the eligible alien's second petition to remove conditions.

(4) *Initial determination.* USCIS will make determinations on the initial Form I–829 pursuant to section 11031(c)(1) of Public Law 107–273 based on the evidence previously submitted with Form I–829 and without requesting additional evidence or an interview.

(i) *Favorable determination.* Upon a favorable determination on the initial Form I–829, USCIS will remove the conditional basis of his or her status (and that of the alien's spouse and/or children if their status was obtained under section 216A of the Act) effective on the second anniversary of the alien's admission for permanent residence, if the alien is not in deportation or removal proceedings. If the alien is in deportation or removal proceedings, regardless of whether he or she is physically present in the United States, DHS must file a motion to recalendar proceedings with the immigration judge. A favorable determination is one in which USCIS has determined that the alien has met the job creation and capital investment requirements, and the initial Form I–829 did not contain material misrepresentations.

(ii) *Notice and opportunity for rebuttal of adverse determinations.* If USCIS makes an adverse determination on the initial Form I–829, USCIS will provide the alien with written notice of the determination pursuant to section 11031(c)(1)(F) of Public Law 107–273. The notice will provide the alien with 12 weeks from the date of the notice to submit evidence in writing to rebut any adverse determination. If the adverse determination is based upon failure to satisfy the capital investment or the job creation requirements, the notice of adverse determination must include a statement notifying the alien of the opportunity to submit information relating to capital investment and/or job creation in commercial enterprises not identified in the initial Form I–829. To request consideration of job creation and capital investments based on additional commercial enterprises, the alien must file a supplement to the petition to remove conditions with the alien's written rebuttal. The alien must also submit supporting evidence with the supplement, as described in 8 CFR 216.7(a)(5)(i)(C). If an eligible alien seeks to submit evidence of a commercial enterprise not identified in the initial Form I–829, the amount of the required investment shall be calculated as provided in proposed 8 CFR 216.7(a)(5)(iii). During the 12 week rebuttal period, the alien (and the alien's spouse and/or children) remains a conditional resident. USCIS will determine whether to reverse the adverse determination at the conclusion of the 12 week rebuttal period whether or not a rebuttal response is received.

(iii) *Notice following opportunity to rebut.* If USCIS reverses the adverse determinations following the opportunity to rebut, USCIS must send the alien written notice stating the decision to reverse the adverse determinations. In addition, the procedures in 8 CFR 216.7(a)(4)(i) applicable to favorable determinations apply. If USCIS does not reverse the adverse determinations, the procedures in 8 CFR 216.7(a)(4)(iv) and (v) apply. In the case of multiple investors, jobs will be allocated among the investors in accordance with 8 CFR 204.6(g).

(iv) *Notice following rebuttal period affirming adverse determinations for*

aliens with pending deportation or removal proceedings. Following the alien's opportunity to submit rebuttal evidence, if USCIS does not reverse the adverse determinations with respect to an alien who is in deportation or removal proceedings, USCIS will send written notice to such alien with this decision, the reasons therefor, and the determinations regarding the number of qualifying jobs created and amount of capital investment made as provided by paragraph (a)(4)(v)(D) of this section and the date described in section 11031(c)(1)(D) of Public Law 107–273 that USCIS applied to each determination (if applicable). Subject to paragraph (a)(4)(vi) of this section, DHS will move to recalendar deportation or removal proceedings.

(v) *Notice following rebuttal period affirming adverse determinations and termination or continuation of status for eligible aliens not in removal proceedings.* Following the alien's opportunity to submit rebuttal evidence, if USCIS does not reverse the adverse determinations with respect to an alien who is not in removal proceedings, USCIS will send written notice to such alien with this decision, the reasons therefor, and a statement of USCIS's determination regarding the number of qualifying jobs created and capital investment made, as provided by paragraph (a)(4)(v)(D) of this section, and the date described in section 11031(c)(1)(D) of Public Law 107–273 that USCIS applied to each determination (if applicable).

(A) *Termination if adverse determination based on material misrepresentation.* Subject to paragraph (a)(4)(vi) of this section, if the adverse determination is based, in whole or in part, on material misrepresentation as defined in 8 CFR 216.7(c)(1), the alien's lawful permanent resident status and that of his or her spouse and/or any children (if such status was obtained on a conditional basis under section 216A of the Act) will be terminated effective on the date of the notice required by 8 CFR 216.7(a)(4)(ii). If the alien appeals the adverse determination to the BIA or federal courts pursuant to 8 CFR 216.7(a)(4)(vi), then termination is effective on the date of the highest appellate body's decision. DHS will notify the alien to surrender his or her Form I–551. The alien may seek review of the decision to terminate in deportation or removal proceedings.

(B) *Adverse determination based on failure to establish capital investment and/or job creation.* Subject to paragraph (a)(4)(vi) of this section, USCIS will extend the conditional residence of an eligible alien (and that of the alien's spouse and/or children if their status was obtained under section 216A of the Act) for a two-year period upon an adverse determination that is not based on a material misrepresentation. The notice provided under 8 CFR 216.7(a)(4)(v) will include notification of the extension of conditional residence.

(C) *Start date for continuation of conditional residence.* The extension of an alien's permanent resident status on a conditional basis and that of the alien's spouse and any children (if such status was obtained under section 216A of the Act) will begin on the date of the decision following the opportunity for rebuttal or the last day of the rebuttal period if the alien does not submit rebuttal evidence. If the alien seeks administrative or judicial review of the adverse determination pursuant to 8 CFR 216.6(a)(vi), the two-year extension will commence on the date of the highest appellate body's decision. If the alien is in deportation or removal proceedings, then the date of the immigration judge's decision to continue conditional residence will mark the starting point for the new two-year period. Such decision cannot be made before the alien exhausts all avenues of administrative or judicial review.

(D) *Determination and crediting of qualifying jobs created and capital investment made.* The number of qualifying jobs created and capital investment made as determined by USCIS in the initial determination will be credited for purposes of the second determination under 8 CFR 216.7(a)(5).

(vi) *Administrative and judicial review.* An alien may seek administrative review with the BIA of an adverse determination. While the appeal to the BIA and judicial review of such appeal, if any, is pending, the alien's conditional permanent resident status and that of his or her spouse and/or children (if such status was obtained under section 216A of the Act) will continue.

(5) *Second determination.* (i) *Filing petition to remove conditions.* To remove the conditional basis of the permanent resident status of an eligible alien whose conditional resident status was continued for a new two-year period, the alien must meet the requirements for removal of conditions in section 11031(c)(2) of Public Law 107–273 and in this section. The alien must file a second petition to remove conditions, with the supplement to request consideration of additional commercial enterprises (if applicable), and in accordance with the form instructions, within the 90-day period before the second anniversary of the continuation of the conditional basis. The second petition to remove conditions must be accompanied by the required fee and any supporting documentary evidence necessary to establish that the alien meets the requirements in section 11031(c)(2) of Public Law 107–273 for removal of conditions and in this section, including, but not limited to the following:

(A) If an adverse determination was based on failure to meet the job creation requirement of section 11031(c)(1)(A)(ii) of Public Law 107–273, evidence of the number of qualifying jobs created since conditional resident status was continued and the beginning and ending dates of the jobs. Evidence may include, but is not limited to, payroll records, tax documents, and Employment Eligibility Verification (Forms I–9 or any successor forms).

(B) If the adverse determination was based on failure to meet the capital investment requirement of section 11031(c)(1)(A)(iii) of Public Law 107–273, evidence of the alien's capital investment in one or more commercial enterprises since conditional resident status was continued establishing that the alien is in substantial compliance with the capital investment requirement described in section 216A(d)(1)(B) of the Act as of the date of USCIS' second determination. Such evidence may include, but is not limited to, audited financial statements, federal tax returns, bank statements, bank wire transfers, or escrow agreements, or other probative evidence.

(C) Regardless of the bases for the adverse determination, evidence of any commercial enterprise that the alien wants USCIS to consider (except any evidence previously submitted in connection with the initial Form I–829 or initial determination), including, but not limited to, its formation and current ownership and such other evidence as:

(*1*) Audited financial statements, or other probative evidence of the alien's capital investment in the commercial enterprises to be considered;

(*2*) Articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the commercial enterprise; and

(*3*) Certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require such a certificate, a statement to that effect.

(D) In the case of a ''troubled business'' as defined in 8 CFR 204.6(j)(4)(ii), evidence that the

commercial enterprise maintained the number of existing employees at no fewer than the pre-investment level for the period following admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Form I–9 or any successor form).

(ii) *Termination of permanent resident status for failure to file petition.*

(A) Failure to properly file the second petition to remove conditions within the 90-day period before the second anniversary of the continuation of the conditional basis will result in the automatic termination of the alien's permanent resident status and the initiation of removal proceedings unless such late filing is excused under paragraph (a)(5)(ii)(B) of this section. No appeal will lie from this decision. USCIS will send a written notice of termination and, as appropriate, issue an NTA or file a motion to re-calendar proceedings with the immigration judge pursuant to 8 CFR 216.7(a)(4)(iv). The alien may request a review of the determination in proceedings.

(B) The second petition to remove conditions may be considered, at USCIS's discretion, to be filed prior to the second anniversary of the continuation of the alien's conditional resident status and accepted as a late petition if USCIS determines that failure to timely file was for good cause and due to extenuating circumstances. If the late petition is filed prior to jurisdiction vesting with the immigration judge (whether by issuance of an NTA or motion to re-calendar) in removal proceedings and USCIS excuses the late filing, USCIS will restore the alien's conditional permanent resident status and adjudicate the petition on the merits pursuant to this paragraph. If the second petition to remove conditions is not filed until after jurisdiction vests with the immigration judge and USCIS excuses the late filing, DHS and the alien may file a joint motion with the immigration judge to administratively close or terminate proceedings as appropriate. USCIS will then restore the alien's conditional permanent resident status and adjudicate the petition on the merits pursuant to this paragraph.

(iii) *Consideration of capital investments that are both in and out of targeted employment areas when making determinations on the petition.* If an eligible alien requests consideration of capital investments in commercial enterprises that are both located within a targeted employment area, and not located in a targeted employment area as defined by 8 CFR 204.6(f), USCIS will calculate the prorated percentage of the alien's capital investment in commercial enterprises located in a targeted employment area and the prorated percentage of the eligible alien's capital investment based on capital investments in commercial enterprises that are not located in a targeted employment area. USCIS will combine the prorated percentages when making a determination as to whether the alien substantially complies with the capital investment requirement.

(iv) *Crediting of jobs previously created and prior capital investments.* USCIS must credit the number of jobs created and prior capital investments made as determined at the initial determination.

(v) *Favorable determination and removal of conditions.* Where the alien is not subject to deportation or removal proceedings, USCIS will remove the conditional basis of an eligible alien's status and that of his or her spouse and/or children (if such status was obtained under section 216A of the Act) effective on the second anniversary of the continuation of conditional residence and notify such alien(s) in writing upon a favorable determination on the petition to remove conditions. Where the alien is subject to deportation or removal proceedings, USCIS will notify the alien in writing of the favorable determination and DHS will file a motion to re-calendar proceedings.

(vi) *Adverse determinations.*

(A) *Notice and opportunity for rebuttal of adverse determination.* If USCIS makes an adverse determination on the petition to remove conditions, USCIS will provide the alien with written notice of the determination and allow 12 weeks from the date of the notice for the alien to submit evidence in writing to rebut. If the alien submits evidence sufficient to rebut the adverse determination, USCIS will notify the alien in writing and the case will be treated as a favorable determination as provided in paragraph (a)(5)(v) of this section.

(B) *Termination if adverse determination.*

(*1*) *Failure to submit rebuttal evidence.* If the alien does not submit rebuttal evidence within the 12-week period, the alien's conditional resident status, and that of his spouse and children (if such status was obtained on conditional basis under section 216A of the Act) will be automatically terminated after the expiration of the 12-week period. USCIS will provide written notice to the alien(s) of the automatic termination and require the alien(s) to surrender any Form(s) I–551 to USCIS. DHS will, as appropriate, issue a Notice to Appear, or file a motion to re-calendar proceedings with EOIR. There is no appeal of the decision to terminate conditional resident status, but the alien may request a review of the adverse determination in deportation or removal proceedings.

(*2*) *Insufficient rebuttal evidence.* If the alien timely submits rebuttal evidence, but USCIS determines that the evidence is not sufficient to rebut the adverse determination, USCIS will terminate the conditional resident status of the alien and that of his or her spouse and/or children (if such status was obtained on a conditional basis under section 216A of the Act) if the alien is not in deportation or removal proceedings. If the alien is in deportation or removal proceedings, USCIS will provide written notice to the alien(s) of the decision, and the reason(s) therefore. The alien and the alien's spouse and children (as appropriate) will be required to surrender any Forms I–551 to USCIS. DHS will, as appropriate, issue an NTA or file a motion to re-calendar proceedings with the immigration judge. There is no appeal of this decision, but the alien may request a review of the adverse determination in deportation or removal proceedings.

(6) *Death of eligible alien and effect on spouse and children.* If the principal eligible alien dies during his or her period of conditional residence, the spouse and/or children of such alien will be eligible for removal of conditions if it can be demonstrated that the conditions for removal of conditions have been met, regardless of whether the alien, spouse, or children individually or collectively met such conditions.

(b) *Removal of conditions for aliens granted adjustment of status pursuant to 8 CFR 245.25 or admitted as a conditional resident based upon an immigrant visa granted pursuant to section 11032 of Public Law 107–273.*

(1) *Applicability of 8 CFR 216.6.* Unless otherwise provided in paragraphs (b)(2) and (b)(3) of this section, 8 CFR 216.6(a) through (d) apply to aliens whose conditional resident status was obtained on the basis of an adjustment of status application approved pursuant to 8 CFR 245.25 or an immigrant visa approved on the basis of section 11032 of Public Law 107–273.

(2) *Petition.* An alien who was granted the status of an alien lawfully admitted for permanent residence on a conditional basis pursuant to section 11032 of Public Law 107–273, must file a petition to remove conditions (Form I–829 or any successor form) in accordance with 8 CFR 216.6(a) and the

form instructions and, if appropriate, the supplement to the form and its instructions. In lieu of 8 CFR 216.6(a)(4), such an alien must include the following documentary evidence with the petition to remove conditions and supplement:

(i) Evidence that all eligible enterprises, considered together, in which the alien invested created full-time jobs for not fewer than 10 qualifying employees, and that such jobs exist or existed on either of the dates described in section 11032(e)(3) of Public Law 107–273. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Forms I–9 or any successor forms);

(ii) In the case of a ''troubled business'' as defined in 8 CFR 204.6(e), evidence that the number of existing employees is at no fewer than the pre-investment level for the conditional resident period. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Forms I–9 or any successor forms);

(iii) In the case of an investment within an approved regional center, evidence that the alien's investment created full-time jobs, either directly or indirectly, for not fewer than 10 qualifying employees. Such evidence may include payroll records, relevant tax documents, and Employment Eligibility Verification forms (Forms I–9 or any successor forms);

(iv) Evidence of the dates on which the jobs existed;

(v) Considering the alien's investment in all enterprises on either of the dates cited in section 11032(e)(3) of Public Law 107–273 or on both such dates, evidence that the alien is or was in substantial compliance with the requirement to invest or is actively in the process of investing the requisite capital. If the petition to remove conditions is based upon commercial enterprises located both within and outside of a TEA, the investment amount must comply with proposed 8 CFR 216.7(a)(5)(iii). Such evidence may include, but is not limited to, audited financial statements, federal tax returns, bank statements, bank wire transfers, escrow agreements, or other material evidence;

(vi) Evidence of any commercial enterprise in the United States in which the eligible alien made a capital investment and the formation and current ownership structure of such commercial enterprise including, but not limited to:

(*A*) Articles of incorporation, certificate of merger or consolidation, partnership agreement, joint venture agreement, business trust agreement, or other similar organizational document for the commercial enterprise; and

(*B*) Certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require such a certificate, a statement to that effect.

(C) *Determination on petition.* USCIS will make a determination on the petition to remove conditions in accordance with section 11032(e)(2) of Public Law 107–273, in lieu of section 216A(c)(3) of the Act and 8 CFR 216.6(c)(1).

(c) *Definitions.* (1) *Material misrepresentation.* Under this section, a material misrepresentation includes a statement or representation in an eligible alien's petition to remove conditions, as originally filed or supplemented, or any accompanying documentation which is determined, as a matter of discretion, to be both false and a statement or representation to which importance would reasonably be attached for determining whether to grant the petition, without regard to the petitioner's or any other person's intent or to whether or not there was detrimental reliance upon the statement or representation. Material misrepresentation also includes any omission of fact that has the effect of making any material representation in the petition to remove conditions or accompanying documentation false.

(2) *Substantial compliance with the capital investment.* For purposes of paragraphs (a) and (b) of this section, substantial compliance with the capital investment requirement means that the alien has invested nearly all of the requisite amount, with evidence that any balance is legally obligated for final disbursement within a reasonable period of time of the date on which the initial petition to remove conditions (Form I–829 or successor form) was filed (not applicable to petitions to remove conditions under paragraph (a)(6) of this section); 6 months after that date in the case of petitions to remove conditions under paragraph (a)(5) of this section only; or the date upon which the determinations are made. Funds that cannot be counted toward compliance with the capital investment requirement include funds returned to the alien in the form of guaranteed interest payments or as redemption for his or her interest, or otherwise diverted, as these funds would not have been made available to the commercial enterprise for the purposes of creating qualifying jobs.

(3) *Full-time.* The term ''full-time'' means a position that requires at least 35 hours of service per week at any time, regardless of who fills the position. Such a position must be required by the commercial enterprise at all times and filled by one or more qualifying employees as defined by 8 CFR 204.6(e).

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

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

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; Title VII of Pub. L. 110–229; 8 CFR part 2.

4. Section 245.25 is added to read as follows:

§ 245.25 Adjustment of status of certain alien entrepreneurs under section 11032 of Public Law 107–273.

(a) *Definitions.* As used in this section, the term:

Application for adjustment of status means a Form I–485, Application to Register Permanent Residence or Adjust Status (or successor form) and any supporting documentation.

Eligible alien in this section means an eligible alien as described in section 11032 of Public Law 107–273.

Form I–485 that is no longer pending means that the qualifying Form I–485 was subsequently terminated for abandonment or denied by the Immigration and Naturalization Service on or before November 2, 2002.

Qualifying Form I–485 means a Form I–485 filed before November 2, 2002.

Qualifying Form I–526 means a Form I–526, Immigrant Petition by Alien Entrepreneur, that INS approved after January 1, 1995 and before August 31, 1998.

(b) *Procedures for eligible aliens and their spouses and children.*

(1) *Requesting consideration for eligibility determinations.* An eligible alien must request USCIS to consider his or her qualifying Form I–485 for approval under section 11032 of Public Law 107–273 and must demonstrate that he or she meets the requirements in section 11032 of Public Law 107–273 and this section. Failure to follow the procedures in paragraph (b) of this section or to demonstrate eligibility will result in denial of the qualifying Form I–485 in accordance with paragraph (e) of this section. An eligible alien must:

(i) In accordance with the form instructions, file (without fee) a newly completed application for adjustment of status (Form I–485 or succeeding form) with supporting documentation signed and dated after the effective date when

this rule is published as a final rule and on or before 180 days from the effective date when this rule is published as a final rule;

(ii) Include payment of a biometrics fee with each application for adjustment of status; and

(iii) Appear as requested by USCIS for the capture of biometric information and, if USCIS determines it to be necessary, an interview.

(2) *Overseas aliens.* Aliens who are not physically present in the United States may submit an application for adjustment of status from outside the United States to facilitate a determination whether they are eligible aliens. Such aliens, upon request, must appear for the submission of certain biometric information at the DHS office located outside the United States having jurisdiction over the alien's foreign residence.

(3) *Forms I–485 that are no longer pending.* An alien whose Form I–485 is no longer pending must include with his or her submission in paragraph (b) of this section written evidence demonstrating that the reason an Application to Register Permanent Resident or Adjust Status (Form I–485) is no longer pending is either because he or she failed to satisfy the job creation requirement in section 203(b)(5)(A)(ii) of the Act or departed the United States without advance parole. A copy of a decision denying a Application to Register Permanent Resident or Adjust Status (Form I–485) on either of these bases satisfies this requirement. Acceptable secondary evidence includes, but is not limited to an alien's sworn statement together with: travel records; payroll records; alien's request for withdrawal of the Application to Register Permanent Resident or Adjust Status (Form I–485).

(4) *Revoked qualifying Immigrant Petitions by Alien Entrepreneur.* An alien whose qualifying Immigrant Petition by Alien Entrepreneur (Form I–526) was revoked must include with his or her submission, as described in paragraph (b) of this section, evidence demonstrating that the reason for the revocation was that such alien failed to satisfy the job creation requirement in section 203(b)(5)(A)(ii) of the Act. A copy of a decision revoking an Immigrant Petition by Alien Entrepreneur satisfies this requirement. Acceptable secondary evidence includes, but is not limited to the alien's sworn statement accompanied by additional documentation, such as a letter to INS responding to a notice of intent to revoke and documents filed by the alien related to an appeal of the revocation of the Immigrant Petition by Alien Entrepreneur.

(5) *Spouse and children.* Applications for adjustment of status by an alien's accompanying spouse and children must be filed with the alien's application for adjustment of status. If the spouse and children are following to join the alien, then their applications for adjustment of status must be filed no later than USCIS's determination of the alien's eligibility. The applications must contain supporting documentation of eligibility, including but not limited to evidence of the current relationship between the alien and spouse and children such as a marriage certificate and birth certificates.

(c) *USCIS determinations.* Following receipt of the required documentation and information in paragraph (b) of this section, USCIS will make a determination on whether an alien is an eligible alien, and whether the alien and any spouse and children, as applicable, qualify for adjustment of status to that of a conditional resident in accordance with section 11032 of Public Law 107–273 and this section. If USCIS determines that the alien does not qualify for conditional residence, it will deny Form I–485 for aliens in the United States and terminate processing of the request for benefits under this section for aliens who are residing outside the United States in accordance with paragraph (e) of this section.

(1) *Permanent residence on other grounds.* USCIS will make a determination that an alien does not qualify for conditional residence under section 11032 of Public Law 107–273 if he or she obtained permanent resident status on other grounds.

(2) *Departing the United States while qualifying Applications to Register Permanent Resident or Adjust Status are pending.* If an eligible alien with a pending, qualifying Application to Register Permanent Resident or Adjust Status (Form I–485 or any successor form) departed the United States after November 2, 2002 without advanced parole, USCIS will make a determination that the alien does not qualify for conditional resident status under section 11032 of Public Law 107–273 and will deny the Application to Register Permanent Resident or Adjust Status.

(3) *Eligible aliens and accompanying spouse and children who are not physically present in the United States.* Following receipt of a new Application to Register Permanent Resident or Adjust Status (Form I–485 or any successor form) (including medical examination in accordance with 8 CFR 245.5 and the instructions to the Application to Register Permanent Resident or Adjust Status) and biometric fee in accordance with paragraph (b) of this section, USCIS will send written notice to the eligible alien requiring an appearance by the alien and any accompanying or following to join spouse and children for biometric capture and an interview at the USCIS office located outside the United States having jurisdiction over the alien's foreign residence. If USCIS determines that the alien qualifies as an eligible alien and for conditional resident status under section 11032 of Public Law 107–273, USCIS will send the eligible alien written notice of USCIS' determination and require the alien and accompanying or following to join spouse and children to return to the United States by obtaining parole, described in 8 CFR 212.5, and, if granted parole, arrive in the United States by the date stated in the parole document. To request parole, the alien must file, by mail and with fee, a signed and completed application for parole on an Application for Travel Document, Form I–131 or successor form, in accordance with the form instructions. The alien and accompanying or following to join spouse and children may be requested to appear at such office for biometric capture or an interview in connection with the parole request. If the eligible alien, or his or her spouse and children, is not granted parole by USCIS or is not paroled upon his or her arrival to the United States, USCIS will deny his or her Application to Register Permanent Resident or Adjust Status in accordance with paragraph (e) of this section.

(d) *Approval.* Upon a determination by USCIS that the alien qualifies for conditional resident status under section 11032 of Public Law 107–273, USCIS will approve the eligible alien's qualifying Application to Register Permanent Resident or Adjust Status (Form I–485 or any successor form) and that of his or her spouse and children physically present in the United States, provided that USCIS has not revoked the alien's approved Immigrant Petition by Alien Entrepreneur (Form I–526 or any successor form), and all qualifying Applications to Register Permanent Resident or Adjust Status are pending or have been reopened. USCIS may not approve such Applications to Register Permanent Resident or Adjust Status until the Department of State allocates an immigrant visa number. Upon approval of the qualifying Application to Register Permanent Resident or Adjust Status, USCIS will grant the alien and his or her spouse and children, the status of an alien lawfully

admitted for permanent residence on a conditional basis under section 216A of the Act as of the date of such approval. USCIS will send written notice of the decision to the eligible alien.

(e) *Denials and terminations.* (1) If USCIS determines that the eligible alien does not qualify for conditional resident status under section 11032 of Public Law 107–273, USCIS will deny the eligible alien's qualifying Application to Register Permanent Resident or Adjust Status (Form I–485 or any successor form) and any Applications to Register Permanent Resident or Adjust Status of his or her spouse and children considered under this section. USCIS will send the eligible alien written notice of the denial and reasons for the denial. A denial of the qualifying Application to Register Permanent Resident or Adjust Status is not subject to appeal, but can be reviewed by an immigration judge in removal proceedings.

(2) If USCIS determines that an alien who is not physically present in the United States is not an eligible alien, USCIS will terminate processing of the request for benefits pursuant to this section. If USCIS determines that an alien who is overseas does qualify as an eligible alien, but that the spouse or child of the eligible alien does not qualify for benefits pursuant to this section, USCIS will terminate processing of the request for benefits. There is no administrative appeal of this decision.

(f) *Petitions revoked on a basis other than failure to meet job creation requirement.* If USCIS revoked the Immigrant Petition by Alien Entrepreneur (Form I–526 or any successor form) due to grounds of ineligibility other than failure to meet the job creation requirement, USCIS will not disregard the revocation under Public Law 107–273 and will deny the application for adjustment of status if it is pending.

Janet Napolitano,

Secretary.

[FR Doc. 2011–24619 Filed 9–26–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1022; Directorate Identifier 2011–NE–20–AD]

RIN 2120–AA64

Airworthiness Directives; BRP—Powertrain GMBH & CO KG 914 F2, 914 F3, and 914 F4 Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Isolated manufacturing deviations have been reportedly found on the threads of a certain batch of fuel pressure regulators, Part Number (P/N) 887130, installed on Rotax 914 F series engines.

This condition, if not corrected, could lead to a fuel leak and in-flight fire which would necessitate an engine shut-down, possibly resulting in a forced landing, with consequent damage to the aeroplane and injury to occupants.

These affected fuel pressure regulators may have non-conforming threads in the banjo bolt fitting for the fuel return line to the fuel tank from original manufacture. These non-conforming threads could result in fuel leakage during engine operation. We are proposing this AD to prevent fuel leaks, which could result in an in-flight fire and damage to the aircraft.

DATES: We must receive comments on this proposed AD by November 14, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: mark.riley@faa.gov; phone:* 781–238–7758; *fax:* 781–238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1022; Directorate Identifier 2011–NE–20–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0082, dated May 10, 2011 (referred to after this as ''the MCAI''), to correct an unsafe

condition for the specified products. The MCAI states:

> Isolated manufacturing deviations have been reportedly found on the threads of a certain batch of fuel pressure regulators, Part Number (P/N) 887130, installed on Rotax 914 F series engines.
>
> This condition, if not corrected, could lead to a fuel leak and in-flight fire which would necessitate an engine shut-down, possibly resulting in a forced landing, with consequent damage to the aeroplane and injury to occupants.

These affected fuel pressure regulators may have non-conforming threads in the banjo bolt fitting for the fuel return line to the fuel tank from original manufacture. These non-conforming threads could result in fuel leakage during engine operation, in-flight fire, and damage to the airplane.

For the reasons described above, this proposed AD would require the replacement of all affected P/N 887130 fuel pressure regulators with parts eligible for installation. You may obtain further information by examining the MCAI in the AD docket.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by EASA, and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require the replacement of all affected P/N 887130 fuel pressure regulators with parts eligible for installation, within 100 flight hours after the effective date of the proposed AD.

Differences Between This AD and the MCAI or Service Information

The EASA AD requires replacing the fuel pressure regulator within 100 flight hours (FH) or 6 months after the effective date of that AD, whichever occurs first. This proposed AD would require replacing the fuel pressure regulator within 100 FH after the effective date of this proposed AD.

Costs of Compliance

We estimate that this proposed AD would affect about 75 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $180 per product. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $26,250.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

BRP—Powertrain GMBH & CO KG (formerly Bombardier-Rotax GmbH): Docket No. FAA–2011–1022; Directorate Identifier 2011–NE–20–AD.

Comments Due Date

(a) We must receive comments by November 14, 2011.

Affected Airworthiness Directives (ADs)

(b) None.

Applicability

(c) This AD applies to BRP—Powertrain GMBH & CO KG 914 F2, 914 F3, and 914 F4 reciprocating engines with certain fuel pressure regulators, part number (P/N) 887130 installed.

Reason

(d) This AD results from:

Isolated manufacturing deviations have been reportedly found on the threads of a certain batch of Fuel pressure Regulators, Part Number (P/N) 887130, installed on Rotax 914 F series engines.

This condition, if not corrected, could lead to a fuel leak and in-flight fire which would necessitate an engine shut-down, possibly resulting in a forced landing, with consequent damage to the aeroplane and injury to occupants.

We are issuing this AD prevent to fuel leaks, which could result in an in-flight fire and damage to the aircraft.

Actions and Compliance

(e) Within 100 flight hours (FH) after the effective date of this AD, replace fuel pressure regulators listed in Table 1 of this AD with a fuel pressure regulator that is not listed in Table 1 of this AD, and is eligible for installation.

(f) After the effective date of this AD, do not install any fuel pressure regulator P/N 887130 onto any engine, if the fuel pressure regulator has a serial number (S/N) listed in Table 1 of this AD.

(g) After the effective date of this AD, do not install any Rotax 914 F series engine on any airplane if it has installed in it a fuel pressure regulator P/N 887130 with a S/N listed in Table 1 of this AD.

TABLE 1—S/NS OF AFFECTED FUEL PRESSURE REGULATORS, P/N 887130

100200 through 100246 inclusive.
100248 through 100280 inclusive.
100282 through 100293 inclusive.
100295 through 100314 inclusive.
100316 and 100317.
100319 through 100326 inclusive.
100330.
100332 and 100333.

TABLE 1—S/NS OF AFFECTED FUEL PRESSURE REGULATORS, P/N 887130—Continued

100338 through 100340 inclusive.
100342 through 100345 inclusive.
100348.
100350 through 100355 inclusive.
100357 through 100363 inclusive.
100365 through 100368 inclusive.
100371 and 100372.
100374 through 100376 inclusive.
100379 and 100380.
100395 and 100396.

FAA AD Differences

(h) This AD differs from the Mandatory Continuing Airworthiness Information (MCAI) by the compliance time. The MCAI requires replacing the fuel pressure regulator within 100 FH or 6 months after the effective date of EASA AD 2011–0082, dated May 10, 2011. This AD requires replacing the fuel pressure regulator within 100 FH after the effective date of this AD.

Alternative Methods of Compliance (AMOCs)

(i) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) Refer to MCAI Airworthiness Directive 2011–0082, dated May 10, 2011, for related information.

(k) Contact Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: mark.riley@faa.gov; phone:* 781–238–7758; *fax:* 781–238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on September 21, 2011.

Peter A. White,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–24842 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA–2010–0019]

RIN 1218–AC50

Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revisions

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule; Notice of reopening of rulemaking record.

SUMMARY: OSHA is reopening the rulemaking record to allow interested persons to comment on OSHA's proposal to update Appendix A to Subpart B of its Injury and Illness Recording and Reporting regulation and the proposed requirement to report to OSHA, within eight hours, all work-related fatalities and all work-related in-patient hospitalizations; and within 24 hours, all work-related amputations. The docket is being reopened in response to a request made by the National Automobile Dealers Association. The record will remain open for 30 days.

DATES: *Written comments:* Comments must be submitted by October 28, 2011.

ADDRESSES:

Written comments: You may submit comments, identified by docket number OSHA–2010–0019, or regulatory information number (RIN) 1218–AC50, by any of the following methods:

Electronically: You may submit comments electronically at *http://www.regulations.gov,* which is the Federal e-rulemaking portal. Follow the instructions on the Web site for making electronic submissions;

Fax: If your submission, including attachments, does not exceed 10 pages, you may fax it to the OSHA docket office at (202) 693–1648; or

Mail, hand delivery, express mail, messenger, or courier service: You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket Number OSHA–2010–0019, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and docket office's normal business hours, 8:15 a.m.–4:45 p.m.

Instructions for submitting comments: All submissions must include the docket number (Docket No. OSHA–2010–0019) or the RIN (RIN 1218–AC50) for this rulemaking. Because of security-related procedures, submission by regular mail may result in significant delay. Please contact the OSHA docket office for information about security procedures for making submissions by hand delivery, express delivery, and messenger or courier service.

All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting personal information such as social security numbers and birthdates.

Docket: To read or download submissions in response to this **Federal Register** notice, go to docket number OSHA–2010–0019, at *http://regulations.gov.* All submissions are listed in the *http://regulations.gov* index, however, some information (e.g., copyrighted material) is not publicly available to read or download through that Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA docket office.

Electronic copies of this **Federal Register** document are available at *http://www.regulations.gov.* This document, as well as news releases and other relevant information, is available at OSHA's Web site at *http://www.osha.gov.*

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999.

For general and technical information on the proposed rule: Mr. David Schmidt, OSHA Office of Statistical Analysis, Room N–3641, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2400.

SUPPLEMENTARY INFORMATION: OSHA's current regulation at Section 1904.2 partially exempts certain lower-hazard industries classified in Standard Industrial Classification (SIC) codes 52 through 89 from injury and illness recordkeeping requirements. Lower hazard industries are those industries with an average Days Away, Restricted, or Transferred (DART) rate at or below 75 percent of the national average DART rate. The DART rate represents the total non-fatal injuries and illnesses resulting in days away from work, restricted work activity, and/or job transfer per 100 full-time employees for a given period of time (usually 1 year). The current list of partially exempt industries, which is included in Appendix A to Subpart B, is based on injury and illness data compiled by the Bureau of Labor Statistics (BLS) for 1997, 1998 and 1999.

OSHA is proposing to revise the list of partially exempt industries in Appendix A using the North American Industry Classification System (NAICS). The revised list in proposed Appendix A is based on DART rates compiled by BLS for 2007, 2008 and 2009. Industries listed in proposed Appendix A would still be required to keep records if requested to do so by BLS in connection with its Annual Survey (29 CFR 1904.42), or by OSHA in connection

with its Data Initiative (29 CFR 1904.41).

OSHA is also proposing to revise Section 1904.39, which currently requires an employer to report to OSHA, within eight hours, all work-related fatalities and in-patient hospitalizations of three or more employees. The proposed rule would require an employer to report to OSHA, within eight hours, all work-related fatalities and all work-related in-patient hospitalizations; and within 24 hours, all work-related amputations.

This regulation was developed in accordance with the principles of Executive Order 12866 and Executive Order 13563. Executive Order 12866 requires that OSHA estimate the benefits, costs, and net benefits of proposed regulations. The Agency estimates the regulation will cost approximately $8.5 million, on an annualized basis. As discussed elsewhere in this preamble, the Agency believes the annual benefits, while unquantified, are significantly in excess of the annual costs.

Background

On June 22, 2011 OSHA proposed to update Appendix A to Subpart B of its Injury and Illness Recording and Reporting regulation. See 76 FR 36414. The Notice of Proposed Rulemaking (NPRM) also contained a proposed requirement to report to OSHA, within eight hours, all work-related fatalities and all work-related in-patient hospitalizations; and within 24 hours, all work-related amputations. The comment period for the NPRM ran through September 20, 2011. On September 16, 2011 OSHA received a request to extend the comment period through October 20, 2011. The National Automobile Dealers Association requested this extension to provide them more time to evaluate the Bureau of Labor Statistics injury and illness data used for the proposed industry exemption analysis. OSHA has agreed to this request. The docket is being reopened for comment for an additional 30 days.

Public Submissions

OSHA invites comment on all aspects of the proposed rule. OSHA specifically encourages comment on the questions raised in the issues and potential alternatives sections of this preamble. Interested persons must submit comments by October 28, 2011. The Agency will carefully review and evaluate all comments, information, and data, as well as all other information in the rulemaking record, to determine how to proceed.

You may submit comments in response to this document (1) electronically at *http://www.regulations.gov,* which is the Federal e-rulemaking portal; (2) by fax; or (3) by hard copy. All submissions must identify the Agency name and the OSHA docket number (Docket No. OSHA–2010–0019) or RIN (RIN No. 1218–AC50) for this rulemaking. You may supplement electronic submissions by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit three copies to the OSHA docket office (see **ADDRESSES** section). The additional materials must clearly identify your electronic comments by name, date, and docket number, so OSHA can attach them to your comments.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of submissions. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA docket office at (202) 693–2350 (TTY (877) 889–5627).

Access to Docket

Comments in response to this **Federal Register** notice are posted at *http://www.regulations.gov,* the Federal e-rulemaking portal. Therefore, OSHA cautions individuals about submitting personal information such as social security numbers and birthdates. Although submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through that Web site. All comments and exhibits, including copyrighted material, are available for inspection and copying at the OSHA docket office. Information on using *http://www.regulations.gov* to submit comments and access dockets is available on that Web site. Contact the OSHA docket office for information about materials not available through the Web site and for assistance in using the Internet to locate docket submissions.

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Authority and Signature

This document was prepared under the direction of Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health. It is issued under Sections 8 and 24 of the Occupational Safety and Health Act (29 U.S.C. 657, 673), 5 U.S.C. 553, and Secretary of Labor's Order 4–2010 (75 FR 55355, 9/10/2010).

Signed at Washington, DC, on September 22, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2011–24779 Filed 9–27–11; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2011–6]

Designation of Agent To Receive Notification of Claimed Infringement

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Copyright Office is issuing this Notice of Proposed Rulemaking to solicit public comment on proposals to update its interim regulations governing the designation by online service providers of agents to receive notifications of claimed copyright infringement as provided for in the Copyright Act.

DATES: Written comments are due November 28, 2011. Reply comments are due December 27, 2011.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at *http://www.copyright.gov/onlinesp/NPR.* The online form contains fields for required information including the name and organization of the commenter, as applicable, and the ability to upload comments as an attachment. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of

the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at 202–707–8125 for special instructions.

FOR FURTHER INFORMATION CONTACT: Robert Kasunic, Deputy General Counsel, Copyright Office, GC/I&R, P.O. Box 70400, Washington, DC 20024. *Telephone:* (202) 707–8380. *Fax:* (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Background

In 1998, the Online Copyright Infringement Liability Limitation Act (Title II of the Digital Millennium Copyright Act, Pub. L. 105–304, 112 Stat. 2860 (Oct. 28, 1998)) amended chapter 5 of the Copyright Act, Title 17 of the United States Code, to provide limitations on liability for online service providers relating to material on their systems. With respect to material residing, at the direction of a user, on a system or network controlled or operated by or for the service provider, the limitations of liability under section 512 are available only if the service provider has satisfied certain conditions, one of which is the designation of an agent to receive notification of claimed copyright infringement to the Copyright Office, and through the service provider's Web site in a publicly accessible location. The Copyright Office is required to maintain an online directory of designated agents. 17 U.S.C. 512(c)(2). Although this takedown notification process is detailed in subsection 512(c) and is a condition precedent for the limitations of liability under that subsection, the notification process and the elements of notification set forth in subsection 512(c)(3) are also referenced in subsections 512(b) and (d), relating to system caching and information location tools respectively.

Because that Act was effective on its date of enactment and a procedure to enable the designation of agents needed to be in place immediately thereafter, the Copyright Office issued, without opportunity for comment, interim regulations governing the designation by service providers of agents to receive notifications of claimed infringement. 63 FR 59233 (Nov. 3, 1998). The Office made clear that the interim regulations would be replaced by more complete regulations to be promulgated following notice and opportunity for comment. The interim regulations have functioned satisfactorily for many years, but issues have arisen with respect to the currency and accuracy of the information in the directory, and the Office also intends to implement an electronic process by which service providers may designate agents to receive notifications of claimed infringement and an electronic database to search for designated agents of online service providers. This notice provides a general overview of the Office's vision for the new system and seeks public comment on proposed rules that would govern the submission and updating of information relating to designated agents.

Discussion

Electronic Filing. The Copyright Office is developing an online submission form to be used by service providers to designate their respective agents to receive notifications of claimed copyright infringement. If a service provider chooses to designate an agent, it will be required to utilize the online procedure to submit the required information to the Copyright Office. Service providers that have already designated an agent under the interim regulations will be required to file new designations. A submission that does not provide information for each required field, or that provides information identified as inappropriate (*e.g.,* a phone number field that is completed with all zeros), will be automatically rejected. Once this electronic system is adopted, the Office will no longer accept paper submissions, including documents entitled ''Interim Designation of Agent to Receive Notifications of Claimed Infringement,'' as it did pursuant to the interim regulations. Given that online service providers, by definition, operate in an online environment, the Office does not anticipate that an electronic-only designation procedure would be burdensome to submitters. Moreover, an exclusively electronic process is integral to an increase in efficiency and a reduction of costs in the system.

In order to access the electronic designation of agent form, the Office proposes to require service providers to establish accounts with the Copyright Office, obtaining a username and password, through the Copyright Office's Web site. There would be no charge for establishing an account. The account must be used in order to periodically validate designation information or to make changes to designation information. The account will serve as a means of authenticating the person or entity entitled to validate or amend a service provider's designation of agent information. The Office seeks comment on this requirement.

While the Copyright Office is willing to consider allowing a service provider to delegate this responsibility to an agent or other designee, there may be reasons to be concerned about the accuracy of amendments or validations of existing designation information that are not provided by the service provider itself. If the designated agent were permitted to do so, the service provider nevertheless would bave to assume all responsibility for the acts of the agent. The Office seeks public comment on the costs and/or benefits of allowing service providers to delegate, to persons other than their employees, responsibility for maintaining their designated agent information. The current proposed regulation requires that the designation, or any validation or updating of the information in the designation as described below, be submitted by the service provider itself.

Periodic Validation. A small random sampling of a portion of the current directory reveals that a number of existing designations are associated with businesses that have ceased operations. Although the interim regulations require a service provider that ceases operations to notify the Copyright Office by certified or registered mail, few online service providers have complied with this requirement. Similarly, although the Office is unable to discern the precise percentage of designations that contain outdated information, the number of amended designations that the Office does receive suggests that many designations probably are outdated, and it is likely that a sizable portion of paper designations contain information that is no longer accurate. In order to help maintain the accuracy and utility of the directory of designated agents, the Office proposes that each entity that has filed a designation of agent using the online template be required, either annually, every two years, or at some other regular interval, to validate the information set forth in its designation to insure that the directory remains accurate. If any information is no longer accurate, the validation process would enable the responsible party to amend the designation to correct any outdated information. Any revision in a service provider's designation of an agent would create a new record, or version, within the Copyright Office's database. Through the use of ''versioning'' of the records, the Copyright Office will be able to provide a record indicating what information was in the directory for a particular service provider on any given

date. Such information could become important in litigation in order to ascertain whether a service provider was in compliance with the requirements of the statute at a particular point in time. Prior versions of a designation will constitute public records that may be obtained from the Copyright,Office, *e.g.,* when needed for use in litigation. The Office requests comments on whether such prior versions should also be made accessible via the Office's public Web site. In determining whether to make prior versions available via the Web site, consideration should be given to the possible additional cost of constructing a system that provides this form of access (a cost that would most likely be reflected in greater fees), the potential for confusion (*i.e.,* whether a person seeking current information about a service provider's designated agent might inadvertently end up with the information from a prior version), and the benefit of being able to gain immediate access to such information.

The Office's online system would automatically generate, at specific periods of time (*e.g.,* 30 and 60 days) prior to the date on which a service provider is required to validate the information in its designation, e-mails to the e-mail address designated by the service provider for the validation process as well as to the designated agent's e-mail address. These e-mails would contain a link to a login screen and allow the service provider to log in and validate or amend the information associated with the service provider's account. The service provider would be required to click on the link or otherwise log into its account, review the designation of agent information, and then either validate the existing information or amend the information no later than the specified deadline for validation. Should the service provider fail to validate or amend its designation within the allotted time, the designation would expire and be removed from the directory, and the service provider would be notified of that fact. A service provider whose designation has been removed but who desires to receive the benefits of section 512 would be required to file a new designation of an agent or, possibly, to reactivate and validate the expired designation. A fee would be assessed for both validation and amendment for purposes of cost recovery. The proposed rule specifies that a service provider must validate the information relating to its designated agent at least every two years, but the Office invites comment as to the appropriate time period.

As is discussed further below (''*Contact Information for the Service Provider''*), the Copyright Office proposes to require the submission of the service provider's e-mail address as well as the e-mail address of the designated agent. This is necessary in order for the Office to transmit reminder notices of validation deadlines. However, only the designated agent's e-mail address will be made publicly accessible through the online directory. The service provider's e-mail address will be maintained for Office correspondence only.

The Office proposes to also require contact information for the person filing the designation if that information is different from contact information for the online service provider, to be used in case the Office has any questions regarding the designation or the designated agent. The Office invites comments as to whether such information should be displayed in the online directory. Moreover, because of the likelihood that over time, a person responsible for the filing and updating of a designation may no longer be employed by the service provider, the proposed regulation would require alternate name and contact information for another person connected with the service provider in the event that the person filing the designation cannot be contacted.

Amending a Designation. The new online filing system will permit a service provider to amend the information in its designation of agent at any time, and not only during the validation process. It is anticipated that any amendments will appear in the online directory no later than 24 hours after they are entered by the service provider. The prior version of the designation will be archived by the Office as an official record, but as noted above, the information contained in that prior version is likely to be removed from the online database.

Currently, the interim regulations require a service provider to submit an entire new designation if any of its information has changed. This requirement has created some confusion and has led to the unintentional elimination of some information because some service providers submitted only the new or changed information (*e.g.,* the name of a recently purchased Web site), erroneously believing that it would supplement rather than supplant the original designation. The Copyright Office seeks to prevent this confusion by permitting the service provider to make changes only in those fields that contain out of date information. The current information will be the starting point for any changes. For instance, in the field identifying alternative name(s) of the service provider (including DBAs), it will be possible to add to the existing list of names or remove names, or both. It is anticipated that upon amendment of the form, and prior to its submission, the software will generate a preview feature to allow the user to see all of the information that will be contained in the new record.

Amendment of a designation will require the payment of a fee (to be determined) and will generate an e-mail from the Office to the old e-mail address and any new e-mail address(es) provided as a means of reducing the likelihood of unauthorized changes. Even though there will be a fee associated with amending a designation in the Copyright Office's directory, it is prudent for online service providers to maintain current and accurate information, since courts may find that incorrect or outdated information constitutes a material failure to comply with the statutory requirements necessary for invoking the limitations on liability in section 512. *See, e.g., Ellison* v. *Robertson,* 189 F. Supp. 2d 1051, 1057–1058 (C.D. Cal. 2002), aff'd in part and rev'd in part and remanded, 357 F.3d 1072 (9th Cir. 2004). Moreover, the Copyright Office requests comment on whether it should set the fee for interim amendments below the fee for periodic validation in order to encourage the timely provision of accurate information.

The Office also intends the amendment process to serve as a means of correcting any mistakes in a previous submission. However, as with all amendments, a fee will be required to correct any mistakes and the previous designation containing the mistakes will be maintained in the Office's archived records.

Overlapping Designations. A related issue has periodically arisen when one service provider transfers a Web site to another service provider, but fails to notify the Office of the change. The result is that when the buyer files its designation of agent and lists the purchased Web site as an alternative name, both the seller's and the buyer's designations include that Web site in the directory. This can create confusion for copyright owners who find two different agents identified in the directory for the same service provider. This problem exists with the current directory. (*See, e.g.,* the various designations for ''Altavista,'' at *http://www.copyright.gov/onlinesp/list/a_agents.html*) The Office can conceive of two options in such situations. First,

the two designations can both exist in the online directory until the time for the validation of the old designation, at which time the old designation would expire. In the meantime, persons seeking the identity of and contact information for a service provider's agent may find two inconsistent listings for the service provider's designated agent and might have to suffer the inconvenience of serving a notice of claimed infringement on both the old and the new designated agent. Alternatively, it might be required that the seller, who has control of the existing entry in the online directory of designated agents, amend the designation to identify the buyer as the new service provider and identifying the new agent (or confirming that the existing agent is continuing in that role). The Office seeks public comment on these alternatives and any other alternatives that might address this issue.

Of course, situations may arise (and have already arisen) in which two different service providers have the same name. This is particularly likely with respect to alternative names (*i.e.,* other names by which a service provider is doing business). *See, e.g.,* the two entries for ''CUA'' at *http://www.copyright.gov/onlinesp/list/c_agents.html.* While the Office is not aware of any filings by two different service providers with the same corporate name, it is certainly conceivable that there might be an XYZ Corporation in Alaska and an unrelated XYZ Corporation in Maine, each of which operates as an online service provider. Each would be entitled to file a designated agent. For that reason, the Office is inclined to conclude that it should play no role in ''policing'' the submission of potentially conflicting information designating the agents for service providers with the same name.

At the same time, the Office recognizes the possibility of fraudulent (or negligent) filings and solicits comment on whether and how it might resolve such situations without having to engage in the adjudication of disputes over who has the right to designate an online service provider's agent.

Alternatively, problems caused by overlapping designations could possibly be eliminated if the organizing principle of the directory were to be shifted to focus on service provider's web address. See the discussion below (''*Possible Alternative Organizing Principle for Directory: Designation of Web Address''*).

Mandatory Re-filing. As the Office makes the transition to an electronic filing system, it will be necessary that all service providers refile (and, if necessary, update) their previously filed designations of agents to receive notifications of claimed infringement. The Office proposes the requirement for two reasons: (1) As noted above, due to the passage of years since it was created, the current directory contains out-of-date information, including information about service providers that no longer exist, and (2) the current directory consists of a list of service providers with a link, for each service provider, to a pdf file of the paper ''Interim Designation of Agent to Receive Notifications of Claimed Infringement'' or ''Amended Interim Designation of Agent to Receive Notifications of Claimed Infringement'' that was submitted to the Office by the service provider. The new directory will consist of a database to be populated with data entered online by the service provider itself. In order to ensure that the database contains accurate, up-to-date information, and in order to avoid requiring Copyright Office personnel to key in the information from the existing directory, creating additional costs that would have to be passed on to service providers and creating the potential for errors as the information is keyed into the directory, the Office proposes to place the burden of supplying complete, up-to-date information on service providers, who are in the best position to ensure that the new directory consists of complete and accurate information.

Upon adoption of the electronic system, an approximately one year transition period will begin. During the transition period, the existing paper-generated database will be maintained. At the same time, the new designated agent database will begin to be populated and no new paper designations will be accepted. During the transition period, a listing in either database will satisfy the requirements of section 512(c)(2) and parties seeking to locate a service provider's designated agent will need to search both databases. Approximately one year after the effective date of the final rule, all paper-submitted designations will become invalid and only those designations contained in the new electronically-submitted directory will satisfy the statutory requirement for designating an agent with the Copyright Office.

Filing Fee. The Copyright Office will establish fees to file, validate, or amend a designation of agent to receive notifications of claimed copyright infringement. In each instance, a new record, or version, will be created, including when a preexisting record is simply validated. The Office will conduct a cost study as it builds the online system to determine the appropriate fee or fees and then will publish an additional notice of proposed rulemaking to seek comments on the proposed fees. Such fee(s) will also be incorporated into the Office's general fee schedule set forth at 37 CFR 201.3. The online filing fee may be less than the current $105 fee for a paper filing due to the likely decrease in human labor required to manually input and cross-reference the information to the online directory of designated agents appearing on the Copyright Office's Web site, but it is likely that part of the fee, during an initial period of time, will be used to recoup the costs of building the new online system. Since a validation or an amendment will result in a replacement of the prior version, there is likely to be a fee associated with these transactions, but the fees for amendment and/or validation may be lower than the initial filing fee. The cost study will also examine the additional cost associated with indexing multiple alternative names for a single service provider. Based on a random sampling of a portion of the designations, the Office concludes that the majority of service providers list five or fewer alternative names, but that a significant remainder list fifty to as many as three thousand alternative names. While the Office is inclined to continue to make it possible for service providers to list as many alternative names as they deem relevant in order to enhance the utility of the directory, those service providers with larger numbers of alternative names should pay their proportionate share of the indexing cost. Therefore, the Office contemplates continuing to charge an additional fee for alternative names of the online service provider. Currently, the Copyright Office charges $30 for each group of ten (or fewer) alternative names, but for technical reasons it is preferable to charge at least a nominal fee for each alternative name.

Content. The Office proposes that the information required from service providers through the online submission process should be, for the most part, the same as that currently required on the paper designations under the interim regulation. Under the proposed regulatory amendment, a service provider would be required to state its full legal name, its physical street address, its e-mail address (a new requirement; see the discussion below), all alternative names under which it does business, and the name, address, telephone number, and e-mail address of the agent designated to receive notification of claimed infringement.

The Office is inclined to continue to require that the e-mail address be submitted in traditional format (*e.g., userid@domain.com*) so that it can automatically verify the authenticity of the address and return e-mails to that address. Some concern has been expressed in the past about displaying the agent's e-mail address on the Office's Web site, and suggestions have been made to the Office to display e-mail addresses as text (*e.g.,* userid at domain dot com) in order to reduce automated harvesting and spam software programs from locating service providers' e-mail addresses. While the Copyright Office is sympathetic to this problem, it is a fact of the Internet that online users and online service providers must resolve by their own means. Translating working e-mail addresses into text and vice versa would require additional programming costs and may create additional problems for the system. Moreover, the whole point of the database is to make it easy to locate a service provider's designated agent and to serve a notification of claimed infringement on that agent. On balance, it seems that there is more to be said for facilitating such notifications by providing an operable e-mail address than for requiring someone who wishes to send such a notification to key in the address in each case. Accordingly, the Office is not inclined to alter e-mail addresses within the database, but solicits comments from the public on this issue.

Service Provider Identity and Alternative Names. In addition to the legal name of the individual or corporation meeting the statutory definition of a service provider, the Office allows the service provider to list any alternative names (including DBAs) that would enable a copyright owner to identify the service provider and its agent. The Copyright Office leaves the determination of what alternative names to include up to the service provider, but the information provided should reasonably identify the service provider.

Agent's Identity. Under the interim regulation, the Office initially required the online service provider to identify the proper name of the designated agent to whom notifications of alleged copyright infringement are to be sent. However, as a result of concerns that personnel changes could inadvertently render a designation of agent obsolete, the Office has subsequently allowed service providers to designate a specific position or a particular title (*e.g.,* Copyright Manager, VP legal affairs, or General Counsel) rather than an individually named person as its agent. The Office is inclined to allow such designations in the proposed rule, but is not inclined to permit a service provider to designate an entity generally (*e.g.,* law firm or copyright management agency) as its agent. The Office is concerned that notices of claimed infringement addressed to a general entity, rather than a natural person or specific title, will be overlooked or not attended to in a timely fashion. This concern is reduced when a service provider designates a specific position or title at an entity or a natural person as its agent, particularly when that role is associated with a specific e-mail address.

Section 512(c)(2)(A) specifies that the limitation of liability under subsection (c) is contingent on substantially providing ''the name, address, phone number and electronic mail address of the agent.'' The legislative history explains that: ''The substantial compliance standard in subsections (c)(2) and (c)(3) are intended to be applied so that technical errors (such as misspelling a name, supplying an outdated area code if the phone number is accompanied by an accurate address, or supplying an outdated name if accompanied by an e-mail address that remains valid for the successor of the prior designated agent or agent of a copyright owner) do not disqualify service providers and copyright owners from the protections afforded under subsection (c). It is expected that the parties will comply with the functional requirements of the notification provisions—such as providing sufficient information so that a designated agent or the complaining party submitting a notification may be contacted efficiently—in order to ensure that the notification and take down procedures set for in this subsection operate smoothly.'' Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, (Rep. Coble) (Comm. Print 1998), at 31–32. Accord: Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105–551, pt. 2, at 56 (1998).

The only judicial decision to address whether Congress's use of the word ''name'' requires a personal name or may be interpreted broadly to encompass a position or title, in dictum, stated that ''[n]othing in the DMCA mandates that service providers must designate the name of a person as opposed to a specialized department to receive notifications of claimed infringement.'' *Hendrickson* v. *eBay Inc.,* 165 F. Supp. 2d 1082, 1092, fn. 13 (C.D. CA 2001).

The Office invites public comment on the question of whether an online service provider must provide the actual name of a natural person or whether the name of a specific position or title will satisfy this requirement.

The Office is also inclined to permit a service provider to designate as an agent a position or individual within the service provider's organization itself rather than requiring the agent to be an unrelated third party. Since there are arguably both benefits and drawbacks to having a third party or an internal representative serve as the agent, the Office is inclined to permit each service provider to make the decision that best suits its needs. The Office is not, however, inclined to permit the designation of multiple agents, as doing so would unjustifiably complicate the statutory process. Although the Office is sensitive to the concern that multiple agents would be helpful in case of personnel turnover, the Office believes that the ability to name a position or title rather than an individual adequately addresses this issue.

Contact Information for the Service Provider. The statute addresses some of the information a service provider must provide to the Copyright Office, but also authorizes the Register of Copyrights to determine any additional contact information that is deemed appropriate. Under the current interim regulation, the service provider is required only to provide its legal name and permitted to provide alternative names used by the service provider. The Office is inclined to require the service provider to provide an e-mail address in order to send validation notifications to the service provider as well as the designated agent. This information is sought for the benefit of the service provider so that it is directly on notice of the impending validation requirement and potential expiration of its designated agent's listing with the Copyright Office. Since the service provider will be required to create an account in order to use the online system, the service provider will also be required to use that account to validate or amend the designation. Therefore, it is necessary to have a means of contacting the service provider. However, this e-mail address will not be posted in the Copyright Office's directory of designated agents, but rather used by the Office for the maintenance of the designated agent listing.

Contact Information for the Designated Agent. The statute requires the online service provider to provide the telephone number and e-mail address of the designated agent. This

information is central to the requirements of 512(c)(2) and it is particularly important that it be kept current. See, *e.g., Ellison* v. *Robertson,* 189 F. Supp. 2d 1051, 1057–1058 (C.D. Cal. 2002), aff'd in part and rev'd in part and remanded, 357 F.3d 1072 (9th Cir. 2004). A fax number may be provided, but is optional information that supplements, but does not supersede the requirement of listing a telephone number and e-mail address for the designated agent.

Service Provider's and Agent's Address. The Office proposes to change its rules to permit a post office box to serve as a designated agent's address. The Office proposes this change due to concerns raised about an agent's privacy, particularly where the agent's only address is a home address. However, the Office proposes not, as a matter of course, to permit a post office box to serve as the address for a service provider, as it can be important that copyright owners are able to physically locate the service provider, *e.g.,* for service of process. The Register of Copyrights may waive this prohibition in exceptional circumstances upon written request from the service provider.

The Office is also taking this opportunity to clarify that a designated agent's address can be outside of the United States; because a copyright owner is permitted to give notice of claimed infringement via e-mail, the copyright owner bears no additional expense or burden in giving notice to an agent located in a foreign country. The Office also permits a service provider to list a foreign address for itself. Although the limitations on liability in the United States Copyright Act may not apply to a particular foreign entity, the Office believes that if a U.S. court finds cause to assert jurisdiction over a foreign service provider pursuant to the U.S. Copyright Act, then no reason exists why the Copyright Office's regulations should prohibit that service provider from having filed a designation of agent as a condition precedent to receiving the benefits of the limitations of liability afforded by section 512.

Signature. The Office proposes to eliminate the requirement of an actual signature, which has been a requirement for the paper designations that have been submitted up to now. Because all online filings will require the creation of an online account as well as payment via pay.gov with a credit card, a checking account, or a Copyright Office deposit account, the online system will be able to reasonably verify and authenticate the identity of the person submitting, validating or amending the designation of agent filing. The person submitting the designation will also be required to provide contact information and attest to his or her authority to file on behalf of the subject service provider.

Related Service Providers. The Copyright Office solicits comments as to whether related service providers (*e.g.,* parent and subsidiary companies) should be permitted to file a single, joint designation of agent to receive notifications of claimed infringement. Under the interim regulations, related companies are considered separate entities and thus required to file separate designations. The Office has received occasional complaints from service providers about the inefficiency of this practice. The Office is receptive to any process which eases the burden on service providers without sacrificing clarity and usefulness of the online directory, and is inclined to permit related service providers to file a joint designation. However, it may be that any efficiency gained by a joint filing would be undercut should changes to a designation become necessary. For example, if one of the related companies were to change its address, agent or one of its Web site alternative names, then the joint designation would have to be revised and perhaps even severed to account for the then-current information of each of the related companies. In contrast, if each company had maintained its own designation, then a change at one company would only affect one designation.

If the Office permits joint designations, the service providers named on a joint designation would be required to have and state a legally recognized relationship (*e.g.,* parent/subsidiary). Informal teaming arrangements would not be acceptable for a joint filing. The person submitting the designation would be required to certify that this requirement had been satisfied and that he or she has the authority of each service provider named on the joint designation to make the submission on each service provider's behalf. The Office will examine as part of its cost study whether there is any additional cost associated with processing a joint designation. If such a fee is imposed, it will be incorporated into the Copyright Office's general fee schedule. The Office requests comments on this proposed change and any information that would weigh in favor of or against such a change. The Copyright Office is particularly interested in knowing whether the benefits of such a change for an online service provider are outweighed by other considerations.

Possible Alternative Organizing Principle for Directory: Designation of Web Address. As noted above, one possible means of minimizing the number of overlapping designations would be to require that a separate designation be filed for each web address. Since all or almost all service providers operate via Web sites, and since in most if not all cases a single web address will be used by only one service provider, requiring that a separate designation be submitted for each web address could effectively prevent all or almost all such duplicative designations. Since each web address is unique, providing that a designation of the agent for a particular web address will not be changed without the consent of the service provider currently identified in that designation in the Office's database should insure against contradictory entries in the directory. Moreover, it may well be that Web addresses are the principal means by which persons identify service providers. A substantial portion of the names currently used in the directory of agents consists of web domains.

The Office seeks comment on whether requiring a separate designation for each web address is the preferable means of organizing the directory. If so, a further question arises as to whether service providers should continue to be able to identify additional names by which they are known, which would be searchable in the directory. Conceivably, the web address is the primary or even the only name that a person searching the directory would need to ascertain who the designated agent of a service provider is.

However, further thought needs to be given to what is meant by ''web address.'' As a general proposition, this would be the basic domain (*e.g.,* loc.gov, *google.com,* or *verizon.net*) We recognize the possibility that sometimes, multiple service providers will use the same domain, but in such cases it is our understanding that each service provider would be using a different subdomain (*e.g.,* thomas.loc.gov).or folder (*e.g.,* loc.gov/crb). The Office seeks comments on the extent to which subdomains and folders are used by separate service providers, and whether separate designations of agents should be permitted for subdomains and for Uniform Resource Locators (''URLs'') of folders within a domain.

If using web addresses as the organizing principle for the directory makes sense, the Office also seeks comment on whether, as an alternative to a web address, a service provider

could in appropriate circumstances identify itself by reference to the name of the ''app'' through which it offers online services. By ''app,'' we refer to ''an application, typically a small, specialized program downloaded onto mobile devices.'' *See http://dictionary.reference.com/browse/app* (definition of ''app''). While it is the Office's impression that as a general proposition, any app currently will be associated with a particular Web site, further information about the current and likely future usage of apps as online services will assist the Office in fleshing out the requirements for the new online directory.

The Copyright Office invites comments on any and all aspects of the proposed regulations and of the proposed new system for processing online service provider agent designations discussed above.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes to amend 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Revise § 201.38 to read as follows:

§ 201.38 Designation of Agent To Receive Notification of Claimed Infringement.

(a) *General.* This section prescribes the rules under which service providers may provide the Copyright Office with designations of agents to receive notification of claimed infringement pursuant to section 512(c)(2) of title 17 of the United States Code, as amended.

(b) *Electronic Filing.* Service providers choosing to submit to the Copyright Office a designation of agent to receive notification of claimed infringement must do so by establishing an account on the Copyright Office's Web site and then utilizing the applicable online template. Paper submissions and amendments made pursuant to the interim regulation for the designation of will no longer be accepted. A service provider that has filed a paper designation of an agent under the interim regulation and desires to remain in compliance with section 512(c)(2) must resubmit its designation of agent using the online template within one year after [the effective date of this amendment]. On [DATE one year after the effective date of this amendment], designations that were submitted prior to [The effective date of this amendment] shall expire.

(c) *Content.* All required template fields must be completed in order for the submission to be submitted to the Copyright Office. The person submitting the designation of agent to receive notification of claimed infringement must provide:

(1) The full legal name and physical street address of the service provider and, if desired, any related entity that has a legally recognized relationship with the service provider and that shares the same physical street address. A post office box will not be accepted, unless in exceptional circumstances and upon written request by the service provider, the Register of Copyrights determines that the circumstances warrant a waiver of this requirement;

(2) Alternative names, if any, under which the service provider, and any related entity, is doing business; The service provider should include any names that it expects members of the public would be likely to use if engaging in a search in the Copyright Office's electronic directory for its designation of an agent to receive notification of claimed infringement.

(3) The name of the agent (either an individual, a specific position, or a title) designated to receive notification of claimed infringement. An agent may be a third party or an employee of the service provider, but must be a natural person or a position occupied by an individual, rather than a business or office name. Multiple agents may not be named;

(4) The physical mail address (street address or post office box), telephone number, and e-mail address of the agent designated to receive notification of claimed infringement;

(5) An e-mail address of the online service provider for receipt of e-mail notifications from the Copyright Office regarding the recurring validation process or amendments to the service provider's directory information;

(6) The full legal name, title, physical mail address, telephone number, and e-mail address of the person submitting the designation of agent on behalf of the service provider.

(7) The full legal name, title, physical mail address, telephone number, and e-mail address of another person affiliated with the service provider, who can be contacted by the Copyright Office in the event that the person who submitted the designation of agent cannot be contacted.

(8) An attestation by the person submitting the designation of agent that he or she has the appropriate authority of the service provider, including any related entities listed, if applicable, to submit the designation of agent on its or their behalf.

(d) *Directory of Designated Agents.*

For a period of one year after the effective date of this regulation, the Copyright Office will maintain two directories of designated agents which in combination will satisfy the requirements of section 512(c)(2): the directory consisting of notifications submitted before [the effective date of this amendment] (the ''old directory'') and the directory consisting of notifications submitted electronically on or after [the effective date of this amendment] (the ''new directory''). During this transition period, any new designation of an agent must be submitted via the electronic submission process, and only designations submitted via that process may be amended. The directories of designated agents will be available on the Copyright Office's Web site at: *http://www.copyright.gov/onlinesp/.* One year after the effective date of this regulation, the old directory will no longer be accessible through the Copyright Office's Web site and will no longer satisfy the requirements of section 512(c)(2).

(e) *Validation.*

A service provider that has filed a designation of agent on or after [INSERT the effective date of this amendment] is required either to validate the accuracy of the information contained in its designation or to amend the information as appropriate and validate the accuracy of the amended information within two years after the later of (1) The filing of the designation of agent or (2) the most recent amendment of the designation that has been submitted by the service provider. If a service provider does not validate or amend its designation within that two-year period, the designation of agent will expire and will be removed from the Office's directory.

(f) *Amendment.*

At any time after a service provider has designated an agent with the Copyright Office, the service provider may amend the filing online to correct or update information. The Copyright Office will maintain all versions of electronic designations, including validations or amendments, for evidence in litigation, but only the current information in the directory will be available online.

(g) *Fees.*

The Copyright Office's general fee schedule, located at section 201.3 of title 37 of the Code of Federal Regulations, sets forth the applicable fees for the online filing of a service provider's designation of agent to

receive notification of claimed infringement, periodic validation or amendment thereof, as well as the fee for the listing of alternative names.

Dated: September 21, 2011.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2011–24780 Filed 9–27–11; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[EPA–R06–RCRA–2009–0312; SW FRL–9472–6]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Withdrawal of proposed rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of proposed rule.

SUMMARY: Because EPA has discovered additional information which we believe is pertinent for consideration in this decision, we are withdrawing the proposed rule to grant an exclusion for Republic Services, Inc./BFI Gulf West Landfill (Gulf West) located in Anahuac, TX, published on January 28, 2011. This notice removes the proposed rule published in 76 FR 5110 (January 28, 2011) for public review and comment.

FOR FURTHER TECHNICAL INFORMATION CONTACT: Michelle Peace by mail at U.S. EPA Region 6, Multimedia Planning and Permitting Division, Corrective Action and Waste Minimization Section (6PD–C), 1445 Ross Avenue, Dallas, TX 75202, by phone at (214) 665–7430 or by e-mail at *peace.michelle@epa.gov*.

SUPPLEMENTARY INFORMATION: Because EPA has discovered additional information pertinent to the final disposition of the petition, we are withdrawing the proposed rule for Republic Services, Inc./BFI Gulf West Landfill (Gulf West) located in Anahuac, TX, published on January 28, 2011 (76 FR 5110). EPA subsequently received information after the comment period which highlighted several deficiencies in the data submitted by Gulf West. EPA will return the December 2009 petition submitted by Gulf West. No further action will be taken on this petition. A new petition will be required for this waste stream.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f).

Dated: September 14, 2011.

Carl E. Edlund,

Division Director, Multimedia Planning and Permitting Division, Region 6.

[FR Doc. 2011–24984 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1220]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this proposed rule is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before December 27, 2011.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1220, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)	
				Existing	Modified
Town of Pownal, Vermont					
Vermont	Town of Pownal	Potter Hollow Brook	At the Hoosic River confluence	+507	+504
			Approximately 1,200 feet upstream of the Hoosic River confluence.	+507	+506

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Pownal
Maps are available for inspection at the Town Office, 467 Center Street, Pownal, VT 05261.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Existing	Modified	
Pima County, Arizona, and Incorporated Areas				
Agua Caliente Split Flow	Approximately 1,500 feet upstream of the Tanque Verde Creek confluence.	+2584	+2583	Unincorporated Areas of Pima County.
	Approximately 500 feet downstream of the Agua Caliente Wash divergence.	+2588	+2593	
Agua Caliente Spur Flow	Approximately 0.5 mile downstream of East Tanque Verde Road.	+2594	+2593	Unincorporated Areas of Pima County.
	Approximately 0.4 mile upstream of East Tanque Verde Road.	+2623	+2624	
Agua Caliente Wash	Approximately 130 feet downstream of North Bonanza Avenue.	+2566	+2567	City of Tucson, Unincorporated Areas of Pima County.
	Approximately 700 feet upstream of Horse Head Road.	+2807	+2805	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Tucson

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Existing	Modified	

Maps are available for inspection at the Planning and Development Services Department, 201 North Stone Avenue, 3rd Floor, Tucson, AZ 85701.

Unincorporated Areas of Pima County

Maps are available for inspection at the Pima County Flood Control District, 97 East Congress Street, 3rd Floor, Tucson, AZ 85701.

Mesa County, Colorado, and Incorporated Areas

Leach Creek	Approximately 200 feet upstream of U.S Route 6 (U.S. Route 50).	+4548	+4547	City of Grand Junction, Unincorporated Areas of Mesa County.
	Approximately 0.55 mile upstream of Summer Hill Way.	None	+4751	
North Leach Creek	At the Leach Creek confluence	None	+4561	City of Grand Junction.
	Approximately 200 feet upstream of G Road	None	+4567	
Ranchmen's Ditch	At the Mesa Mall/Patterson Road Storm Sewer output	+4548	+4547	City of Grand Junction
	Approximately 0.45 mile upstream of North 12th Street.	+4690	+4688	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Grand Junction

Maps are available for inspection at 250 North 5th Street, Grand Junction, CO 81501.

Unincorporated Areas of Mesa County

Maps are available for inspection at 544 Rood Avenue, Grand Junction, CO 81502.

St. Mary Parish, Louisiana, and Incorporated Areas

Lower Atchafalaya River	At the downstream side of Berwick Lock	+5	+8	City of Patterson, Town of Berwick.
	At the downstream side of Levee Road	+5	+8	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Patterson

Maps are available for inspection at 1314 Main Street, Patterson, LA 70392.

Town of Berwick

Maps are available for inspection at 3225 3rd Street, Berwick, LA 70342.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: September 13, 2011.

Sandra K. Knight,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–24898 Filed 9–27–11; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 79

[MB Docket No. 11–154; FCC 11–138]

Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes rules to implement provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') that mandate rules for closed captioning of certain video programming delivered using Internet protocol (''IP''). The Commission seeks comment on rules that would apply to the distributors, providers, and owners of IP-delivered video programming, as well as the devices that display such programming.

DATES: Comments are due on or before October 18, 2011; reply comments are due on or before October 28, 2011. Written PRA comments on the proposed information collection requirements contained herein must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before November 28, 2011.

ADDRESSES: You may submit comments, identified by MB Docket No. 11–154 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Electronic Comment Filing System (ECFS) Web Site: http://fjallfoss.fcc.gov/ecfs/.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by *e-mail*: *FCC504@fcc.gov* or *phone:* 202–418–0530 or *TTY:* 202–418–0432.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act proposed information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding pertaining to Section 202 of the CVAA, contact Diana Sokolow, *Diana.Sokolow@fcc.gov*, of the Policy Division, Media Bureau, (202) 418–2120. For additional information on this proceeding pertaining to Section 203 of the CVAA, contact Jeffrey Neumann, *Jeffrey.Neumann@fcc.gov*, of the Engineering Division, Media Bureau, (202) 418–7000. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 11–138, adopted and released on September 19, 2011. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–257, Washington, DC 20554. This document will also be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

This document contains proposed information collection requirements. As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Public and agency comments are due November 28, 2011.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR as show in the **SUPPLEMENTARY INFORMATION** section below (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

OMB Control Number: 3060–XXXX.

Title: Section 79.4, Closed Captioning of Video Programming Delivered Using Internet Protocol.

Form Number: Not applicable.

Type of Review: New collection.

Respondents: Individuals or households; Businesses or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 1,140 respondents; 12,225 responses.

Estimated Time per Response: 0.084–5 hours.

Frequency of Response: On occasion reporting requirement; Recordkeeping requirement.

Obligation to Respond: Voluntary and required to obtain or retain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 154(i), 154(j), 303(r), and 613.

Total Annual Burden: 6,140 hours.

Total Annual Costs: $420,000.

Privacy Act Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.* The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries.'' As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 ''Informal Complaints and Inquiries'', in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010.

Needs and Uses: The Commission is seeking approval for this proposed information collection from the Office of Management and Budget (OMB). On September 19, 2011, the Commission released a Notice of Proposed Rulemaking, MB Docket No. 11–154; FCC 11–138. This rulemaking proposed information collection requirements that support the Commission's IP closed captioning rules that would be codified at 47 CFR 79.4, as required by the CVAA.

The proposed information collection requirements consist of:

Certifications if Captions Are Not Required

Pursuant to proposed 47 CFR 79.4(c)(1)(i), video programming owners must send program files to video programming distributors and providers either with captions as required by Section 79.4, or with a dated certification that captions are not required for a specified reason.

Pursuant to proposed 47 CFR 79.4(c)(1)(ii), video programming owners must provide video programming distributors and providers with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.

Pursuant to proposed 47 CFR 79.4(c)(2)(ii), video programming distributors and providers must retain all certifications received from video programming owners pursuant to proposed 47 CFR 79.4(c)(1)(i)–(ii) for so long as the video programming distributor or provider makes the certified programming available to end users through a distribution method that uses IP and thereafter for at least one calendar year.

Petitions for Exemption Based on ''Economic Burden''

Pursuant to proposed 47 CFR 79.4(e), a video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning requirements for IP-delivered video programming based upon a showing that they would be economically burdensome.

Petitions for exemption must by filed with the Commission, placed on Public Notice, and be subject to comment from the public.

Complaints Alleging Violations of the Closed Captioning Rules for IP-Delivered Video Programming

Pursuant to proposed 47 CFR 79.4(f)(1), a complaint alleging a violation of the closed captioning rules for IP-delivered video programming may be filed with the Commission. Proposed 47 CFR 79.4(f)(1) would require such a complaint to be in writing, and to include:

The name and address of the complainant;

The name and postal address, Web site, or e-mail address of the video programming distributor, provider, and/or owner against whom the complaint is alleged, and information sufficient to identify the video programming involved;

Information sufficient to identify the software or device used to view the program;

A statement of facts sufficient to show that the video programming distributor, provider, and/or owner has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

The specific relief or satisfaction sought by the complainant; and

The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the complainant).

The Commission is seeking OMB approval for the proposed information collection requirements.

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. The Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') requires the Federal Communications Commission (''Commission'') to revise its regulations to mandate closed captioning on certain video programming delivered using Internet protocol (''IP'').[1] In this Notice of Proposed Rulemaking (''*NPRM*''), we initiate a proceeding that will fulfill this requirement. We seek comment on proposals that would better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, by requiring that programming be provided with closed captions if it was shown on television with captions after the effective date of the rules adopted pursuant to this proceeding. We also seek comment on requirements for the devices that are subject to the CVAA's new closed captioning requirements.[2] Our goal is to require the provision of closed captions with IP-delivered video programming in the manner most helpful to consumers, while ensuring that our regulations do not create undue economic burdens for the distributors, providers, and owners of online video programming.

2. Closed captioning is an assistive technology that provides individuals who are deaf or hard of hearing with access to television programming. Closed captioning displays the audio portion of a television signal as printed words on the television screen. Existing regulations require the use of closed captioning on television.[3] Until now, however, closed captioning has not been required for IP-delivered video programming. That changed with the enactment of the CVAA. Specifically, Section 202(b) of the CVAA revised Section 713 of the Communications Act of 1934, as amended (the ''Act''), to require the Commission to ''revise its regulations to require the provision of

[1] Public Law 111–260, 124 Stat. 2751, § 202(b) (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

[2] *See* Public Law 111–260, § 203.

[3] *See* 47 CFR 79.1 (setting forth the requirements for closed captioning of video programming on television).

closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.[4]

3. The CVAA also required the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (''VPAAC'').[5] Section 201(e)(1) of the CVAA required the VPAAC to submit a report on closed captioning to the Commission six months after its first meeting, or by July 13, 2011.[6] The VPAAC submitted this report on July 12, 2011.[7] By statute, within six months of the submission of the VPAAC Report, the Commission must issue final regulations to require the provision of closed captioning on IP-delivered video programming.[8] Accordingly, the Commission must revise its regulations by January 12, 2012.[9] By the same date, pursuant to Section 203 of the CVAA, the Commission must revise its regulations to include any technical standards, protocols, and procedures needed for the transmission of closed captioning delivered using IP, to ensure that certain apparatus are capable of rendering, passing through, or otherwise permitting the display of closed captions for end users.[10]

We consider below revisions to our rules that would implement the requirements of Sections 202(b) and 203 of the CVAA, as well as the conforming amendment set forth in Section 202(c) of the CVAA. These proposals could fulfill Congress' goal of enabling consumers who are deaf or hard of hearing to have access to IP-delivered video programming. As discussed below, we seek comment on rule changes that would:

- Specify the obligations of entities subject to Section 202(b) by:
- Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and video programming providers along with program files;
- Requiring video programming distributors and video programming providers to enable the rendering or pass through of all required captions to the end user; and
- Requiring the quality of all required captioning of IP-delivered video programming to be of at least the same quality as the captioning of the same programming when shown on television; [11]
- Create a schedule of deadlines by which:
  - All prerecorded and unedited programming subject to the new requirements must be captioned within six months of publication of the rules in the **Federal Register**;
  - All live and near-live programming subject to the new requirements must be captioned within 12 months of publication of the rules in the **Federal Register**; and
  - All prerecorded and edited programming subject to the new requirements must be captioned within 18 months of publication of the rules in the **Federal Register**; [12]
- Craft procedures by which video programming providers and video programming owners may petition the Commission for exemptions from the new requirements based on economic burden; [13]
- Establish a mechanism to make information about video programming subject to the CVAA available to video programming providers and distributors, by requiring video programming owners to provide programming for IP delivery either with captions, or with a certification that captions are not required for a stated reason; [14]
- Decline to adopt particular technical standards for IP-delivered video programming; [15]
- Decline to treat a *de minimis* failure to comply with the new rules as a violation, and permit entities to comply with the new requirements by alternate means; [16] and
- Adopt procedures for complaints alleging a violation of the new requirements.[17] Additionally, we seek comment on the appropriate requirements for devices subject to the closed captioning requirements of Section 203.[18]

II. Background

A. History of Closed Captioning

5. Captions first appeared on television in the early 1970s in an ''open captioning format'' by which the text was transmitted with the video in a manner that was visible to all viewers.[19] In 1977, the Commission adopted rules providing that line 21 of the vertical blanking interval (''VBI'') would be used primarily for the transmission of closed captioning to analog receivers.[20] For

[4] 47 U.S.C. 613(c)(2)(A).

[5] Public Law 111–260, § 201(a) (providing that, within 60 days of the CVAA's enactment, the Chairman must establish an advisory committee). The CVAA was enacted on October 8, 2010, and the Commission announced the establishment of the VPAAC on December 7, 2010. *See* Notice, *Video Programming and Emergency Access Advisory Committee Announcement of Members*, DA 10–2320, 76 FR 2686, January 14, 2011; *see also* Public Notice, Erratum, *Video Programming and Emergency Access Advisory Committee Announcement of Members* (rel. Jan. 7, 2011). Although in the CVAA, this advisory committee is formally known as the ''Video Programming and Emergency Access Advisory Committee,'' its working name was shortened to the ''Video Programming Accessibility Advisory Committee'' in order to avoid confusion with a second advisory committee required by the CVAA that is addressing 9–1–1 emergency access issues. *See* Public Law 111–260, § 106 (directing the Commission to establish an ''Emergency Access Advisory Committee'').

[6] Section 201(e)(1) of the CVAA required the VPAAC's report to include:

(A) A recommended schedule of deadlines for the provision of closed captioning service.

(B) An identification of the performance objectives for protocols, technical capabilities, and technical procedures needed to permit content providers, content distributors, Internet service providers, software developers, and device manufacturers to reliably encode, transport, receive, and render closed captions of video programming, except for consumer generated media, delivered using Internet protocol.

(C) An identification of additional protocols, technical capabilities, and technical procedures beyond those available as of the date of enactment of the [CVAA] for the delivery of closed captions of video programming, except for consumer generated media, delivered using Internet protocol that are necessary to meet the performance objectives identified under subparagraph (B).

(D) A recommendation for technical standards to address the performance objectives identified in subparagraph (B).

(E) A recommendation for any regulations that may be necessary to ensure compatibility between video programming, except for consumer generated media, delivered using Internet protocol and devices capable of receiving and displaying such programming in order to facilitate access to closed captions.

Public Law 111–260, § 201(e)(1).

[7] *See* First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, *available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf* (''VPAAC Report'').

[8] 47 U.S.C. 613(c)(2)(A).

[9] *See id.*

[10] Public Law 111–260, § 203(a)–(b), (d).

[11] *See* Section III.A., *infra.* As discussed below, a covered entity may be permitted to improve upon the quality of the captioning of IP-delivered video programming.

[12] *See* Section III.B., *infra.*

[13] *See* Section III.C., *infra.*

[14] *See* Section III.D., *infra.*

[15] *See* Section III.E., *infra.*

[16] *See* Section III.F., *infra.*

[17] *See* Section III.G., *infra.*

[18] *See* Section IV., *infra.*

[19] *See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility,* FCC 96–318, 61 FR 42249, August 14, 1996.

[20] *See TV Captioning for the Deaf,* Report and Order, 63 FCC 2d 378 (1977). *See also Permissible Uses of the Vertical Blanking Interval*, FCC 93–235, 58 FR 29981, May 25, 1993 (permitting enhanced closed captioning and other broadcast-related information services on line 21, field 2 of the VBI).

analog television, closed captioning is transmitted through encoded data within the television signal's VBI ''which, when decoded, provides a visual depiction of information simultaneously being presented on the aural channel (captions).[21] Since closed captioning is hidden as encoded data transmitted within the television signal, receivers can be (and are) designed to allow consumers to turn the captioning on and off.[22] In addition to displaying the audio portion of a television signal as printed words, captions may identify speakers, sound effects, music, and laughter.[23]

6. The Television Decoder Circuitry Act of 1990 (''TDCA'')[24] required all television receivers with screen sizes of 13 inches or larger, manufactured or sold in the United States, to possess closed captioning capability.[25] In the years that followed, the use of closed captioning increased somewhat, through the voluntary efforts of the video programming industry.[26] As the number of channels of video programming increased, Congress remained concerned that ''video programming through all delivery systems should be accessible'' to individuals who are deaf or hard of hearing.[27]

7. In the Telecommunications Act of 1996, Congress added a new section entitled ''Video Programming Accessibility'' to the Act.[28] To ensure access for individuals with hearing disabilities, Section 713 of the Act requires the closed captioning of video programming.[29] In 1997, the Commission adopted rules and implementation schedules for closed captioning of video programming, as required by Section 713.[30] The schedules varied based on whether programming is analog or digital, Spanish or English, and whether it is pre-rule (*i.e.*, older) or new programming. Today, all new English and Spanish language television programming that is subject to the rule must be provided with closed captions,[31] and 75 percent of pre-rule English language television programming that is subject to the rule must be provided with closed captions.[32] In 2000, the Commission adopted rules governing the display of captions on digital receivers, and the Commission's rules now specify technical standards for the reception and display of captioning on both analog and digital receivers.[33]

B. IP-Delivered Closed Captioning and Sections 202(b) and (c) of the CVAA

8. Today, IP-delivered video programming takes a number of forms, such as programming delivered to a personal computer, tablet device, cellular telephone, game console, Blu-ray player, or set top box. The Commission previously recognized that the Internet has become a powerful method of video programming distribution, and that the amount of video content available on the Internet is continuing to increase significantly each year, as consumers increasingly utilize the Internet for this purpose.[34] The Internet's role in video programming delivery ''has progressed from negligible just a few years ago to an increasingly mainstream role today.''[35] Although much IP-delivered video programming remains inaccessible to individuals who are deaf or hard of hearing, certain entities have taken voluntarily measures to begin including captions on some of their programming.[36]

9. Through the CVAA, Congress sought to ''update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.''[37] The Committee reports state that, while modern technology such as the Internet has everyday benefits, those benefits are not always accessible to people with disabilities.[38] Section 202(b) of the CVAA requires the Commission to revise its regulations to require closed captioning of IP-delivered video programming that was shown on television with captions after the effective date of the new regulations.[39]

10. The CVAA applies broadly to the distributors, providers, and owners of IP-delivered video programming. Specifically, Section 202(b) of the CVAA amends Section 713 of the Act to require the Commission's regulations to ''include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.[40] The Commission may delay or waive the requirements if application to live IP-delivered video programming is ''economically burdensome to providers of video programming or program owners,''[41] and it may exempt a ''service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.''[42] Section 202(b) of the CVAA also requires the Commission to ''establish a mechanism to make available to video programming providers and distributors information on video programming subject to the [CVAA] on an ongoing basis.''[43] Section 202(b) further directs the Commission not to find that a *de minimis* failure is a violation,[44] and to permit entities to meet the new requirements by alternate means.[45] Finally, Section 202(c) of the CVAA consists of a ''conforming amendment'' to Section 713(d) of the Act, regarding the process for petitioning for an exemption.[46]

[21] 47 CFR 73.682(a)(22)(i).

[22] *See 2008 Closed Captioning Order*, FCC 08–255, 74 FR 1594, January 13, 2009 (''*2008 Closed Captioning Order*'').

[23] *See id.*

[24] Public Law 101–431, 104 Stat. 960 (1990) (codified at 47 U.S.C. 303(u), 330(b)).

[25] *See TDCA Order,* FCC 91–119, 56 FR 27200, June 13, 1991 (''*TDCA Order*'').

[26] *See 1997 Closed Captioning Order,* FCC 97–279, 62 FR 48487, September 16, 1997 (''1997 Closed Captioning Order''), *recon. granted in part,* FCC 98–236, 63 FR 55959, October 20, 1998.

[27] H.R. Rep. No. 104–204, 104th Cong., 1st Sess. at 113–14 (1995).

[28] *See* Section 305 of the Telecommunications Act of 1996, Public Law 104–104, 110 Stat. 56 (codified at 47 U.S.C. 613).

[29] 47 U.S.C. 613.

[30] *See generally 1997 Closed Captioning Order.*

[31] 47 CFR 79.1(b)(1)(iv), 79.1(b)(3)(iv).

[32] 47 CFR 79.1(b)(2)(ii). As of January 1, 2012, 75 percent of pre-rule Spanish language television programming that is subject to the rule will be required to be provided with closed captions. *See* 47 CFR 79.1(b)(4)(ii).

[33] 47 CFR 15.119, 15.122.

[34] *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4256, para. 41 (2011) (''*Comcast-NBCU Order*'').

[35] *Id.* at 4262, para. 60.

[36] For example, we are aware that Apple, CBS, Comcast, DISH, Disney/ABC, Fox, Hulu, NBC, Netflix, Time Warner Cable, and YouTube/Google currently provide captions for certain IP-delivered video programming.

[37] *See* S. Rep. No. 111–386, 111th Cong., 2d Sess. at 1 (2010); H.R. Rep. No. 111–563, 111th Cong., 2d Sess. at 19 (2010).

[38] *See* S. Rep. No. 111–386 at 1–2; H.R. Rep. No. 111–563 at 19.

[39] The CVAA defines ''Internet protocol'' as including ''Transmission Control Protocol and a successor protocol or technology to Internet protocol.'' Public Law 111–260, § 206(5).

[40] 47 U.S.C. 613(c)(2)(B).

[41] 47 U.S.C. 613(c)(2)(C).

[42] 47 U.S.C. 613(c)(2)(D)(ii).

[43] 47 U.S.C. 613(c)(2)(D)(v).

[44] 47 U.S.C. 613(c)(2)(D)(vii).

[45] 47 U.S.C. 613(c)(3).

[46] 47 U.S.C. 613(d). Neither the statute nor the legislative history explains what Congress meant by characterizing the amendment as ''conforming.''

C. Section 203 of the CVAA

Congress also determined that the objectives of the CVAA could not be met unless the devices that consumers use to view video programming, including those devices that may be small and portable, are able to display closed captions. Therefore, it enacted Section 203(a), requiring ''that [the] devices consumers use to view video programming are able to display closed captions.'' [47] To do this, Congress directed the Commission to enact provisions that require all ''apparatus designed to receive or play back video programming transmitted simultaneously with sound * * * be equipped with built-in closed caption decoder circuitry or capability'' [48] and contain exceptions only for those devices which are ''display-only video monitors with no playback capability'' [49] and devices with picture screens less than 13 inches for which meeting the regulation is not ''achievable.'' [50] Additionally, the Commission must require that all devices ''designed to record video programming * * * [must] enable the rendering or the pass-through of closed captions'' [51] and that the ''interconnection mechanisms and standards for digital video source devices are available to * * * permit or render the display of closed captions.'' [52]

12. Taken together, these statutory provisions seek to encompass many devices on which consumers view video, such as portable media players, personal computers, televisions, and the devices consumers connect to their televisions to access programming via the Internet and other sources. As in Section 202(b), the Commission is required to prescribe regulations within six months of the VPAAC Report and to provide that entities may meet the requirements of these provisions through ''alternate means.'' [53]

D. VPAAC Working Group 1 and Its Report

13. The VPAAC's first meeting was held at the Commission on January 13, 2011, and a second meeting was held on May 5, 2011. During the first meeting, the VPAAC was divided into four working groups; Working Group 1 took on the task of examining ''issues involved in transferring closed captions provided on television programs to the online environment.'' [54] In addition to work conducted at the January and May meetings, Working Group 1 conferred and collaborated on these issues through weekly conference calls, regular e-mail correspondence, and the group's workshare Web site (or ''wiki''). [55] The Media Bureau also conducted informal meetings with online video programming distributors, broadcast networks, multichannel video programming distributors (''MVPDs''), consumer advocacy groups, and others that were interested in discussing Section 202 of the CVAA in anticipation of the Media Bureau's receipt of the VPAAC Report and its preparation of this *NPRM*.

14. As noted above, the VPAAC submitted its report on July 12, 2011. The VPAAC Report provided suggestions for how the Commission's regulations on IP closed captioning should address caption completeness, placement, accuracy, and timing, as well as specific technical requirements that a user's Internet-connected media players should support.[56] The VPAAC Report went on to describe technical requirements for the delivery of closed captioning of IP-delivered television programming, suggesting that the Commission require a single interchange format but not a single delivery format for IP closed captioning.[57] Next, the VPAAC Report described ''the technical capabilities and procedures needed for entities to reliably encode, transport, receive and render broadcast-television closed captions over the Internet.[58] The VPAAC Report discussed three interfaces that may require standardization—(i) interchange formats (*i.e.*, between video programming owners and video programming distributors/providers), (ii) delivery file formats (*i.e.*, between video programming distributors/providers and user devices), and (iii) linkages to users'' captioning display controls (*i.e.*, between devices or between software and firmware running on one device).[59] The VPAAC Report also briefly discussed potential developments in IP-delivered closed captioning [60] and proposed a schedule of deadlines for the provision of closed captioning over IP. [61] We describe the VPAAC recommendations more specifically in the context of our discussion of Sections 202 and 203 below.[62]

III. Section 202(b) of the CVAA

A. Entities Subject to Section 202(b) of the CVAA and Their Obligations

Various provisions of Section 202(b) of the CVAA reference ''video programming distributors'' (''VPDs''), ''video programming providers'' (''VPPs''), and ''video programming owners'' (''VPOs''). We seek comment on how the Commission should define these terms.[63] The CVAA provides some guidance on the definition of the first two terms, requiring the Commission to ''clarify that, for the purposes of implementation, [sic] of this subsection, the terms 'video programming distributors' and 'video programming providers' include an entity that makes available directly to the end user video programming through a distribution

[47] S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30

[48] 47 U.S.C. 303(u)(1).

[49] 47 U.S.C. 303(u)(2)(B).

[50] 47 U.S.C. 303(u)(2)(A). In determining whether the requirements of a provision are achievable, the Commission shall consider the following factors: (1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points. 47 U.S.C. 617(g)(1)–(4).

[51] 47 U.S.C. 303(z)(1).

[52] 47 U.S.C. 303(z)(2).

[53] Public Law 111–260, § 203(d)(1), (e).

[54] *See* VPAAC Report at 4.

[55] *See id.* at 5.

[56] *See id.* at 13–16.

[57] *See id.* at 16–20. The VPAAC Report proposed defining ''interchange format'' as ''[t]he encoded caption data that preserves all of the original semantic information and text * * * and allows easy conversion to other formats.'' *See id.* at 18. *See also id.* at 22 (''By 'interchange format' we mean the format of closed-captioning data carried within television content as it is distributed from the content provider to programming distributors.''). The VPAAC Report proposed defining ''delivery format'' as ''[t]he encoded caption data contained within a download or stream of content to a consumer device in either the standard interchange format or a different network-specific or video-player-specific format * * *.'' *See id.* at 18.

[58] *See id.* at 21–28.

[59] *See id.* at 22–23, 26–28. We discuss interchange and delivery formats in Sections III.E. and IV.B., *infra*.

[60] *See id.* at 28–29.

[61] *See id.* at 29–30. The VPAAC Report also contains three appendices. Appendix A contains a summary of recommended DTV receiver requirements. *See id.* at 31–32. Appendix B lists ''best practices'' for closed captioning of IP-delivered video programming. *See id.* at 33 (noting that ''there is not consensus about whether these practices should be mandated or only offered as suggestions''); see also id. at 13 n. 29. Lastly, Appendix C details unresolved issues that the VPAAC recommended the Commission consider in the NPRM. *See id.* at 34–35.

[62] *See* Sections III. and IV., *infra*.

[63] Our use of the terms VPD and VPP in this NPRM is meant to reference our proposed definitions of those terms in this context, and not to invoke any use of those terms in other contexts, including in our television closed captioning or video description rules. This NPRM does not propose any modifications to our television closed captioning rules.

method that uses Internet protocol.'' [64] We propose to define VPD and VPP as having the same meaning, because there does not seem to be a practical benefit in distinguishing between the two for purposes of Section 202(b) of the CVAA. We seek comment on this proposal. In addition, in recognition of the broad reach that Congress intended for Section 202(b), we propose to define both a VPD and a VPP as any entity that makes available directly to the end user video programming through a distribution method that uses IP. Further, we propose to define a VPO as any person or entity that owns the copyright of the video programming delivered to the end user through a distribution method that uses IP. We seek comment on these proposed definitions. Should the Commission instead define VPDs and VPPs separately, and if so, how should those definitions differ from one another? [65] If we were to define VPDs and VPPs differently from one another, what would be the effect on provisions of the CVAA that apply to VPPs and VPOs but not VPDs? Will a significant number of small entities be covered by the proposed definition of VPD/VPP? If multiple video programming distributors/providers are involved in making video programming available to the end user, but only one distributor/provider directly makes the video programming available to the end user, where do the distributors/providers in the middle of the chain fit within our proposed definitions? Should the definition of VPO include anything in addition to the person or entity that owns the copyright of the IP-delivered video programming, for example, any person or entity to which the copyright owner licenses IP-delivered video programming?

16. The CVAA requires the Commission to ''describe the responsibilities of video programming providers or distributors and video programming owners.'' [66] We propose to require VPOs to send program files to VPDs/VPPs with all required captions, and, as contemplated by Section 202(b), to require VPDs/VPPs to enable ''the rendering or pass through'' of all required captions to the end user.[67] When a VPD/VPP receives a program file with required captions, it would be required to include those captions at the time it makes the program file available to end users.[68] We seek comment on these proposals as well as other appropriate responsibilities of VPDs/VPPs and VPOs under Section 202(b) of the CVAA.[69] For example, should we require the VPD/VPP to provide a mechanism, such as a button or icon, on its Web site which would allow consumers to easily access closed captioning? If a VPO licenses its content to a third party for Internet distribution, what are the obligations of that third party licensee? If a VPD/VPP knows or reasonably should have known that a program is required to include captions, but the VPO failed to provide such captions, what obligations should the VPD/VPP have to obtain such captions before providing the programming to the end user? In an enforcement proceeding, what types of evidence could be considered to establish the VPD/VPP's knowledge, and should the VPD/VPP bear the burden of proof on that issue? Should the VPD/VPP have an obligation to determine whether the programming is subject to captioning requirements before providing it to the end user? In addition, what liability should the VPD/VPP face should it decide to provide the program to end users without the required captions? [70] In such a situation, should both the VPD/VPP and VPO be held responsible for the violation? We seek comment generally on the responsibilities that VPDs/VPPs should have to ensure that video programming has the required captions before they pass it through to viewers. Should we require VPDs/VPPs to include on their Web sites program listings that indicate whether a particular program is captioned? If multiple video programming distributors/providers are involved in making video programming available to the end user, what are the obligations of the distributors/providers in the middle of the chain? For example, would the distributors/providers in the middle of the chain be required to enable the rendering or pass through of all required captions?

17. In addition to requiring the presence of captions, we seek comment on whether our rules for closed captioning of IP-delivered video programming should include any required performance objectives. It is important that, in considering this issue, the Commission balances the interests of users of closed captioning against the concern that overly burdensome standards may cause VPDs/VPPs to refrain from posting videos online. The VPAAC Report made a number of proposals regarding the quality of captions of IP-delivered video programming:

(1) That the Commission require IP-delivered captions to be complete, such that ''[n]othing must be lost in transcoding when converting captions between conventional broadcast captioning formats and Internet;'' [71]

(2) That ''[f]or Internet-delivered caption content, the positioning information as originally authored shall be made available to the consumer device;'' [72]

(3) That the accuracy of IP-delivered video programming must be ''equal to or greater than the accuracy of captions shown on television;'' [73]

(4) That the Commission require IP-delivered captions to possess sufficient timing, such that ''[a]ll processing through the distribution chain, including transcoding, must provide a timing experience that is equal to or an improvement to the timing of captions

[64] 47 U.S.C. 613(c)(2)(D)(iii). The Commission's rules currently define VPDs and VPPs but these definitions apply only to the closed captioning of video programming that is being distributed and exhibited on television. Specifically, our rules define a ''video programming distributor'' as ''[a]ny television broadcast station licensed by the Commission and any [MVPD] * * * and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.'' 47 CFR 79.1(a)(2). In addition, our rules define a ''video programming provider'' as ''[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.'' 47 CFR 79.1(a)(3).

[65] The definition of VPD and VPP may be particularly relevant insofar as certain provisions of Sections 202(b) and (c) refer to VPPs and VPOs, but not VPDs. *See, e.g.*, 47 U.S.C. 613(c)(2)(C), (c)(2)(D)(vii), (d)(3).

[66] 47 U.S.C. 613(c)(2)(D)(iv).

[67] *See also* Section III.D., *infra* (discussing a proposed mechanism that would require VPOs providing a video program to VPDs/VPPs for IP delivery to provide the program either with captions, or with a certification that captions are not required for a reason stated in the certification). Congress did not explain what it meant by enabling ''the rendering or pass through'' but we presume that Congress meant that VPDs/VPPs must ensure that closed captions are transmitted appropriately.

[68] We propose in Section III.D., *infra*, that when a program previously provided to a VPD/VPP without captions becomes subject to the captioning requirement, the VPO must send a certification to that effect to VPDs/VPPs within seven days, and the VPD/VPP must make captions available within five days of receipt of the revised certification.

[69] The VPAAC indicated that it did not have sufficient time to determine the responsibilities of various stakeholders. *See* VPAAC Report at 34.

[70] Section 713(h) of the Act previously provided, ''Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.'' Section 202(a) of the CVAA redesignated former Section 713(h) as Section 713(j). *See* Public Law 111–260, § 202(a). This provision applies to the Commission's IP closed captioning regulations promulgated in accordance with the CVAA's revisions to Section 713 of the Act, in addition to the Commission's existing closed captioning regulations.

[71] *See* VPAAC Report at 13.

[72] *See id.* at 13–14.

[73] *See id.* at 14.

provided in the captioning shown on television;'' [74] and

(5) That a user's Internet-connected media players should support the ability to change character color, opacity, size, font, background color and opacity, character edge attributes, window color, and language.[75]

We note that Part 15 of the Commission's rules currently contains certain required user controls for television closed captions, including the ability to change text color, opacity, size, font, background color and opacity, character edge attributes, and window color.[76]

18. It appears that Congress intended, at a minimum, that captions of IP-delivered video programming should be of at least the same quality as captions shown on television. Accordingly, we propose to adopt a rule requiring the captioning of IP-delivered video programming to be of at least the same quality as the television captions for that programming. An evaluation of ''quality'' could include the consideration of such factors as completeness, placement, accuracy, and timing, all of which the VPAAC suggested that we consider. We seek comment as to whether the inclusion of any of these factors would lead to unintended consequences such as requiring a large amount of resources to be expended to comply. We contemplate that a requirement for captions of IP-delivered video programming to be of at least the same quality as captions of television programming would require IP-delivered captions to include the same user tools, such as the ability to change caption font and size. These proposals are consistent with the VPAAC's recommendation that captions of IP-delivered video programming should provide consumers with an experience that is equal to or better than the comparable television experience.[77] We seek comment on these proposals, which could help benefit consumers, while ensuring that compliance with our new rules is as similar as possible to compliance with existing rules for television closed captioning.

19. In meetings with Commission staff, certain VPDs/VPPs expressed concern that they would be unable to provide captions that are ''better than'' those available on television because improving the captions would violate the VPO's copyright. Under our proposal, however, VPDs/VPPs would not be *required* to improve caption quality; rather, they would be required to ensure that the quality of captions does not decline when delivered via IP as compared to when shown on television. To the extent that VPDs/VPPs have permission to alter captions on the programming so that they improve the viewing experience, we propose that they be permitted to do so.[78] We seek comment on any copyright concerns implicated by our proposals, including how we should balance any desire for certain user controls against a VPO's copyright protections.

20. Section 202(a) of the CVAA defines ''video programming'' as ''programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).'' [79] Section 3 of the Act, as revised by the CVAA, defines ''consumer generated media'' as ''content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.'' [80] The Senate and House Committee reports do not shed further light on the terms ''video programming'' and ''consumer-generated media.'' [81] We seek comment on the scope of these definitions. We seek specific examples of IP-delivered video programming that is not comparable to programming provided by a television broadcast station, and examples of consumer-generated IP-delivered video programming, both of which would be exempt from the CVAA's captioning requirements. We also seek specific examples of IP-delivered video programming that is comparable to programming provided by a television broadcast station. Does ''consumer-generated media'' include content that has been published or exhibited on television with captions, which is made available online by individual consumers without the consent of the VPO?

21. We propose to apply the captioning requirements of Section 202(b) to full-length programming, and not to video clips or outtakes.[82] We seek comment on what Congress meant by the phrase ''full-length programming.'' We propose to define ''outtakes'' as content that is not used in an edited version of video programming shown on television, and we invite comment on this proposal. We propose to define ''video clips'' as small sections of a larger video programming presentation, and we invite comment on this proposal.[83] Should we specify the definition of ''video clips'' by providing a maximum duration of the video programming that constitutes a ''clip,'' or by providing that the length of a ''video clip'' may not exceed a certain percentage of the overall length of the video program? When a full-length program is posted online in multiple segments, to enable consumers to access a particular segment of the program, does each segment constitute a video clip?

22. We seek comment on whether IP-delivered content that has aired on television only in another country, and not in this country, is exempt from the CVAA's captioning requirements. Although not explicitly stated in the CVAA, it appears that the best reading of the statute requires closed captioning on IP-delivered video programming that was published or exhibited on television *in this country* with captions after the effective date of the

[74] *See id.*

[75] *See id.* at 15–16.

[76] *See* 47 CFR 15.122.

[77] *See, e.g.*, VPAAC Report at 13 (''the consumer must be given an experience that is equal to, if not better than, the experience provided as the content was originally aired on television using the CEA–608/708 system'').

[78] For example, if programming was shown live on television and then re-shown over the Internet, a VPD/VPP with permission may want to fix mistakes that occurred as a result of real-time captioning. While we do not propose requiring the correction of such errors, we encourage VPDs/VPPs to make corrections where permitted and feasible, given that the subject programming will be available on an ongoing basis to viewers on the VPD/VPP's Web site. We believe that such improvements could significantly enhance the viewing experience of people who are deaf or hard of hearing.

[79] 47 U.S.C. 613(h)(2). We note that this definition of ''video programming'' is almost identical to the definition set forth in Section 602(20) of the Act. *See* 47 U.S.C. 522(20) (defining ''video programming'' as ''programming provided by, or generally considered comparable to programming provided by, a television broadcast station''). *See also Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, FCC 09–14, 74 FR 11334, para. 8, March 17, 2009 (seeking comment on whether the definition of the term ''video programming'' from Section 602(20) of the Act is the definition that the Commission should use for purposes of the Child Safe Viewing Act, and asking whether that term includes videos provided on Internet video hosting sites such as YouTube).

[80] 47 U.S.C. 153(54).

[81] The Senate Committee report echoed the Section 3 definition of ''consumer generated media,'' stating that that term ''encompasses content created and made available by consumers to Internet Web sites and venues, including audio, video, and multimedia content.'' *See* S. Rep. No. 111–386 at 5–6.

[82] *See* 47 U.S.C. 613(h)(2) (''The term 'video programming' means programming by, or generally considered comparable to programming provided by a television broadcast station * * *''); *see also* S. Rep. No. 111–386 at 13–14 (''The Committee intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.''); H.R. Rep. No. 111–563 at 30 (same).

[83] This is consistent with the *Comcast-NBCU Order*, which explained that ''short programming segments'' are ''also known as clips.'' *See* 26 FCC Rcd at 4358 (Appendix A: Conditions).

regulations, and we seek comment on this determination. It appears that the differing caption standards in foreign countries could hinder the process of transferring those captions to a suitable format for U.S. consumers and seek comment on this understanding.

B. Schedule of Deadlines

23. Pursuant to the CVAA, the Commission must, by January 12, 2012, ''revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.'' [84] The regulations must ''include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.'' [85] Further, the regulations must define the phrases ''near-live programming'' and ''edited for Internet distribution.'' [86] Below, we seek comment on the definitions of ''live programming,'' ''near-live programming,'' ''prerecorded programming,'' and ''edited for Internet distribution.'' We propose to apply these definitions solely to regulations of IP closed captioning pursuant to the CVAA, and we seek comment on that proposal. Further, below we seek comment on the appropriate schedule of deadlines for the provision of closed captioning.

24. The VPAAC proposed to define ''live programming'' as ''programming created and presented on television and simulcast for Internet distribution to the end user as it airs on television.'' [87] Based on conversations with members of the VPAAC, we understand that the definition of ''live programming'' was meant to encompass programming such as news, sports, and awards shows, for which captioning cannot be done in advance, rather than a ''simulcast'' in which potentially prerecorded programming is shown on television and the Internet simultaneously.[88] We note that, in the recent *Video Description Order,* the Commission defined ''live programming'' in that context as ''programming aired substantially simultaneously with its performance.'' [89] The definition of ''live programming'' in the *Video Description Order* could achieve the same objective as the definition of ''live programming'' proposed by the VPAAC. In the context of our IP closed captioning rules, however, we believe it is important to clarify that programming is ''live'' if it is shown live on television. Accordingly, we propose defining ''live programming'' as video programming that is shown on television substantially simultaneously with its performance. The phrase ''substantially simultaneously'' contemplates that live programming may include a slight delay, for example, to prevent certain objectionable material from airing. We seek comment on this proposal. We understand that additional processes may need to be put in place to facilitate the captioning of live programming when it is delivered using IP, and we seek comment on what those processes entail and who would be responsible for them.

25. In addition, given the VPAAC's use of the word ''simulcast'' in its proposed definition of ''live programming,'' we also seek comment on whether there are additional difficulties in providing captioning of IP-delivered video programming, when the programming is shown on television and the Internet simultaneously. If so, should we provide a lengthier deadline by which simulcast programming must comply with Section 202(b)?

26. The VPAAC proposed to define ''near-live programming'' as ''any programming that was produced from start to finish within 12 hours of being published or exhibited on television.'' [90] As referenced in Appendix C to the VPAAC Report, we understand that members of the industry and consumer groups expressed differing views as to whether the definition of ''near-live programming'' should reference programming that was ''substantively produced'' within 12 hours of being shown on television. We understand based on conversations with members of the VPAAC that ''substantively produced'' means programming that is largely, but not entirely, produced within 12 hours of being shown on television. For example, a news magazine may include a number of live segments, but it may also include some segments that were recorded and produced weeks or months earlier. It appears that VPDs/VPPs and/or VPOs may need to put additional processes in place to handle captioning of certain video programming that is predominantly, but not entirely, recorded and produced within 12 hours of its distribution, such as some news magazines, because the audio may be captioned as the program is shown on television. Accordingly, we propose to modify the VPAAC's proposed definition, and instead to define ''near-live programming'' as video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers.[91] We invite comment on this proposal. How should we define ''substantively recorded and produced''? Should we require a certain percentage of a program to be recorded and produced within 12 hours of the program being shown on television, for the program to be considered ''substantively produced'' within that timeframe? What are examples of programming that we should consider ''near-live''? What additional processes would need to be put in place to facilitate the captioning of such near-live programming when it is delivered using IP, and who would be responsible for those processes? [92] In lieu of our proposed definition of ''near-live programming,'' should we instead define that phrase as it is defined in the *Video Description Order,* which is ''programming performed and recorded less than 24 hours prior to the time it was first aired,'' [93] or would that definition be too narrow in the IP-

[84] 47 U.S.C. 613(c)(2)(A).

[85] 47 U.S.C. 613(c)(2)(B).

[86] 47 U.S.C. 613(c)(2)(D)(i).

[87] *See* VPAAC Report at 29.

[88] We understand that a simulcast may either involve live programming or prerecorded programming.

[89] *See Video Description Order,* FCC 11–126, 76 FR 55585, para. 40, September 8, 2011 (''*Video Description Order*'').

[90] *See* VPAAC Report at 29. The VPAAC indicated that industry and consumer groups were not in agreement as to the proposed definition of ''near-live programming.'' *See id.* at 34–35. Further, the VPAAC indicated its understanding ''that this definition of near-live programming is only to be used for determining the schedule of deadlines for the provision of closed captioning.'' *See id.* at 35.

[91] If a program is not live, and is not substantively recorded and produced within 12 hours of its distribution to television viewers, then we propose that it would be considered prerecorded, as explained below.

[92] We note that, in the *Video Description Order,* the Commission adopted its proposal to define ''near-live programming'' as ''programming performed and recorded less than 24 hours prior to the time it was first aired.'' *See Video Description Order* at para. 40. We note that there are differences between video description and closed captioning which may necessitate different definitions. First, the definitions of ''live programming'' and ''near-live programming'' in the video description context had the ''primary purpose [of] determin[ing] which nonbroadcast networks are excluded from the top five. * * *'' *See id.* at para. 42. In contrast, the purpose of these definitions in the IP closed captioning context is to determine the date by which live and near-live programming must comply with our new requirements. Second, a shorter timeframe within which the performance and recording must occur for a program to be considered ''near-live'' in the closed captioning context may be appropriate since closed captioning can, in fact, be done live, whereas video description of television programming generally is not.

[93] *See id.* at para. 40.

delivered video programming context, insofar as it excludes programming that consists of both live segments and prerecorded programming?

27. The VPAAC proposed definitions for programming that is ''prerecorded and edited for Internet distribution to the end user,'' [94] and for programming that is ''prerecorded and unedited for Internet distribution to the end user'' [95] Rather than adopt these two definitions, however, we think it would be clearer to define the terms ''prerecorded programming'' and ''edited for Internet distribution.'' [96] We propose to define ''prerecorded programming'' as video programming that is not ''live'' or ''near-live.'' Also, based on the VPAAC's recommendation, we propose to define video programming that is ''edited for Internet distribution'' as video programming whose television version is substantially edited prior to its Internet distribution. We tentatively agree with the VPAAC that examples of ''substantial edits'' include when scenes are deleted or scores are changed from the television version,[97] and that changes to the number or duration of advertisements from the television version do not constitute ''substantial edits.'' We seek comment on these definitions. How should we distinguish ''substantial edits'' from ''insubstantial edits''? To what extent do VPDs/VPPs edit content for Internet distribution, and what is the nature of such editing? We assume that any editing that is subject to these definitions does not run afoul of copyright law. Is most prerecorded programming unedited for Internet distribution, as we have proposed defining that phrase?

28. The VPAAC proposed the following schedule of deadlines for compliance with the new requirements for closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new rules: (1) For programming that is prerecorded and not edited for Internet distribution, a compliance deadline of six months after the rules are published in the **Federal Register;** (2) for programming that is live or near-live, a compliance deadline of 12 months after the rules are published in the **Federal Register;** and (3) for programming that is prerecorded and edited for Internet distribution, a compliance deadline of 18 months after the rules are published in the **Federal Register.**[98] We seek comment on the VPAAC's suggested schedule of deadlines. We believe that these compliance deadlines are reasonable, given that they have been agreed upon by the VPAAC, which includes industry representatives that will have to comply with our new rules as well as consumer groups that have a strong interest in ensuring that our rules are implemented as quickly as possible. If commenters do not believe that these compliance deadlines are reasonable, we invite them to propose alternative compliance deadlines, with explanations as to why those deadlines would be more appropriate, along with a discussion of the burden to comply with the proposed deadlines. We seek comment also on why a lengthier compliance deadline is justified or necessary for programming that is live or near-live, and for programming that is prerecorded and edited for Internet distribution.

C. Exemption Process Where Economically Burdensome

29. In the CVAA, Congress amended Section 713(d)(3) of the Act by replacing the term ''undue burden'' with the term ''economically burdensome.'' Specifically, Section 202(c) of the CVAA contains a conforming amendment providing details on an exemption process by which:

> a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome. During the pendency of such a petition, such provider or owner shall be exempt from the requirements of this section. The Commission shall act to grant or deny any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.[99]

The Senate Committee on Commerce, Science, and Transportation encouraged the Commission, in determining whether the requirements enacted under Section 202(b) are ''economically burdensome,'' to consider the factors listed in pre-existing Section 713(e) of the Act.[100] Section 713(e) provides that the following factors should be considered in determining whether closed captioning requirements for television programming would result in an undue economic burden: ''(1) The nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.'' [101]

30. We propose to create a process by which VPPs and VPOs may petition the Commission for a full or partial exemption of their captioning obligations based on economic burden, comparable to the Commission's procedures for exemptions based on undue burden applicable to our television closed captioning rules.[102] Since the factors that Congress encouraged the Commission to consider here in determining whether application of our new rules are ''economically burdensome'' are identical to the factors used to determine whether the television closed captioning rules impose an ''undue burden,'' it appears that Congress intended that ''economic burden'' in this context would have the same meaning as ''undue burden'' in the television closed captioning context. Accordingly, we propose to define the term ''economically burdensome'' as imposing significant difficulty or expense.[103] We further propose, in accordance with our television closed captioning rules,[104] that petitioners be required to support a petition for exemption with sufficient evidence to demonstrate that compliance with the new requirements would be economically burdensome. In determining whether the requirements for closed captioning of IP-delivered

[94] The VPAAC's proposed definition is ''any programming that is prerecorded and has been substantially edited for Internet distribution to the end user.'' *See* VPAAC Report at 30. The VPAAC suggested that substantial edits may include deleting scenes or substituting music scores due to rights restrictions. *See id.*

[95] The VPAAC's proposed definition is ''any programming that is prerecorded and has not been substantially edited for Internet distribution to the end user.'' *See id.* The VPAAC suggested that insubstantial edits may include changes to the number or duration of advertisements. *See id.*

[96] This is also consistent with the CVAA's requirement that we define ''edited for Internet distribution.'' *See* 47 U.S.C. 613(c)(2)(D)(i).

[97] According to the VPAAC, rights restrictions necessitating such edits would prevent broadcasters from repurposing the television captions on such programming for Internet distribution to the end user. *See* VPAAC Report at 30. We note that any adopted definition should not permit VPDs or VPPs to edit programming in a manner that copyright law would otherwise prohibit.

[98] *See id.*

[99] 47 U.S.C. 613(d)(3).

[100] *See* S. Rep. No. 111–386 at 14.

[101] 47 U.S.C. 613(e).

[102] *See* 47 CFR 79.1(f). The process we propose to adopt herein is consistent with the *Video Description Order,* in which we adopted our proposal ''to reinstate the previously adopted process for requesting an individual exemption from our rules, replacing the term 'undue burden' with 'economically burdensome,' while using the same range of factors previously applied under the undue burden standard.'' *See Video Description Order* at para. 43 (footnote omitted).

[103] In the *Video Description Order,* we also defined ''economically burdensome'' as ''imposing significant difficulty or expense.'' *See id.* at para. 44 and Final Rules.

[104] 47 CFR 79.1(f)(2).

video programming would be economically burdensome, we propose that the Commission consider the four factors listed above. In addition, as under the Commission's current rules in the television context, we propose that the petitioner be required to describe any other factors that it deems relevant to the Commission's final determination, and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements.[105] Finally, we propose that the Commission evaluate the extent to which a petitioner has successfully proven an economic burden on a case-by-case basis, with regard to the individual outlet or programming in question, and that the Commission could deny or approve a petition in whole or in part. We seek comment on these proposals.

31. Regarding the exemption process, we propose to require the petitioner to file with the Commission an original and two copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings. Should we instead require electronic filing? We further propose that the Commission place the petition on public notice, with comments or oppositions due within 30 days of the public notice, and the petitioner's reply to any comments or oppositions due within 20 days of the close of the comment period. Next, we propose that parties filing comments or oppositions serve the petitioner with a copy and include a certification that the petitioner was served with a copy, and that parties filing replies to comments or oppositions serve the commenting or opposing party with a copy and include a certification that the party was served with a copy. We propose that parties filing petitions and responsive pleadings include a detailed, full showing, supported by affidavit, of any facts or considerations relied on. We propose codifying the statutory requirement that the Commission consider the VPP or VPO subject to an exemption request to be exempt from the IP closed captioning requirements while the exemption petition is pending.[106] We seek comment on these proposals. We note that the CVAA permits VPPs and VPOs to petition the Commission for an exemption. Although we have proposed defining VPP and VPD to mean the same thing,[107] if we ultimately define them differently, should we conclude that Congress intended both VPPs and VPDs to benefit from the economic exemption process? [108]

32. In addition to case-by-case exemptions discussed above, the CVAA permits the Commission to ''exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.'' [109] We note that the existing rules for closed captioning of television programming contain a number of categorical exemptions.[110] Since the new requirements for closed captioning of IP-delivered video programming will not be triggered unless the programming is shown on television with captions after the effective date of the new rules, it seems that the inclusion of the previous categorical exemptions in our new rules would generally be duplicative. In other words, if a program is not captioned on television because it is subject to one of the existing categorical exemptions, then it will not be required to be captioned when delivered via IP. For this reason, it does not appear that the categorical exemptions found in the television closed captioning rules are applicable here, and we seek comment on adopting this approach. Further, the CVAA makes no distinction as to whether the television programming must be captioned under the Commission's television captioning rules or whether the captioning was included voluntarily. Accordingly, we believe that once programming is captioned on television, it must be captioned when delivered via IP—even if it otherwise would have been subject to one of our television closed captioning exemptions. We seek comment on this proposal as well. If a program with audio in a language other than English or Spanish is captioned on television, even though such captioning is not required,[111] should we require the program to include captions when delivered via IP?

33. The CVAA also permits the Commission to delay or waive the applicability of its IP closed captioning rules to live programming ''to the extent the Commission finds that the application of the regulation to live video programming delivered using Internet protocol with captions after the effective date of such regulations would be economically burdensome to providers of video programming or program owners.'' [112] The VPAAC considered the special nature of live programming by proposing a longer compliance deadline for live programming than for prerecorded and unedited video programming. Given that the VPAAC recommendation reflects a consensus achieved by representatives of both consumers and the affected industries, we propose not to institute any further delay or waiver of the applicability of the Commission's new IP closed captioning rules to live programming at this time, and we seek comment on this proposal.

D. Mechanism for Information on Video Programming Subject to the CVAA

34. The CVAA requires the Commission to ''establish a mechanism to make available to video programming providers and distributors information on video programming subject to the [CVAA] on an ongoing basis.'' [113] The purpose of the mechanism would be to ensure that VPDs/VPPs have a way of finding out whether the video programming they intend to make available via IP has been shown on television with captions after the effective date of the new rules. The

[105] *See* 47 CFR 79.1(f)(3) (containing the comparable rule in the television closed captioning context).

[106] 47 U.S.C. 613(d)(3). Section 202(c) of the CVAA requires the Commission to resolve such exemption petitions within six months of their receipt, unless the Commission finds that an extension of the six month period is necessary to determine whether the requirements are economically burdensome. 47 U.S.C. 613(d)(3).

[107] *See* Section III.A., *supra.*

[108] *See* 47 U.S.C. 613(c)(2)(D)(iii) (clarifying that VPDs and VPPs both include entities that make IP-delivered video programming available directly to the end user).

[109] 47 U.S.C. 613(c)(2)(D)(ii). The VPAAC did not address ''the determination of economically burdensome relative to services, programs and equipment.'' *See* VPAAC Report at 35.

[110] *See* 47 CFR 79.1(d). The Commission created exemptions for the following categories of programs and providers: programming subject to contractual captioning restrictions; video programming or a video programming provider for which the captioning requirement has been waived; programming other than English or Spanish language; primarily textual programming; programming distributed in the late night hours; interstitials, promotional announcements and public service announcements; Educational Broadband Service programming; locally produced and distributed non-news programming with no repeat value; programming on new networks; primarily non-vocal music programming; captioning expense in excess of two percent of gross revenues; channels producing revenues of under $3,000,000; and locally produced educational programming.

[111] *See* 47 CFR 79.1(d)(3) (exempting from the television closed captioning requirements ''[a]ll programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the 'electronic news room' technique is not exempt''). The ''electronic news room'' television captioning technique creates captions from a news script computer or teleprompter, and it is commonly used for live newscasts.

[112] 47 U.S.C. 613(c)(2)(C).

[113] 47 U.S.C. 613(c)(2)(D)(v).

CVAA further explains that the new regulations of IP closed captioning:

> shall consider that the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the [CVAA] using the mechanism [referenced above].[114]

35. Accordingly, we seek comment on the ''mechanism'' that should be used to make available to VPDs/VPPs information on video programming that must be captioned when delivered via IP. We presume that VPOs are in the best position to know if captions are required for a particular program (*i.e.*, whether the program has been shown on television with captions after the effective date of the new rules). We seek comment on this presumption. We propose to require VPOs providing video programming to VPDs/VPPs for IP delivery to provide each program either with captions simultaneously, or with a dated certification stating that captions are not required for a reason stated in the certification. Suitable reasons for a VPO to provide a program without captions might include, for example, that the program is not a full-length program,[115] has not been ''published or exhibited on television with captions after the effective date of'' the new rules,[116] or has been exempted from the requirements.[117] Are VPOs aware of the identity of all VPDs/VPPs that are authorized to make the VPO's video programming available directly to the end user through a distribution method that uses IP? Would VPDs/VPPs and VPOs need to revise their contractual agreements to reflect their new obligations? Do VPOs have contracts with all VPDs/VPPs that are authorized to make the VPO's programming available to end users via IP, and if not, would the proposed certifications be workable?

36. We also propose to require VPDs/VPPs to retain all such VPO certifications for as long as they make the certified programming available to end users through a distribution method that uses IP and at least one calendar year thereafter. Because the CVAA provides that the Commission shall consider a VPD/VPP ''in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the [CVAA] using the mechanism,'' it seems that generally a VPD/VPP would not be subject to an enforcement action if it relied in good faith on a VPO's erroneous certification that captioning was not required for a particular program and did not know or have reason to know (at any time) that the certification was erroneous. If a VPP/VPD knew or should have known that a certification was erroneous,[118] the Commission could take action against the VPP/VPD as well as (or instead of) against the VPO that submitted the erroneous certification. Otherwise, however, the Commission's recourse in the case of a faulty certification would be enforcement action against the VPO only. We seek comment on how we should approach closed captioning compliance certifications, including comments on whether and how the inclusion of indemnification clauses in contracts between VPDs/VPPs and VPOs may affect the effectiveness of our proposed approach. We seek comment also on the situation where a VPO may pass along captions for a program but, as a legal matter, the captions are not required for that program because the program has not been shown on television with captions after the effective date of the new rules. Would the Commission have the authority to require the VPD/VPP to enable the rendering or pass through of such captions, when they are provided by the VPO? Or instead, should the VPO make known to the VPDs/VPPs that captioning is not required under Commission rules for that IP-delivered program even though the VPO is sending captions to the VPD/VPP? We recognize that, while a program may not be subject to the captioning requirements as of the effective date of the new rules, it might later become subject to the requirements, once the program is re-run on television with captions after the effective date. Accordingly, we propose to require VPOs to keep their certifications current, and to provide VPDs/VPPs with any revised information as to the captioning status of previously delivered programming within seven days of the underlying change (*i.e.*, within seven days of a program being shown on television with captions for the first time after the effective date of the new rules). If the underlying change of status requires that the programming at issue be captioned pursuant to the CVAA, we propose to require the VPO also to deliver within seven days the caption file, if not previously delivered, to the VPDs/VPPs. We also propose to require VPDs/VPPs to make required captions available online within five days of the receipt of an updated certification.[119] We seek comment on the five day timeframe, which would provide VPDs/VPPs with time to update their existing program files.[120] Are seven and five days, respectively, appropriate timeframes within which to require VPOs to provide updated certifications, and to require VPDs/VPPs to provide newly required captions?

37. In the alternative to the certification proposal discussed above, we seek comment on other types of ''mechanisms'' the Commission could adopt to ensure that VPDs/VPPs know which programming is required to be captioned. For example, should we simply permit the relevant parties to effectuate a mechanism through private contracts? [121] Or, should we instead require VPOs to send, along with the program and caption files, encoded information informing the VPDs/VPPs as to whether the program has been captioned on television (to the extent it is technically possible to do so)? Or, rather than place requirements on the relationship between the VPO and the VPD/VPP, we could require VPDs/VPPs to provide certain information to consumers, demonstrating that the VPDs/VPPs have complied with our regulations. Do we have authority to require VPDs/VPPs to provide certain information to consumers? If so, should we require the VPD/VPP to provide information to consumers such as: The name of the program, and information sufficient to identify the episode; the identity of the VPD/VPP responsible for delivering the program; the device or software on which the consumer is watching the program (to the extent known); [122] and whether the program is

[114] 47 U.S.C. 613(c)(2)(D)(vi). The VPAAC did not address the definition of a ''good faith effort to identify video programming'' subject to the CVAA. *See* VPAAC Report at 35.

[115] *See* Section III.A., *supra.*

[116] *See* 47 U.S.C. 613(c)(2)(A). Thus, the CVAA's requirements for captioning of IP-delivered video programming are not triggered unless the programming is published or exhibited on television with captions after the effective date of the new rules.

[117] *See* Section III.C., *supra.*

[118] Paragraph 16, above, includes questions regarding what types of evidence could be considered in an enforcement proceeding to determine a VPD/VPP's knowledge and who should bear the burden of proof on that issue.

[119] This five day timeframe would not apply to programming for which the schedule of deadlines was not yet triggered. *See* Section III.B., *supra.*

[120] In contrast, when a VPD/VPP receives a program initially with required captions, we see no need to provide for a delay between receipt of the captions and the date by which captions must be made available with the program, since there is no existing file to update.

[121] A private contractual mechanism might, for example, obligate the contracting VPO to provide all required captions for IP delivery, while requiring the contracting VPD/VPP to enable the rendering or pass through of all such captions to the end user.

[122] The device or software is an important consideration because if the consumer is viewing

Continued

required to include captioning, and, if not, an explanation. This information could be provided to consumers along with the IP-delivered video programming, for example, as a link from or a pop-up window adjacent to the programming. Overall, this approach would equip consumers with useful information and might lead to fewer—and better supported—complaints. While requiring VPDs/VPPs to provide this information with IP-delivered video programming would necessitate a certain level of coordination with VPOs, thus investing VPDs/VPPs and VPOs in the process, we recognize that this approach could pose technical challenges that may have to be overcome and could impose costs on the relevant parties. Accordingly, we seek comment on the costs and benefits of such an approach.

38. Still another approach would be for the Commission to rely on independent third parties to provide databases containing information on all video programming that is shown on television with captions after the effective date of the new rules. For example, we know that there are companies today that already collect this information and it is available for purchase by the Commission and other parties.[123] An advantage of this approach is that, potentially, it could allow any VPD/VPP to go to an independent source to verify whether the programming it wishes to exhibit must be shown with captions when delivered via IP. Consumers, too, might be able to access this database to learn whether programs they wish to watch are required to contain captions.[124] What technical and administrative difficulties would the use and maintenance of such a database create? Who would fund such a database? To what extent could such a database be automated? What other type of ''mechanisms'' could the Commission establish to ensure that VPDs/VPPs have up-to-date information about the captioning status of the programming they intend to show?

E. Technical Standards for IP-Delivered Video Programming

39. CEA–608 is the technical standard used for analog closed captioning, and CEA–708 is the technical standard used for digital closed captioning.[125] The VPAAC stated that CEA–708 ''provides for a rich set of features and capabilities above and beyond those supported by CEA–608 captions. In addition, CEA–608 captions can be transported within 708.'' [126] Because millions of households today still use analog television receivers that cannot decode CEA–708 captions, CEA–608 captions remain relevant.[127] On the Internet, there are currently multiple closed captioning formats.[128] In light of the decades of video programming that has been captioned using the CEA–608/708 standards, the VPAAC concluded that ''a standard format must be specified for these captions to be delivered via Internet protocols in such a way that the consumer's experience is in no way degraded.'' [129] Specifically, the VPAAC suggested ''that there be a single standard interchange format for content providers to encode closed captions into programming before they distribute it,'' such that video programming would not need to be re-captioned to comply with different standards.[130] Regarding delivery format, the VPAAC suggested that there should not be a single standard, so as to provide the Internet with sufficient flexibility to evolve.[131] The VPAAC stated that ''distributors of programming services and applications must be required to (a) receive the captioned content from the content provider encoded in the standard interchange format, and then (b) ensure that any reformatting performed before delivery to end users (consumers) is supported by the applications and devices * * * used for playback. * * *'' [132]

40. We seek comment on whether to specify a particular standard for the interchange format or delivery format of IP-delivered video programming subject to Section 202(b) of the CVAA. We note that closed captions are included on certain IP-delivered video programming today, even in the absence of a single standard for the interchange format or the delivery format. Accordingly, we propose to refrain from specifying any particular standard for the interchange format or delivery format of IP-delivered video programming at this time, in order to foster the maximum amount of technological innovation. We seek comment on this proposal. How necessary is it for the Commission to select an interchange and delivery format standard? If we decide to deem a particular standard compliant, what should that standard be? After considering several standards, the VPAAC recommended the Society of Motion Picture and Television Engineers (''SMPTE'') Timed Text (''SMPTE–TT'') standard for the interchange format because it ''best meets all the requirements'' and because it ''is already being employed in production environments to repurpose television content for Internet use.'' [133] At this juncture, however, we do not propose adopting a specific interchange format because it is our understanding that the interchange format involves negotiations between the VPO and the VPD/VPP, which typically require the entities involved to reach a mutually agreeable solution. It makes sense that, if SMPTE–TT is the best interchange format, the industry will settle on that format without Commission intervention and, if it is not, they will come to a different agreed-upon format. Further, the proposal to mandate particular features that must be supported [134] will, in effect, ensure a robust interchange format. If ultimately we do decide to deem a particular standard compliant, should we permit the parties to petition the Commission to use ''alternate means'' rather than the standard we adopt? [135] Should we require accommodation of both in-band and out-of-band delivery of closed captions? [136] What are the benefits and harms of specifying a particular

IP-delivered video programming through a device or software that is not required to support captions, that would explain why a consumer is unable to view required captions. We understand that it is possible for a device itself to fill in the information on the device's identity, without direct involvement of the VPD/VPP.

[123] Rovi and Tribune Media Services are examples of two such companies. Through their databases, they currently maintain information on when programs are shown on television with captions. This information could be used to determine when the CVAA's captioning requirements are triggered.

[124] Consumers then may be less likely to file complaints about programs that are not covered by the CVAA, thereby conserving resources for the Commission and covered entities.

[125] *See, e.g.*, VPAAC Report at 8–9.

[126] *See id.* at 9.

[127] *See id.*

[128] *See id.* at 11–12.

[129] *See id.* at 17.

[130] *See id.*

[131] *See* VPAAC Report at 17.

[132] *See* VPAAC Report at 17. In other words, ''For interchange purposes, captions may be encoded in the single, defined interchange format; for delivery purposes, captions may be encoded either in interchange or delivery formats as long as captions are always available to all video users.'' *See id.* at 18.

[133] *See id.* at 26.

[134] *See* Section III.A., *supra* (proposing a requirement that the same user tools, such as the ability to change caption font and size, which are available on television, should be made available for IP-delivered video programming).

[135] *See* Section III.F., *infra.*

[136] *See* VPAAC Report at 24 (''* * * VPAAC recommends that platforms and applications accommodate in-band and/or out-of-band delivery techniques as appropriate.''). When closed captions are delivered ''in-band,'' they are ''embedded in the video data stream or file,'' which is likely ''the most optimal delivery method for live simulating [sic] of a television channel.'' *See id.* at 23–24. When closed captions are delivered ''out-of-band,'' they are ''a separate data stream or file from the video,'' which is ''more flexible.'' *See id.*

''interchange format'' or ''delivery format'' for IP-delivered video programming subject to Section 202(b) of the CVAA?

F. De Minimis Failure To Comply and Alternate Means of Compliance

41. Section 202(b) of the CVAA requires the Commission's regulations to ''provide that *de minimis* failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations.'' [137] The statute and legislative history do not elaborate upon the meaning of ''*de minimis* failure to comply.'' We seek comment on what constitutes a ''*de minimis* failure to comply.'' In determining whether a failure to comply is *de minimis*, we propose to consider the particular circumstances of the failure to comply, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, and the timeframe within which the failure was remedied. We seek comment on this proposal and any other factors that should be considered in determining what constitutes a ''*de minimis* failure to comply.''

42. Congress determined in the CVAA that an entity may meet the requirements of Section 202(b) of the CVAA ''through alternate means than those prescribed by regulations * * * if the requirements of this section are met, as determined by the Commission.'' [138] The statute and legislative history do not elaborate upon the meaning of ''alternate means'' in Section 202 of the CVAA, although the House Committee explained that in the context of Section 203, alternate means was intended ''to afford entities maximum flexibility in meeting the requirement that video programming delivered using Internet protocol be captioned,'' and that the Commission should ''provide some flexibility where technical constraints exist.'' [139] We seek comment on how to define this term to best effectuate Congressional intent. For example, did Congress mean that the Commission should permit those subject to the IP closed captioning requirements to use alternate technical standards for the transmission and exhibition of IP closed captioning? [140] We seek comment on the ''alternate means'' that we should consider permissible, with a goal of fostering technological advancement through some flexibility, and in recognition of the fact that a single standard may not be feasible for all VPDs/VPPs and VPOs in all circumstances. Should we require any ''alternate means'' to provide a viewing experience that is equal or superior to that otherwise available to the general public? If we decline to specify a particular standard for the interchange format or delivery format of IP-delivered video programming, is it still necessary for us to consider permissible ''alternate means''?

G. Complaint Procedures

43. We propose to adopt procedures for complaints alleging a violation of the IP closed captioning rules that are analogous to the procedures the Commission uses for complaints alleging a violation of the television closed captioning rules.'' [141] With some modification, it appears that these proposed complaint procedures generally would work in the IP-delivered video closed captioning context. The procedures for complaints alleging a violation of the television closed captioning rules require a complaint to be filed with the Commission or the video programming distributor responsible for delivering the program within 60 days of the problem with captioning, and they provide that ''[a] complaint must be in writing, must state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation.'' [142] When the Commission receives complaints alleging a violation of the television closed captioning rules, it forwards the complaint to the appropriate video programming distributor (as that term is defined in the television closed captioning context), which must respond in writing to the Commission and the complainant within 30 days of receiving the complaint from the Commission.'' [143] The television video programming distributor is required ''to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules.'' [144] The Commission then reviews the complaint, including all supporting evidence, and determines if a violation has occurred.[145] The Commission may request additional information from the television video programming provider, if needed.[146]

44. We seek comment on whether to apply comparable procedures to complaints alleging a violation of the closed captioning rules for IP-delivered video programming. Is 60 days the appropriate timeframe within which to require a complaint about a captioning problem? Unlike television, where programs are exhibited at specific times, Internet programming is available continuously to any viewer. Given this, we seek comment on when this 60-day period should begin to run. Should it begin to run from the latest date on which the program was available on the Internet to consumers without required captions? How should we handle intermittent problems where closed captioning may not be transmitted continuously or with every streaming session? Would the best course be to eliminate the 60-day filing window altogether as unenforceable in the IP-delivered video programming market?

45. In addressing complaints alleging a violation of the IP closed captioning rules, we propose that the Commission will forward complaints to the named VPD/VPP and/or VPO, as well as to any other VPD/VPP and/or VPO that Commission staff determines may be involved. Upon receipt of a consumer complaint, should we require the VPD/VPP or VPO to attempt to resolve the dispute with the complainant, before proceeding with the Commission's complaint process? We further propose to permit the Commission to request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission rules.[147] Generally, we expect that consumers will direct their complaints to the VPD/VPP, since that is the entity from which the consumer views the programming, but the Commission could instead, or in addition, direct any resulting investigation and subsequent enforcement action against the VPO to the extent necessary and appropriate. The bureau handling the complaint would be expected to act in an expeditious fashion to determine which entity(ies) is/are responsible and dismiss claims against any others. In that vein, we seek comment as to whether a shotclock should be imposed. In recognition of the breadth of the IP-delivered video programming market, we propose to state explicitly in the rules that, although the Commission will generally require VPDs/VPPs and

[137] 47 U.S.C. 613(c)(2)(D)(vii).

[138] 47 U.S.C. 613(c)(3).

[139] H.R. Rep. No. 111–563 at 31.

[140] *See* Section III.E., supra (discussing technical standards for IP-delivered video programming).

[141] *See* 47 CFR 79.1(g).

[142] *See* 47 CFR 79.1(g)(1).

[143] *See* 47 CFR 79.1(g)(2).

[144] *See* 47 CFR 79.1(g)(5).

[145] *See* 47 CFR 79.1(g)(7).

[146] *See id.*

[147] This flexibility would enable the Commission to determine which of the entities involved—the VPD/VPP or VPO—is responsible.

VPOs to respond to complaints within 30 days, the Commission may lengthen the required response period on a case-by-case basis (for example, when it is difficult to determine which entity is responsible for the alleged violation). We seek comment on these proposed complaint procedures. As in the television context, should we permit those filing complaints alleging a violation of the closed captioning requirements for IP-delivered video programming to file the complaint directly with the VPD/VPP first,[148] or is it preferable to require that all complaints come directly to the Commission in the first instance? If the Commission finds that a VPD/VPP or VPO has violated the requirements for closed captioning of IP-delivered video programming, what sanctions or remedies should it impose? [149] We propose to adjudicate each complaint on its merits and employ the full range of sanctions and remedies available to the Commission under the Act.

46. Complaints alleging a violation of the television closed captioning requirements can be filed online,[150] or by fax or postal mail. We seek comment on whether the same options should be available for complaints alleging a violation of the closed captioning requirements for IP-delivered video programming. As in the *Video Description Order*, should we instead permit viewers to file complaints about a failure to comply with the closed captioning rules for IP-delivered video programming by ''any reasonable means,'' including any method that would best accommodate the complainant? [151] Should the Commission revise the existing complaint form for disability access complaints (Form 2000C) to request information specific to complaints involving IP closed captioning? To foster the Commission's efficient review of complaints, should the Commission decline to consider complaints that do not include certain information, and if so, what information should be required? Such information might include, for example: (i) The name and address of the complainant; (ii) the name and postal address, Web site, or e-mail address of the VPD/VPP and/or VPO against whom the complaint is alleged, and information sufficient to identify the video programming involved; (iii) information sufficient to identify the software or device used to view the program; (iv) a statement of facts sufficient to show that the VPD/VPP and/or VPO has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation; (v) the specific relief or satisfaction sought by the complainant; and (vi) the complainant's preferred format or method of response to the complaint.

47. Section 79.1(i) of our television closed captioning rules requires video programming distributors, as that term is defined in the context of television closed captioning, to provide certain contact information. Specifically, television video programming distributors must provide contact information by which consumers may contact them immediately, at the time that a captioning problem is discovered.[152] Television video programming distributors must also provide contact information for the receipt and handling of written closed captioning complaints.[153] Television video programming distributors must file this contact information with the Commission, which then makes it available on a database of television video programming distributors.[154] We seek comment on whether we should impose comparable contact information requirements on VPDs/VPPs as part of our rules governing closed captioning of IP-delivered video programming, to assist consumers wishing to reach out to VPDs/VPPs about their concerns or complaints, and to assist the Commission in resolving complaints. Instead of providing VPD/VPP contact information through a database, should we require VPDs/VPPs to provide this information directly to viewers of IP-delivered video programming, for example, through the VPD/VPP's Web site? What contact information should we require VPDs/VPPs to provide consumers? [155] We also ask whether we should apply any other existing provisions of the television closed captioning rules to the rules governing captioning of IP-delivered video programming.

IV. Section 203 of the CVAA

A. Scope of Section 203 of the CVAA and Exempted Apparatus

48. Section 203 of the CVAA seeks to extend closed captioning requirements to the devices consumers use to access video programming.[156] Specifically, Section 203(a) of the CVAA directs the Commission to require that the devices consumers use to receive or play back video programming are equipped to decode and display closed captioning,[157] while Section 203(b) extends requirements to devices that record video and to the interconnection mechanisms that carry signals from these source devices to consumer equipment.[158] In this section, we seek to address the specific classes of devices subject to these provisions, as well as those that fall into various statutory exemptions. Additionally, we address the issues of what functionality must be supported by these devices and whether that functionality may vary based on specific devices. However, while Section 203(a) of the CVAA significantly expands the requirement to implement closed captioning capabilities to essentially all apparatus, Section 203 also provides substantial limitations on this expanded definition. These limitations—(1) that implementation of closed captioning capability be achievable for apparatus with pictures screens less than 13 inches in size and for apparatus designed to record video programming transmitted simultaneously with sound [159] (2) that the requirements do not apply to display-only monitors; [160] and (3) that the Commission may waive the requirements for devices which derive their essential utility from uses other than video playback [161]—demand varying degrees of interpretation and clarification.

49. *All Apparatus.* Section 203(a) of the CVAA requires that ''if technically feasible'' each ''apparatus designed to

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[148] *See* 47 CFR 79.1(g)(1).

[149] We note that in 2004, a petition filed by consumer groups proposed a base forfeiture of $8,000 for violations of the Commission's closed captioning rules. *See* Telecommunications for the Deaf, Inc. *et al.* Petition for Rulemaking, RM–11065 (July 23, 2004). Petitioners included Telecommunications for the Deaf, Inc., the National Association of the Deaf, Self Help for Hard of Hearing People, the Association for Late Deafened Adults, Inc., and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN).

[150] *See http://www.fcc.gov/complaints.*

[151] *See Video Description Order* at para. 55.

[152] *See* 47 CFR 79.1(i)(1) (requiring television video programming distributors to ''designate a telephone number, fax number, and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns,'' and requiring distributors to ''include this information on their Web sites (if they have a Web site), in telephone directories, and in billing statements'').

[153] *See* 47 CFR 79.1(i)(2).

[154] *See* 47 CFR 79.1(i)(3); *http://esupport.fcc.gov/vpd-search/search.action#scroll/There.*

[155] *See Closed Captioning of Video Programming,* FCC 09–109, 75 FR 7368, February 19, 2010 (describing the webform by which television video programming distributors may submit their contact information). Television video programming distributors may enter their contact information at *https://esupport.fcc.gov/vpd-data/login!input.action.*

[156] *See* S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30–31.

[157] Public Law 111–260, § 203(a).

[158] Public Law 111–260, § 203(b).

[159] 47 U.S.C. 303(u)(2)(A), 303(z)(1).

[160] 47 U.S.C. 303(u)(2)(B).

[161] 47 U.S.C. 303(u)(2)(C).

receive or play back video programming transmitted simultaneously with sound * * * be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.'' [162] We seek comment on the issue of what constitutes an ''apparatus.'' How should the Commission determine whether it is ''technically feasible'' for apparatus to meet the requirements of Section 203? We note that neither the statute nor legislative history gives us guidance on a definition of apparatus. Nevertheless, we begin with the assumption that the term includes all hardware that is used in receiving or playing back video programming. At the same time, we note that the CVAA gives the Commission authority to waive the requirements of its rules requiring the display, render or pass through of closed captioning for apparatus or any class of apparatus ''(i) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or (ii) for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.'' [163]

50. Therefore, we seek comment on how to determine whether hardware is primarily designed for receiving or playing back video programming transmitted simultaneously with sound, and how to determine whether hardware derives its essential utility from receiving and playing back video. The legislative history expanded on the availability of waivers by stating that the Commission may waive the Section 203 closed captioning requirements ''where, for instance, a consumer typically purchases a product for a primary purpose other than viewing video programming, and access to such programming is provided on an incidental basis.'' [164] In making waiver decisions, the Commission generally considers whether special circumstances exist that warrant deviation from the general rule, and whether the waiver will serve the public interest.[165] Accordingly, we seek comment on the factors that the Commission should evaluate in determining whether an apparatus is eligible for a waiver. Should we consider how the apparatus is designed and marketed? How should we consider the fact that different people may consider the same device as having a different ''essential utility''? In recognition of the fact that, as technology evolves, the ''essential utility'' of apparatus may change, should waivers be temporary, and if so, what should their duration be and what process should be used for renewing waivers? We invite examples of apparatus that are or are not primarily designed for receiving or playing back video programming transmitted simultaneously with sound, and examples of apparatus that do or do not derive their essential utility from receiving and playing back video. Where do devices such as video gaming consoles, cellular telephones, and tablet devices fit within these criteria? Are there are any specific classes of apparatus that warrant the establishment of a categorical or blanket waiver, or should all waivers be addressed case-by-case? We note that personal computers and video gaming consoles are used by a large percentage of viewers of VPDs/VPPs.[166] Should we make any special considerations for these devices? If the Commission considers waivers for a particular ''class'' of apparatus, what factors should we consider, and how should we determine what apparatus constitute a ''class''? Should the Commission adopt a process for determining whether to waive the closed captioning requirements of Section 203 of the CVAA, or should we handle waivers pursuant to Section 1.3 of our rules? [167]

51. We also seek comment on whether apparatus also includes software. To what extent is hardware that is designed to receive or play back video programming dependent on software for its functionality? For example, consumers view programming intended to be covered by Section 202 on personal computers and cellular telephones. Both a computer and a cellular phone can be viewed as a single apparatus or several working together, such as the processor, memory, and storage, the display and other peripheral components, and the operating system and applications. If software is considered an apparatus, we seek comment on how the Commission can ensure compliance, particularly when software is provided over the Internet directly to the end user.[168]

52. *Screen Size and Display-Only Monitors.* The closed captioning requirement of the CVAA is no longer restricted to television receivers or to those devices with screens larger than 13 inches, exceptions that were put into place by the Television Decoder Circuitry Act.[169] As Congress noted, consumers now view video programming on smaller and portable devices, and to the extent ''achievable,'' closed captioning must be made available on these devices.[170] However, apparatus that use a picture screen that is less than 13 inches in size and that are designed to receive or play back video must be equipped with built-in closed caption decoder circuitry or the capability to display closed captions only if this is ''achievable.'' [171] Therefore, while we propose to remove the screen-size limitation entirely from Section 15.119 and Section 15.122 of the Commission's rules, and to not include any screen size limitation in our new rules,[172] we address the issue of achievability below. Additionally, the CVAA provides that ''any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements'' to display or render captions and we subsequently propose adopting this exception as written.[173] How should the Commission define devices that qualify for inclusion in this exempted category of apparatus? It would seem that Congress intended to exempt computer monitors with this language, because the monitor itself lacks playback capability. We seek comment on what other devices, if any, Congress intended to exempt by this language.

53. *Achievability.* The CVAA contains a definition for achievability, directing that for the purposes of the CVAA, determining whether a requirement is achievable consists of evaluating the following factors: (1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or

[162] 47 U.S.C. 303(u)(1)(A).

[163] 47 U.S.C. 303(u)(2)(C).

[164] *See* S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30.

[165] *Northeast Cellular Telephone Co., L.P.* v. *FCC*, 897 F.2d 1164, 1166 (DC Cir. 1990) (*citing WAIT Radio* v. *FCC*, 418 F.2d 1153, 1159 (DC Cir. 1969)); *see also* 47 CFR 1.3.

[166] Nielsenwire, ''What Netflix Viewers Are Watching * * * And How,'' July 27, 2011 at *http://blog.nielsen.com/nielsenwire/online_mobile/what-netflix-and-hulu-users-are-watching-and-how/* (visited August 30, 2011).

[167] *See* 47 CFR 1.3 (''Any provision of the [Commission's rules] may be waived by the Commission on its own motion or on petition if good cause therefor is shown.'').

[168] Section 330(b) of the Act as modified by the CVAA prohibits the shipment in interstate commerce, manufacture, assembly or import from a foreign country of apparatus violating the rules we adopt in this proceeding.

[169] Public Law 101–431, 104 Stat. 960 (1990). Previously codified at 47 U.S.C. 303(u), 330(b).

[170] S. Rep. No. 111–386 at 14.

[171] 47 U.S.C. 303(u)(2)(A).

[172] 47 CFR 15.119 (closed captioning requirements for analog television receivers), 47 CFR 15.122 (closed captioning requirements for digital television receivers).

[173] 47 U.S.C. 303(u)(2)(B).

service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.[174] We seek comment on how to apply this definition to apparatus subject to Section 203 of the CVAA. Under this definition, what classes of devices that are otherwise designed to display or record video are nevertheless incapable of supporting closed captioning? Is there a screen size or resolution at which it would become so difficult to read captions that there would be no benefit to justify the cost of including this capability? Are there devices which simultaneously contain the processing power to display video yet are incapable of processing the additional data necessary to display closed captions? Finally, what characteristics of a manufacturer's operations should the Commission consider in determining whether it is achievable for that manufacturer to include closed caption capability in a device with a screen size less than 13 inches? For example, should the Commission consider whether the manufacturer is a small business, and if so, is there an existing definition of ''small business'' that the Commission should apply? How should an evaluation of what is ''achievable'' differ from an evaluation of what is ''technically feasible''? [175]

54. *Recording Devices.* In addition to devices that consumers use to directly view video, those that record video must also have closed-captioning capability. Specifically, the CVAA added Section 303(z) to the Act, which requires that, ''if achievable * * * apparatus designed to record video programming * * * [must] enable the rendering or the pass-through of closed captions.'' [176] Thus, we seek comment on codifying this requirement verbatim in our rules and interpreting ''apparatus'' that are designed to ''record video programming'' to also include hardware-only products. We seek comment on whether we should also interpret ''apparatus'' that are designed to ''record video programming'' to include software-only products, such as software designed to enable a PC to function as a video recording platform. While some devices, such as digital video recorders, plainly appear to be covered by this section, other devices, such as network-connected hard drives, also can be used to record video. For example, home-networking protocol suites, such as DLNA,[177] permit networked devices, such as computers and hard-drives, to be used for video storage while control of those devices is accomplished by a combination of software running on the device itself and on devices accessing or manipulating the video stream. We seek comment on the proper scope of the definition of ''apparatus designed to record video programming.'' Additionally, to the extent the definition of ''achievable'' differs from that discussed above, we seek comment on determining the capabilities of recording devices relative to display devices.

55. *Interconnection Mechanisms.* Finally, the CVAA directs the Commission to regulate interconnection mechanisms. Specifically, the CVAA requires that ''interconnection mechanisms and standards for digital video source devices [be] available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions.'' [178] We seek input on how this objective can best be achieved. Is it sufficient to require that intermediate devices, such as set-top boxes and digital video recorders, be capable of conveying closed captions to display devices and to assume that standards for interconnection will be developed as necessary? Does the Commission need to extend its regulations to manufacturers or standards bodies that develop and deploy these interconnection mechanisms to ensure that they are capable of conveying closed captioning information? Should the Commission take a more active role in requiring a particular standard? We additionally seek comment on what specific connections Congress intended to be covered by this provision. For example, component video connections and HDMI, used to transmit high definition video signals from a set-top box or computer to a television or monitor, do not carry closed captions.[179] However, based on our requirements, those devices connected to the television or monitor via HDMI or component video would be required to render the captions prior to transmitting the video signal. Did Congress intend to cover home networking connections, such as WiFi or Multimedia Over Coax (MoCA), and if so, should we instead direct our attention to the protocol suites which use these interconnection technologies, such as DLNA? We seek comment on what it means to carry the necessary information to ''permit or render the display of closed captions'' and what existing technologies satisfy this requirement.

B. Obligations Under Section 203 of the CVAA

56. In this *NPRM*, we also seek comment on the features and specifications that must be supported by the devices covered by Section 203. Section 203(c) requires that the Commission prescribe performance and display standards for built-in decoder circuitry or capability designed to display closed captioned video programming.[180] The VPAAC Report addresses this issue, recommending a feature set which mirrors that available on television receivers and we propose rules requiring these same features. These capabilities include the presentation of captions, via roll-up, pop-on, or paint-on techniques, and the setting of semantically significant character formatting, as well as capabilities regarding character color, character opacity, character size, fonts, caption background, character edge attributes, caption window color, and language selection.[181] We further propose, pursuant to the VPAAC recommendation, that these settings be user configurable and that the user's selection be retained between viewing sessions, though where the user has not made a selection, the settings provided by the content owner are displayed.[182] While the VPAAC states that the functionality in an IP world should not be less than what is provided to consumers through digital television, there are other features the VPAAC Report identifies as components of the ''experience'' that must be provided to users, but that are not included in the VPAAC Report's discussion of specific capabilities, such as the user-controlled

[174] 47 U.S.C. 617(g).

[175] *See* para. 49, *supra.*

[176] 47 U.S.C. 303(z)(1).

[177] *See* Digital Living Network Alliance, *http://www.dlna.org.*

[178] 47 U.S.C. 303(z)(2).

[179] *See Does HDMI Support Closed Captioning?* High Definition Multimedia Interface, Frequently Asked Questions *http://www.hdmi.org/learningcenter/faq.aspx#117.* Captions are rendered by the host device, such as a set-top box and transmitted in an open matter, rendered into the video stream. While this makes captioning available, it does not utilize the functionality built into the end device, which some consumers may prefer.

[180] Public Law 111–260, § 203(c).

[181] VPAAC Report at 13–16.

[182] *Id.* at 15.

placement of captions.[183] We seek comment on the list of features included in the VPAAC Report, especially whether the requirements must be modified for specific classes of devices, such as those with very small screens or those with limited processing power. To what extent beyond what is currently available should users be able to control the appearance of their captions through user tools on video apparatus? Which aspects must, and which may, be user-controllable? Is there a need to require such functionality to ensure compliance? We also seek comment on the inherent differences, technical and otherwise, in the rendering of captions on Internet-connected devices (*e.g.*, on a Web browser or a smartphone app) versus television receivers? What are the inherent differences, technical and otherwise, in the rendering of captions on mobile devices versus fixed-use television and video receivers?

57. We seek comment on what standards, if any, the Commission should mandate to implement the goals of Section 203 of the CVAA. In particular, we seek comment on whether we should adopt a particular delivery file format that devices must support. The VPAAC Report discusses three use cases of how content can be distributed via the Internet to consumer devices: Use Case 1, where content is delivered to an unaffiliated device; Use Case 2, where content is delivered to a Web browser; and Use Case 3, where content is delivered to a managed device or application.[184] The VPAAC Report concludes that Use Cases 2 and 3 ''require a specific standard distribution format based on standards developed within an open process by recognized industry standard-setting organizations;'' however it does not identify what that standard should be.[185] When the Commission initially adopted rules for closed captioning, it adopted certain standards for delivery and decoding of captions and made those standards mandatory for all devices capable of receiving television content.[186] In those cases, however, a clear industry standard and consensus on the format already existed, and the standard was applied with respect to one television delivery standard. Furthermore, television programmers rarely maintain any relationship with the devices displaying the content they provide. In the Internet-delivery context, however, VPDs/VPPs deliver content in many different formats, each continually evolving, and a Commission-mandated standard could restrict industry innovation. Conversely, Congress clearly envisioned consumers being able to access closed captions contained in any programming on any device that is capable of displaying the associated video, and a lack of standards could make this goal more difficult and costly to achieve.[187] Furthermore, the relationship between the content provider and the device or software provider may be such that the VPP/VPD could contract with device manufacturers to support captions in the format the VPP/VPD chooses. With respect to Use Case 1, the VPAAC Report concludes that a common file format is required, and suggests SMPTE-TT as that format.[188] We seek comment on whether we should require a particular delivery standard or standards to be supported on devices pursuant to Section 203 of the CVAA. As an alternative, would a more general rule requiring that devices capable of receiving unaffiliated content from VPPs/VPDs be capable of decoding and rendering captions transmitted by VPPs/VPDs be preferable to achieve the goals of the CVAA?

58. *Alternate Means of Compliance.* The CVAA permits that ''an entity may meet the requirements of sections 303(u), 303(z), and 330(b) of the [Act] through alternate means than those prescribed by regulations * * * as determined by the Commission.'' [189] We seek comment on a process by which the Commission may determine that the alternate means selected by a party nevertheless meet the requirements of the preceding sections. Additionally, are there some requirements above that cannot be met via alternate means, such as the use of a standardized interconnection or the functional requirements prescribed above? [190]

59. *Location of Rules within the Code of Federal Regulations and Miscellaneous Issues.* Finally, we seek comment on any other issues that need to be addressed by the Commission to meet the CVAA's objective of ensuring that consumers can receive closed captions on video apparatus covered by the Act. For example, while we currently propose to create and modify requirements in Part 15 of the Commission's rules, we seek comment on whether a more appropriate location for these rules would be proximate to the existing closed captioning and video description rules in Part 79, or as a new, video-device specific section created to consolidate the device rules other than those relating to reception of radio frequency signals that the Commission currently maintains Part 15 of the Commission's rules contains numerous ancillary obligations (such as certification or verification) and attendant definitions which may or may not be beneficial to the overall goals of the rules. By creating a new section, we could consolidate various rule parts related to video devices, including other video device rules contained in Title 47 of the CFR that are not directly related to the reception of radio frequency signals. In this case, for example, Section 15.122, the closed captioning rules for digital television, could be moved, and Section 15.119 could be moved if it is still necessary, or else deleted. Are there additional benefits or implications to separating device rules for closed captioning from the general Part 15 requirements?

C. Schedule of Deadlines

60. While the CVAA specifies that the Commission must promulgate rules within six months of the submission of the VPAAC Report, it does not specify the timeframe by which those regulations must become effective.[191] Additionally, while the VPAAC Report recommends timeframes by which closed captioning must be made available, it does not address the timeframe on which devices must become compliant.[192] It notes that one group suggested that a minimum of 24 months would be required to implement the features discussed above, but that others thought this time period was too long.[193] We seek comment on the appropriate timeframe to implement closed captioning technical requirements pursuant to Section 203 of the CVAA. Should features or device classes be phased in, accelerating the deployment of devices for which the addition of closed captioning is easy, while allowing more time for those parties that need it? We note that the Commission allowed slightly less than 24 months for device manufacturers to design and build DTV closed captioning display functionality into their products.[194] Is this timeframe

[183] *Id.* at 34, Appendix C.

[184] *Id.* at 18–20.

[185] *Id.* at 27.

[186] *See DTV Receiver Closed Captioning Order*, FCC 00–259, 65 FR 58467, September 29, 2000 (''*DTV Receiver Closed Captioning Order*''); *TDCA Order.*

[187] *See* S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30.

[188] VPAAC Report at 27.

[189] Public Law 111–260, § 203(e).

[190] *See para.* 55, *supra.*

[191] Public Law 111–260, § 203(d).

[192] VPAAC Report at 34.

[193] *Id.*

[194] *See DTV Receiver Closed Captioning Order*, 65 FR 58467. (The order was adopted on July 21, 2000, released on July 31, 2000, and published in the

Continued

appropriate in light of the current electronics manufacturing process? Would it be an appropriate timeframe if we define ''apparatus'' to include software? If we adopt the compliance schedule for VPPs/VPDs discussed above (varying from six to 18 months, depending on the nature of the programming),[195] should we also ensure that some or all devices that will be used to access those services will be capable of decoding closed captions when they are available?

V. Conclusion

61. In conclusion, in this *NPRM*, we seek comment on proposed rules that would require IP-delivered video programming to include closed captions if that programming is shown on television with captions after the effective date of our new rules. We further seek comment on proposed rules that would require this capability for nearly all devices that consumers use to access IP-delivered video programming. These proposals seek to further the intent of Congress to give individuals who are deaf or hard of hearing better access to IP-delivered video programming.

VI. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

62. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''),[196] the Commission has prepared this present Initial Regulatory Flexibility Analysis (''IRFA'') concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (''*NPRM*''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by in accordance with the same filing deadlines for comments on the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'').[197] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.[198]

Federal Register on September 29, 2000. The rules became effective on July 1, 2002.)

[195] *See* Section III. B., *supra.*

[196] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[197] *See* 5 U.S.C. 603(a).

[198] *See id.*

1. Need for, and Objectives of, the Proposed Rule Changes

63. The Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') requires the Federal Communications Commission (''Commission'') to revise its regulations to mandate closed captioning on certain video programming delivered using Internet protocol (''IP'').[199] In the *NPRM*, we initiate a proceeding that will fulfill this requirement. We seek comment on proposals that would better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, by requiring that programming be provided with closed captions if it was shown on television with captions after the effective date of the rules adopted pursuant to this proceeding. We also seek comment on requirements for the devices that are subject to the CVAA's new closed captioning requirements.[200] Our goal is to require the provision of closed captions with IP-delivered video programming in the manner most helpful to consumers, while ensuring that our regulations do not create undue economic burdens for the distributors, providers, and owners of online video programming.

64. Closed captioning is an assistive technology that provides individuals who are deaf or hard of hearing with access to television programming. Closed captioning displays the audio portion of a television signal as printed words on the television screen. Existing regulations require the use of closed captioning on television.[201] Until now, however, closed captioning has not been required for IP-delivered video programming. That changed with the enactment of the CVAA. Specifically, Section 202(b) of the CVAA revised Section 713 of the Communications Act of 1934, as amended, to require the Commission to ''revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.'' [202]

65. The CVAA also required the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (''VPAAC'').[203] Section 201(e)(1) of the CVAA required the VPAAC to submit a report on closed captioning to the Commission six months after its first meeting, or by July 13, 2011.[204] The VPAAC submitted this report on July 12, 2011.[205] By statute, within six months of the submission of the VPAAC Report, the Commission must issue final regulations to require the provision of closed captioning on IP-delivered video programming.[206] Accordingly, the Commission must revise its regulations by January 12, 2012.[207] By the same date, pursuant to Section 203 of the CVAA, the Commission must revise its regulations to include any technical standards, protocols, and procedures needed for the transmission of closed captioning delivered using IP, to ensure that certain apparatus are capable of rendering, passing through, or otherwise permitting the display of closed captions for end users.[208]

66. The *NPRM* considers revisions to our rules that would implement the requirements of Sections 202(b) and 203 of the CVAA, as well as the conforming amendment set forth in Section 202(c) of the CVAA. These proposals could fulfill Congress' goal of enabling consumers who are deaf or hard of hearing to access IP-delivered video programming. The *NPRM* seeks comment on rule changes that would:

- Specify the obligations of entities subject to Section 202(b) by:
  - Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and video programming providers along with program files;
  - Requiring video programming distributors and video programming providers to enable the rendering or pass through of all required captions to the end user; and
  - Requiring the quality of all required captioning of IP-delivered video programming to be of at least the same quality as the captioning of

[199] Public Law 111–260, 124 Stat. 2751, § 202(b) (2010). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

[200] *See* Public Law 111–260, § 203.

[201] *See* 47 CFR 79.1 (setting forth the requirements for closed captioning of video programming on television).

[202] 47 U.S.C. 613(c)(2)(A).

[203] Public Law 111–260, § 201(a).

[204] *Id.*, § 201(e)(1).

[205] *See* First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, *available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf* (''VPAAC Report'').

[206] 47 U.S.C. 613(c)(2)(A).

[207] *See id.*

[208] Public Law 111–260, § 203(a)–(b), (d).

the same programming when shown on television;[209]

- Create a schedule of deadlines by which:
  - All prerecorded and unedited programming subject to the new requirements must be captioned within six months of publication of the rules in the **Federal Register**;
  - All live and near-live programming subject to the new requirements must be captioned within 12 months of publication of the rules in the **Federal Register**; and
  - All prerecorded and edited programming subject to the new requirements must be captioned within 18 months of publication of the rules in the **Federal Register**; [210]
- Craft procedures by which video programming providers and video programming owners may petition the Commission for exemptions from the new requirements based on economic burden; [211]
- Establish a mechanism to make information about video programming subject to the CVAA available to video programming providers and distributors, by requiring video programming owners to provide programming for IP delivery either with captions, or with a certification that captions are not required for a stated reason; [212]
- Decline to adopt particular technical standards for IP-delivered video programming; [213]
- Decline to treat a *de minimis* failure to comply with the new rules as a violation, and permit entities to comply with the new requirements by alternate means; [214] and
- Adopt procedures for complaints alleging a violation of the new requirements.[215]

Additionally, we seek comment on the appropriate requirements for devices subject to the closed captioning requirements of Section 203.[216]

2. Legal Basis

67. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

68. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[217] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [218] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[219] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[220] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

69. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[221] First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[222] In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [223] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[224] Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [225] Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.[226] We estimate that, of this total, as many as 88,506 entities may qualify as ''small governmental jurisdictions.'' [227] Thus, we estimate that most governmental jurisdictions are small.

70. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [228] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[229] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small

[209] *See NPRM*, Section III.A.

[210] *See id.*, Section III.B.

[211] *See id.*, Section III.C.

[212] *See id.*, Section III.D.

[213] *See id.*, Section III.E.

[214] *See id.*, Section III.F.

[215] *See id.*, Section III.G.

[216] *See id.*, Section IV.

[217] 5 U.S.C. 603(b)(3).

[218] 5 U.S.C. 601(6).

[219] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[220] 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[221] *See* 5 U.S.C. 601(3)–(6).

[222] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' *http://web.sba.gov/faqs* (last visited May 6, 2011; figures are from 2009).

[223] 5 U.S.C. 601(4).

[224] Independent Sector, The New Nonprofit Almanac & Desk Reference (2010).

[225] 5 U.S.C. 601(5).

[226] U.S. Census Bureau, Statistical Abstract of the United States: 2011, Table 427 (2007).

[227] The 2007 U.S Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

[228] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers,'' (partial definition), *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110* (last visited Oct. 21, 2009).

[229] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo&_id=&-fds&_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

business size standard, the majority of such firms can be considered small.

71. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[230] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[231] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[232] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers.[233] Thus, under this second size standard, most cable systems are small.

72. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [234] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[235] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[236] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[237] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

73. *Direct Broadcast Satellite (''DBS'') Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' [238] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[239] To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[240] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (''EchoStar'') (marketed as the DISH Network).[241] Each currently offers subscription services. DIRECTV [242] and EchoStar [243] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

74. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.[244] The second has a size standard of $25 million or less in annual receipts.[245]

75. The category of Satellite Telecommunications ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [246] Census Bureau data for 2007 show that 512 Satellite Telecommunications firms operated for that entire year.[247] Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999.[248] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our proposed action.

76. The second category, *i.e.* ''All Other Telecommunications'' comprises ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable

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[230] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, FCC 95–196, 60 FR 35854, July 12, 1995.

[231] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[232] 47 CFR 76.901(c).

[233] Warren Communications News, *Television & Cable Factbook 2008*, ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[234] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[235] 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[236] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[237] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to sec. 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[238] *See* 13 CFR 121.201, NAICS code 517110 (2007).

[239] 13 CFR 121.201, NAICS code 517110 (2007).

[240] *See http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[241] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, para. 74 (2009) (''*13th Annual Report*''). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (''Dominion'') (marketed as Sky Angel). *See* Public Notice, ''Policy Branch Information; Actions Taken,'' Report No. SAT–00474, 22 FCC Rcd 17776 (IB 2007).

[242] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B–3.

[243] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving ''Sky Angel'' service from DISH Network. *See id.* at 581, para. 76.

[244] 13 CFR 121.201, NAICS code 517410.

[245] 13 CFR 121.201, NAICS code 517919.

[246] U.S. Census Bureau, 2007 NAICS Definitions, ''517410 Satellite Telecommunications.''

[247] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo&_id=&-_skip=900&-ds_name=EC0751SSSZ4-_lang=en*

[248] *See id.*

of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' [249] For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.[250] Of this total, 2,346 firms had annual receipts of under $25 million and 37 firms had annual receipts of $25 million to $49,999,999.[251] Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

77. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[252] Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' [253] The Commission has estimated the number of licensed commercial television stations to be 1,390.[254] According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations [255] in the United States have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (''NCE'') television stations to be 391.[256] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [257] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

78. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

79. *Open Video Services*. Open Video Service (OVS) systems provide subscription services.[258] The open video system (''OVS'') framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[259] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[260] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' [261] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[262] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[263] Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises.[264] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.[265] Affiliates of Residential Communications Network, Inc. (''RCN'') received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

[249] *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search.*

[250] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=-_skip=900 ds_name=EC0751SSSZ4&-_lang=en.*

[251] *See id.*

[252] *See* 13 CFR 121.201, NAICS Code 515120 (2007).

[253] *Id.* This category description continues, ''These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.'' Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[254] *See* News Release, ''Broadcast Station Totals as of December 31, 2010,'' 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) (''*Broadcast Station Totals*''); also available at *http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC–304594A1.pdf''.*

[255] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*; however, we are using BIA's estimate for purposes of this revenue comparison.

[256] *See Broadcast Station Totals.*

[257] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 121.103(a)(1).

[258] *See* 47 U.S.C. 573.

[259] 47 U.S.C. 571(a)(3)–(4). See 13th Annual Report, 24 FCC Rcd at 606, para. 135.

[260] See 47 U.S.C. 573.

[261] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers''; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[262] See *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[263] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[264] *See 13th Annual Report*, 24 FCC Rcd at 606–07, para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[265] *See http://www.fcc.gov/mb/ovs/csovscer.html (current as of February 2007).*

80. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. * * * These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' [266] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, which supersedes data from the 2002 Census, there were 396 firms that in 2007 were engaged in production of Cable and Other Subscription Programming. Of these, 386 operated with less than 1,000 employees, and 10 operated with more than 1,000 employees. However, as to the latter 10 there is no data available that shows how many operated with more than 1,500 employees. Thus, under this category and associated small business size standard, the majority of firms can be considered small.[267]

81. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.'' [268] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The size standard established by the SBA for this business category is that annual receipts of $29.5 million or less determine that a business is small.[269] According to the 2007 Census, there were 9,095 firms that in 2007 were engaged in Motion Picture and Video Production. Of these, 8,995 had annual receipts of $24,999,999 or less, and 100 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[270] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

82. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.'' [271] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Based on the SBA size standard of annual receipts of 29.5 million dollars,[272] and according to that 2007 Census source, which supersedes data from the 2002 Census, there were 450 firms that in 2007 were engaged in Motion Picture and Video Distribution. Of that number, 434 received annual receipts of $24,999,999 or less, and 16 received annual receipts ranging from $25,000,000 to $100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.[273]

83. *Small Incumbent Local Exchange Carriers (LECs).* We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' [274] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[275] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

84. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[276] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[277] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[278] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the NPRM. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small providers.[279]

85. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has

[266] U.S. Census Bureau, 2007 NAICS Definitions, ''515210 Cable and Other Subscription Programming''; *http://www.census.gov/naics/2007/def/ND515210.*

[267] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[268] U.S. Census Bureau, 2007 NAICS Definitions, NAICS Code 512110, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007%20NAICS%20Search.*

[269] 13 CFR 121.201, NAICS Code 512110.

[270] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds&_name=EC0700A1&-_skip=200&-ds_name=EC0751SSSZ5&-_lang=en.*

[271] *See* U.S. Census Bureau, 2007 NAICS Definitions, NAICS Code 512110, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007%20NAICS%20Search.*

[272] 13 CFR 121.201, NAICS Code 512110.

[273] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=200&-ds_name=EC0751SSSZ5&-_lang=en.*

[274] 15 U.S.C. 632.

[275] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (''Small Business Act''); 5 U.S.C. 601(3) (''RFA''). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[276] 13 CFR 121.201, NAICS code 517110.

[277] *See Trends in Telephone Service,* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (''*Trends in Telephone Service*'').

[278] *See id.*

[279] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[280] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.[281] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[282] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[283] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[284] In addition, 72 carriers have reported that they are Other Local Service Providers.[285] Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.[286] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the *NPRM*.

86. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing*. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' [287] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. According to Census bureau data for 2007, there were a total of 919 firms in this category that operated for the entire year. Of this total, 771 had less than 100 employees and 148 had more than 100 employees.[288] Thus, under that size standard, the majority of firms can be considered small.

87. *Audio and Video Equipment Manufacturing*. The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees.[289] Data contained in the 2007 U.S. Census indicate that 491 establishments operated in that industry for all or part of that year. In that year, 376 establishments had between 1 and 19 employees; 80 had between 20 and 99 employees; and 35 had more than 100 employees.[290] Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

88. *Internet Publishing and Broadcasting and Web Search Portals*. The Census Bureau defines this category to include ''* * * establishments primarily engaged in (1) publishing and/or broadcasting content on the Internet exclusively or (2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other Web sites, auctions, news, and other limited content, and serve as a home base for Internet users.''

89. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a Web search portal on the Internet to be small if it has fewer than 500 employees.[291] For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,705 such firms that operated that year.[292] Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees and, thus, would be deemed small under the applicable SBA size standard.[293] Accordingly, the majority of establishments in this category can be considered small under that standard.

90. *Closed Captioning Services*. These entities would be indirectly affected by our proposed action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, ''Teleproduction and Other Postproduction Services'' and ''Court Reporting and Stenotype Services.''

91. The first category of *Teleproduction and Other Postproduction Services* ''comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.'' The relevant size standard for small businesses in these services is an annual revenue of less than $29.5 million.[294] For this category, Census Bureau Data for 2007 indicate that there were 1,605 firms that operated in this category for the entire year. Of that number, 1,597 had receipts totaling less than $29,500,000.[295] Consequently we estimate that the majority of Teleproduction and Other Postproduction Services firms are small

[280] 13 CFR 121.201, NAICS code 517110.

[281] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds&_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[282] *See Trends in Telephone Service* at Table 5.3.

[283] *See id.*

[284] *See id.*

[285] *See id.*

[286] *See id.*

[287] The NAICS Code for this service 334220. *See* 13 CFR 121.201. *See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731SG2&-_lang=en''.*

[288] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=4500&-ds_name=EC0731SG3&-_lang=en..*

[289] 13 CFR 121.201, NAICS Code 334310.

[290] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=300&-ds_name=EC0731I1&-_lang=en.*

[291] 13 CFR 121.201, NAICS Code 519130.

[292] U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 519130 (rel. Nov. 19, 2010); *http://factfinder.census.gov.*

[293] *Id.*

[294] U.S. Census Bureau, 2002 NAICS Definitions, ''512191 Teleproduction and Other Postproduction Services''; *http://www.census.gov/epcd/naics02/def/NDEF512.HTM.* The size standard is $29.5 million.

[295] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo&_id=&-_skip=300&-ds_name=EC0751SSSZ5&-_lang=en.*

entities that might be affected by our proposed actions.

92. The second category of *Court Reporting and Stenotype Services* ''comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.'' The size standard for small businesses in these services is an annual revenue of less than $7 million.[296] For this category, Census Bureau data for 2007 show that there were 2,706 firms that operated for the entire year. Of this total, 2,590 had annual receipts of under $5 million, and 19 firms had receipts of $5 million to $9,999,999.[297] Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities that might be affected by our proposed action.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

93. The *NPRM* proposes requiring video programming owners (''VPOs'') to send program files to video programming distributors (''VPDs'') and video programming providers (''VPPs'') either with captions, or with a dated certification that captions are not required for a reason stated in the certification.[298] When a program newly becomes subject to the captioning requirements, the NPRM proposes requiring VPOs to provide VPDs/VPPs with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.[299] VPDs/VPPs would be required to retain all such VPO certifications for so long as they make the certified programming available to end users through a distribution method that uses IP, and for at least one calendar year thereafter.[300]

94. The *NPRM* proposes creating a process by which VPPs and VPOs may petition the Commission for a full or partial exemption of the requirements for closed captioning of IP-delivered video programming, which the Commission may grant upon a finding that the requirements would be economically burdensome.[301] The *NPRM* also proposes adopting procedures for complaints alleging a violation of the IP closed captioning rules.[302]

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

95. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[303]

96. We note that our discussion of alternatives is circumscribed because of the specificity of Sections 202(b), (c) and 203 of the CVAA. The CVAA does, however, recognize the special concerns of small entities by creating an exemption process where compliance with the rules would be economically burdensome. In furtherance of this statutory requirement, the *NPRM* proposes procedures enabling the Commission to grant exemptions to the rules governing closed captioning of IP-delivered video programming, where a petitioner has shown it would be an economic burden (*i.e.*, a significant difficulty or expense).[304] This exemption process would allow the Commission to address the impact of the rules on individual entities, including smaller entities, and modify the rules to accommodate individual circumstances. The exemption procedures proposed in the *NPRM* were specifically designed to ameliorate the impact of the rules for closed captioning of IP-delivered video programming in a manner consistent with the objective of increasing the availability of captioned programming.

97. Overall, in proposing rules governing the closed captioning of IP-delivered video programming, we believe that we have appropriately balanced the interests of individuals who are deaf or hard of hearing against the interests of the entities who will be subject to the rules, including those that are smaller entities. Our efforts are consistent with Congress' goal of ''updat[ing] the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.'' [305]

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

98. None.

B. Initial Paperwork Reduction Act of 1995 Analysis

99. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

C. Ex Parte Rules

100. *Permit-But-Disclose.* The proceeding this *NPRM* initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules.[306] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing

[296] U.S. Census Bureau, 2002 NAICS Definitions, ''561492 Court Reporting and Stenotype Services''; *http://www.census.gov/epcd/naics02/def/NDEF561.HTM.*The size standard is $7 million.

[297] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=400&-ds_name=EC0756SSSZ4&-_lang=en.*

[298] *See NPRM,* Section III.D.

[299] *See id.*

[300] *See id.*

[301] *See NPRM,* Section III.C.

[302] *See id.,* Section III.G.

[303] 5 U.S.C. 603(c)(1)–(c)(4).

[304] *See NPRM,* Section III.C.

[305] *See* S. Rep. No. 111–386, 111th Cong., 2d Sess. at 1 (2010); H.R. Rep. No. 111–563, 111th Cong., 2d Sess. at 19 (2010).

[306] 47 CFR 1.1200 *et seq.*

them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

101. *Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[307] interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (''ECFS''), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[308] We strongly encourage commenters to indicate which portions of their comments and reply comments pertain to Section 202 of the CVAA, and which portions of their comments and reply comments pertain to Section 203 of the CVAA.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/''* or the Federal eRulemaking Portal: *http://www.regulations.gov*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to Room TW–A325 at FCC Headquarters, 445 12th Street, SW., Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. The filing hours are 8 a.m. to 7 p.m.

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

○ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

102. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be publically available online via ECFS.[309] These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY–A257 at FCC Headquarters, 445 12th Street, SW., Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m.

103. *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 FCC's Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

104. *Additional Information.* For additional information on this proceeding pertaining to Section 202 of the CVAA, contact Diana Sokolow, *Diana.Sokolow@fcc.gov*, of the Policy Division, Media Bureau, (202) 418–2120. For additional information on this proceeding pertaining to Section 203 of the CVAA, contact Jeffrey Neumann, *Jeffrey.Neumann@fcc.gov*, of the Engineering Division, Media Bureau, (202) 418–7000.

VII. Ordering Clauses

105. Accordingly, *it is ordered* that pursuant to the authority contained in sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617, this Notice of Proposed Rulemaking *is adopted*.

106. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 15

Communications equipment, Labeling, and Reporting and recordkeeping requirements.

47 CFR Part 79

Cable television operators, Multichannel video programming distributors (MVPDs), Satellite television service providers, Television broadcasters.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 15 and 79 as follows:

PART 15—RADIO FREQUENCY DEVICES

1. The authority citation for part 15 is revised to read as follows:

Authority: 47 U.S.C. 154, 302(a), 303, 304, 307, 330, 336, 544a, 549, and 617.

2. Section 15.119 is amended by revising paragraph (a) to read as follows:

(a)(1) Effective July 1, 1993, all TV broadcast receivers with picture screens 33 cm (13 in) or larger in diameter shipped in interstate commerce, manufactured, assembled, or imported from any foreign country into the United States shall comply with the provisions of this section.

Note to paragraph (a)(1): This paragraph places no restriction on the shipping or sale of television receivers that were manufactured before July 1, 1993.

(2) Effective [Effective Date of the rule], all television receivers shipped in interstate commerce, manufactured, assembled, or imported from any foreign country into the United States shall comply with the provisions of this section, except for television receivers with picture screens measuring less than 13 inches diagonally for which this is not achievable.

* * * * *

3. Section 15.122 is amended by revising paragraph (a)(1) to read as follows:

(a)(1) Effective [Effective Date of the rule], all digital television receivers and all separately sold DTV tuners shipped in interstate commerce, manufactured or imported for use in the United States

[307] *See id.* 1.415, 1419.

[308] *See Electronic Filing of Documents in Rulemaking Proceedings,* Report and Order, 63 FR 24121, May 1, 1998.

[309] Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

shall comply with the provisions of this section, except for digital television receivers with picture screens measuring less than 13 inches diagonally for which this is not achievable.

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4. Add § 15.125 to read as follows:

§ 15.125 Closed caption decoder requirements for video devices.

(a) Effective [Effective Date of the rule], all apparatus designed to receive or play back video programming transmitted simultaneously with sound manufactured or imported for use in the United States and not subject to § 15.119 or § 15.122 of these rules, or is not a display-only video monitor with no playback capability shall comply with the provisions of this section.

(b) *Specific Technical Capabilities.* All apparatus subject to paragraph (a) of this section, except exempt apparatus and apparatus with picture screens measuring less than 13 inches for which these requirements are not achievable, shall have the following technical capabilities:

(1) All apparatus shall implement ''pop-on,'' ''roll-up,'' and ''paint-on'' presentation of captions.

(2) All apparatus shall make available semantically significant formatting, such as italics, text color and underlining.

(3) All apparatus shall implement consumer selectability of caption availability, including turning captions on and off, selecting font size, selecting style, selecting color, and selecting background color and background opacity.

(4) All apparatus shall provide for the user selection of language, where available multiple languages or caption versions are available.

(5) All apparatus shall preserve original caption information regarding position, font, formatting, color, style, background, opacity, and presentation mode and display captions with such attributes where consumer selection of alternative attributes has not occurred or where consumer selection of default attributes has occurred.

(6) All apparatus shall maintain user selection among video viewing session and provide the ability to preview selection of options in this section.

5. Add § 15.126 to read as follows:

§ 15.126 Closed caption requirements for video recording devices.

(a) Effective [Effective Date of the rule], all apparatus designed to record video programming transmitted simultaneously with sound manufactured or imported for use in the United States and not subject to § 15.119 or § 15.122 of these rules shall comply with the provisions of this section, if achievable.

(b) All devices must enable the rendering of captions consistent with § 15.125 or enable the pass-through of closed-captioning data utilizing closed-captioning standards for transmission or closed-captioning capable interconnection mechanisms.

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

6. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

7. Add § 79.4 to read as follows:

§ 79.4 Closed captioning of video programming delivered using Internet protocol.

(a) *Definitions.* For purposes of this section the following definitions shall apply:

(1) *Video programming.* Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.

(2) *Full-length video programming.* Video programming that is not video clips or outtakes.

(3) *Video programming distributor or video programming provider.* Any entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.

(4) *Video programming owner.* Any person or entity that owns the copyright of the video programming delivered to the end user through a distribution method that uses Internet protocol.

(5) *Internet protocol.* Includes Transmission Control Protocol and any successor protocol or technology to Internet protocol.

(6) *Closed captioning.* The visual display of the audio portion of video programming.

(7) *Live programming.* Video programming that is shown on television substantially simultaneously with its performance.

(8) *Near-live programming.* Video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers.

(9) *Prerecorded programming.* Video programming that is not ''live'' or ''near-live.''

(10) *Edited for Internet distribution.* Video programming whose television version is substantially edited prior to its Internet distribution.

(11) *Consumer-generated media.* Content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.

(12) *Video clips.* Small sections of a larger video programming presentation.

(13) *Outtakes.* Content that is not used in an edited version of video programming shown on television.

(14) *Nonexempt programming.* Video programming that is not exempted under paragraph (e) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) *Requirements for closed captioning of Internet protocol-delivered video programming.* All nonexempt full-length video programming delivered using Internet protocol must be provided with closed captions if the programming was published or exhibited on television in the United States with captions after [Effective Date of the rule], in accordance with the following schedule:

(1) As of [Date six months after the rule is published in the **Federal Register**], all prerecorded programming that is not edited for Internet distribution must be provided with captions.

(2) As of [Date 12 months after the rule is published in the **Federal Register**], all live and near-live programming must be provided with captions.

(3) As of [Date 18 months after the rule is published in the **Federal Register**], all prerecorded programming that is edited for Internet distribution must be provided with captions.

(c) *Obligations of video programming owners, distributors and providers.*

(1) *Obligations of video programming owners.* Video programming owners must:

(i) Send program files to video programming distributors and providers either with captions as required by this section, or with a dated certification that captions are not required for a specified reason.

(ii) Provide video programming distributors and providers with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.

(2) *Obligations of video programming distributors and providers.* Video programming distributors and providers must:

(i) Enable the rendering or pass through of all required captions to the end user.

(ii) Retain all certifications received from video programming owners

pursuant to § 79.4(c)(1)(i) and (ii) for so long as the video programming distributor or provider makes the certified programming available to end users through a distribution method that uses Internet protocol and thereafter for at least one calendar year.

(iii) Make required captions available within five days of the receipt of an updated certification pursuant to § 79.4(c)(1)(ii).

(3) A video programming provider or owner's *de minimis* failure to comply with this section shall not be treated as a violation of the requirements.

(4) A video programming distributor, provider, or owner may meet the requirements of this section through alternate means if the requirements of this section are met, as determined by the Commission.

(d) *Determination of compliance.* To be considered captioned, the quality of the captioning of IP-delivered video programming must be at least equal to the quality of the captioning of that programming when shown on television. In evaluating quality, the Commission may consider such factors as completeness, placement, accuracy, and timing.

(e) *Procedures for exemptions based on economic burden.* (1) A video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements for closed captioning of video programming delivered via Internet protocol would be economically burdensome. The term ''economically burdensome'' means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for closed captioning of Internet protocol-delivered video programming would be economically burdensome:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the video programming provider or owner;

(iii) The financial resources of the video programming provider or owner; and

(iv) The type of operations of the video programming provider or owner.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements of this section including, but not limited to, text or graphic display of the content of the audio portion of the programming. The Commission will evaluate economic burden with regard to the individual outlet or programming.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard in this paragraph, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy.

Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the closed captioning requirements of this section. The Commission shall act to deny or approve any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming provider or owner subject to the request for exemption as exempt from the requirements of this section.

(f) *Complaint procedures.* (1) Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission. A complaint must be in writing and must include:

(i) The name and address of the complainant;

(ii) The name and postal address, Web site, or e-mail address of the video programming distributor, provider, and/or owner against whom the complaint is alleged, and information sufficient to identify the video programming involved;

(iii) Information sufficient to identify the software or device used to view the program;

(iv) A statement of facts sufficient to show that the video programming distributor, provider, and/or owner has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

(v) The specific relief or satisfaction sought by the complainant; and

(vi) The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the complainant).

(2) The Commission will forward complaints to the named video programming distributor, provider, and/or owner, as well as to any other video programming distributor, provider, and/or owner that Commission staff determines may be involved. The video programming distributor, provider, and/or owner must respond to the complaint in writing, to the Commission and the complainant, within the time that the Commission specifies when forwarding the complaint, generally within thirty (30) days. The Commission may specify response periods longer than 30 days on a case-by-case basis.

(3) In response to a complaint, video programming distributors, providers, and/or owners shall file with the Commission sufficient records and documentation to prove that the responding entity was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not carry a video programming distributor's, provider's, or owner's burden of proof.

(4) The Commission will review all relevant information provided by the complainant and the subject video programming distributors, providers, and/or owners, as well as any additional information the Commission deems relevant from its files or public sources. The Commission may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission

rules. When the Commission requests additional information, parties to whom such requests are addressed must provide the requested information within the time period the Commission specifies.

(5) To demonstrate closed captioning compliance, video programming distributors or providers may rely on certifications from video programming owners, as provided for in § 79.4(c)(1)(i) and (ii), unless, at any time, the video programming distributor or provider seeking to rely upon the certification knew or should have known that the certification was false or erroneous. The Commission may take enforcement action against video programming distributors, providers, or owners with respect to false or erroneous certifications.

(6) If the Commission finds that a video programming distributor, provider, or owner has violated the closed captioning requirements of this section, it may employ the full range of sanctions and remedies available under the Act against any or all of the violators.

(g) *Private rights of action prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[FR Doc. 2011–24703 Filed 9–22–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2010–0076; MO 92210–0–0009]

RIN 1018–AX18

Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for Monardella linoides ssp. viminea

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the June 9, 2011, proposed rule to revise the listing and critical habitat designation for *Monardella viminea* (willowy monardella) under the Endangered Species Act of 1973, as amended (Act) (76 FR 33880). We also announce the availability of a draft economic analysis (DEA) of the proposed revised designation of critical habitat for *Monardella viminea* and an amended required determinations section of the proposal. In the proposed rule that published June 9, 2011 (76 FR 33880), we recognized the taxonomic split of the listed entity, *Monardella linoides* ssp. *viminea,* into two distinct full species: *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella). We proposed to retain the listing status of *Monardella viminea* as endangered; we proposed to remove protections afforded by the Act from those individuals now recognized as a separate species, *Monardella stoneana,* because the new species does not meet the definition of endangered or threatened under the Act; and we proposed revised critical habitat for *Monardella viminea.* We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed listing determinations and critical habitat designation, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: We will consider comments received on or before October 28, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R8–ES–2010–0076, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2010–0076; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revised designation of critical habitat for *Monardella viminea* published in the **Federal Register** on June 9, 2011 (76 FR 33880), our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider comments and information from all interested parties. We are particularly interested in comments and information concerning:

(1) Specific information regarding our recognition of *Monardella viminea* and *M. stoneana* at the species rank, on the segregation of ranges of *M. stoneana* and *M. viminea,* and on our proposals that *M. viminea* should remain listed as endangered and that *M. stoneana* does not warrant listing under the Act (16 U.S.C. 1531 *et seq.*).

(2) Any available information on known or suspected threats and proposed or ongoing development projects with the potential to threaten either *Monardella viminea* or *M. stoneana.*

(3) The effects of potential threat factors to both *Monardella viminea* and *M. stoneana* that are the basis for a listing determination under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(4) Specific information regarding impacts of fire on *Monardella viminea* or *M. stoneana* individuals or their habitat.

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act for *Monardella viminea* including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(6) Specific information on:

(a) The amount and distribution of *Monardella viminea* or *M. stoneana* habitat,

(b) What areas that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of these species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change, and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(7) Information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of *Monardella viminea.*

(8) How the proposed critical habitat boundaries could be refined to more closely or accurately circumscribe the areas identified as containing the physical and biological features essential to the conservation of *Monardella viminea.*

(9) How we could improve or modify our design of critical habitat units, particularly our criteria for width of essential habitat for *Monardella viminea.* We especially request information on West Sycamore Canyon and Unit 2 (where two groups of *M. viminea* were not included under the criteria used to draw proposed critical habitat boundaries) and areas such as Elanus, Lopez, and Rose Canyons that we have identified as not meeting the definition of critical habitat.

(10) Information on pollinators of *Monardella viminea* or *M. stoneana* that may be essential for the conservation of these species, including information on areas that provide habitat for these pollinators.

(11) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(12) Information on the projected and reasonably likely impacts of climate change on the two species and the proposed critical habitat.

(13) Information on any quantifiable economic costs or benefits of the proposed designation of critical habitat.

(14) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(15) Whether any specific areas we are proposing for critical habitat designation for *Monardella viminea* should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those lands covered by the County of San Diego Subarea Plan or the City of San Diego Subarea Plan under the Multiple Species Conservation Program (MSCP). Information on obtaining copies of these plans will be provided by the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

(16) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(17) Information on the extent to which the description of potential economic impacts in the DEA is complete and accurate.

(18) Whether the DEA appropriately identifies all costs and benefits that could result from the designation.

If you submitted comments or information on the proposed rule (76 FR 33880) during the initial comment period from June 9, 2011, to August 8, 2011, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning listing *Monardella viminea* as an endangered species, delisting the portion of the previously listed entity (*Monardella linoides ssp. viminea*) now considered to be *M. stoneana,* and designating critical habitat for *M. viminea* will take into consideration all written comments and any additional information we receive during the comment period. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning this proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We request that you submit information ONLY by one of the methods listed in the **ADDRESSES** section. If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hard copy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2010–0076, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed listing and proposed critical habitat (76 FR 33880) and the DEA on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2010–0076, or by mail from the Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT**).

Background

In the proposed rule (76 FR 33880; June 9, 2011), we recognized the taxonomic split of *Monardella linoides* ssp. *viminea* into two distinct taxa: *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella); we proposed the retention of *M. viminea* as endangered; proposed critical habitat for *M. viminea;* and concluded that *M. stoneana* does not meet the definition of endangered or threatened. We did not include an analysis of whether *M. stoneana* warrants listing based on it being threatened or endangered in a significant portion of its range (SPR) in the June 9, 2011 **Federal Register** notice. We have included that analysis here. Apart from the SPR analysis, we discuss only those topics directly relevant to the designation of critical habitat for *M. viminea* in this document. For more information on the taxonomy, nomenclature, biology, and ecology of *M. viminea,* please refer to the listing rule for *M. linoides* ssp. *viminea* published in the **Federal Register** on October 13, 1998 (63 FR 54938), our critical habitat designation published in the **Federal Register** on November 8, 2006 (71 FR 65662), or our proposed critical habitat designation published in the **Federal Register** on June 9, 2011 (76 FR 33880), or contact the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Analysis of Significant Portion of the Range of Monardella stoneana

The Act defines ''endangered species'' as any species which is ''in danger of

extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines the term ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.'' In our proposed rule (76 FR 33880; June 9, 2011), we proposed to list *Monardella viminea* throughout its entire range; therefore, a discussion of significant portion of its range was unnecessary.

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, Apr. 12, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, Feb. 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a ''species,'' as defined by the Act (*i.e.,* species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (*i.e.,* species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this proposed rule, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, it, the species, is an ''endangered species.'' The same analysis applies to ''threatened species.'' Therefore, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species shall be listed as endangered or threatened, respectively, and the Act's protections shall be applied across the species' entire range.

We conclude, for the purposes of this proposed rule, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (i.e., prior to the 2007 Solicitor's Opinion), as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this proposed rule, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this proposed rule, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. *Resiliency* describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one of these concepts.

For the purposes of this proposed rule, we determine if a portion's biological contribution is so important that the portion qualifies as ''significant'' by asking whether, *without that portion,* the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (*i.e.,* would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to

establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this proposed rule carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this proposed rule, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even being in danger of extinction in that portion would be sufficient to cause the species in the remainder of the range to be endangered; rather, the *complete extirpation* (in a hypothetical future) of the species in that portion would be required to cause the species in the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant *and* threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the portion status analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant'', such portions will not warrant further consideration.

As described in the proposed rule (76 FR 88330), we found the stressors affecting *Monardella stoneana* not of sufficient imminence, intensity, magnitude, or geographic concentration such that it warrants listing under the Act. The stressors affecting *M. stoneana,* including megafire, occur across the species' entire range. Additionally, factors that might be limited to individual drainages, such as altered hydrology or urban development, do not threaten *M. stoneana.* Therefore, because *Monardella stoneana* has no geographical concentration of threats, it does not qualify for listing based on threats to the species in a significant portion of its range.

Decisions by Ninth Circuit Court of Appeals in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (2001) and *Tucson Herpetological Society* v. *Salazar,* 566 F.3d 870 (2009) found that the Act requires the Service, in determining whether a species is endangered or threatened throughout a significant portion of its range, to consider whether lost historical range of a species (as opposed to its current range) constitutes a significant portion of the range of that species. While this is not our interpretation of the statute, we will consider whether the lost historical range might qualify as an SPR for *Monardella stoneana.*

We evaluated whether the best available information indicates that the range of *Monardella stoneana* has contracted over time. We have little information on the historical range of *M. stoneana.* However, unlike *M. viminea, M. stoneana* has not undergone a dramatic decline in population size. *Monardella stoneana* appears to have persisted for over two decades in the two occurrences known in the United States since the 1970s and 1980s, respectively (see proposed rule at 76 FR 33880; June 9, 2011). The other seven occurrences of *M. stoneana* in the United States were discovered in 2003 or later, so long-term data are not available; only one of those seven occurrences has since been extirpated. We have almost no information about the range of *M. stoneana* in Mexico other than observations of plants directly across the Mexican border from occurrences in the United States. Because the best available information indicates that *M. stoneana* has not experienced a significant population decline, nor have multiple occurrences been extirpated within its known range, we are unable to find that a significant amount of historical range has been lost. In sum, we conclude that there has not been a loss of historical habitat that represents a significant portion of the range of *M. stoneana.*

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency.

Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

All critical habitat units for *Monardella viminea* were occupied at the time of listing. Occupancy was determined at the unit level, and unit lines were drawn to capture essential habitat supporting the documented occurrences within each unit. For more information on how critical habitat units were outlined, see the Methods section of the proposed critical habitat rule published on June 9, 2011 (76 FR 88330).

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. If we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, we may then exercise our discretion to exclude an area from critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of *Monardella viminea,* the benefits of critical habitat include public awareness of the presence of *M. viminea* and the importance of habitat protection, and, where a Federal nexus exists, potentially increased habitat protection for *M. viminea* due to protection from adverse modification or destruction of critical habitat. A Federal nexus exists where a proposed action will occur on Federal lands or where a proposed action will be conducted, funded, permitted, or authorized by a Federal agency.

The final decision about whether to exercise our discretion to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES** section).

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat.

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for *Monardella viminea.* We prepared a DEA that identifies and analyzes the potential impacts associated with the proposed designation of critical habitat for *M. viminea* that we published in the **Federal Register** on June 9, 2011 (76 FR 33880). The DEA describes the economic impacts of all known potential conservation efforts for *M. viminea;* some of these costs will likely be incurred regardless of whether we designate critical habitat.

The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections otherwise afforded to the species (*e.g.,* under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts specifically due to designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the critical habitat designation for *M. viminea.* In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (*i.e.,* incremental impacts). For a further description of the methodology of the analysis, see Chapter 2, ''Framework for the Analysis'' of the DEA.

The DEA also discusses the potential benefits associated with the designation of critical habitat, but does not monetize these benefits. The incremental impacts are the impacts we may consider in the final designation of critical habitat relative to areas that may be excluded under section 4(b)(2) of the Act.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for *Monardella viminea* over the next 19 years, which was determined to be the appropriate period for analysis because limited planning information is available to forecast activity levels for projects beyond a 19-year timeframe. Additionally, the timeframe evaluates the impacts of the critical habitat rule from its finalization in 2012 to 2030, which is the length of transportation planning efforts by the California Department of Transportation (CalTrans). The DEA identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of *M. viminea* conservation efforts associated with the following categories of activity: (1) Residential development and (2) transportation projects.

The DEA concludes that critical habitat designation is not likely to affect levels of economic activity or conservation measures being implemented within the proposed critical habitat area. Unless changes occur to existing conservation measures or the management of land use activities, the incremental impacts of critical habitat designation would be limited to additional administrative costs of section 7 consultations for Federal agencies associated with considering the potential for adverse modification of critical habitat. The DEA estimates that 50 percent of incremental impacts will be related to urban development, and 50 percent will be related to transportation projects.

The DEA estimates total potential incremental economic impacts in areas

proposed as critical habitat over the next 19 years (2012 to 2030) to be $9,700 ($700 annualized) in present value terms using a 3-percent discount rate, and $9,300 ($800 annualized) in present value terms applying a 7-percent discount rate.

The proposed critical habitat area is unlikely to generate economic impacts beyond administrative costs of section 7 consultation for several reasons. Sixty percent of the proposed designation already receives protection through the MSCP subarea plans, and all units are occupied by the plant and thus will require consultation regardless of the designation. Additionally, project modifications necessary to avoid adverse modification of critical habitat are indistinguishable from those necessary to avoid jeopardizing the species.

In conclusion, the Service does not foresee a circumstance in which critical habitat designation will change the outcome of future section 7 consultations. Any conservation measures implemented to minimize impacts to the species would coincidentally be sufficient to minimize impacts to critical habitat. Therefore, we do not believe any additional conservation measures would be needed solely to minimize impacts to critical habitat. Based on this reasoning, we also do not anticipate critical habitat designation to result in any appreciable incremental economic impacts. Any economic impacts related to conservation activities would result from the listing of the species, rather than the designation of critical habitat, and would fall within the economic baseline.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exercise our discretion to exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Required Determinations—Amended

In our proposed rule that published in the **Federal Register** on June 9, 2011 (76 FR 33880), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). Based on the DEA data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed critical habitat designation, we provide our analysis for determining whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for *Monardella viminea* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where *M. viminea* is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed listing and proposed critical habitat designation, reasonable and prudent measures to avoid adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed critical habitat for *Monardella viminea.* The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in Appendix A of the DEA, and evaluates the potential for economic impacts associated with activity categories including residential development and road construction. The DEA concludes that none of the entities with which the Service might consult on *M. viminea* meet the definition of a small business.

In summary, we have considered whether the proposed designation

would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. We have identified no small entities that may be impacted by the proposed critical habitat designation. For the above reason and based on currently available information, we certify that, if promulgated, the proposed critical habitat would not have a significant economic impact on small entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office, Pacific Southwest Region, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 15, 2011.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–24608 Filed 9–27–11; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 76, No. 188
Wednesday, September 28, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 23, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: WIC Financial Management and Participation Report with Addendum.

OMB Control Number: 0584–0045.

Summary of Collection: The Women, Infants and Children Program (WIC) is authorized by Section 17 of the Child Nutrition Act (CNA) of 1966 (42 U.S.C. 1786), as amended. The Food and Nutrition Service (FNS) of USDA administers the WIC Program by awarding cash grants to State agencies (generally State health department). The State agencies award subgrants to local agencies to deliver program benefits and services to eligible participants. States agencies complete the FNS–798 to comply with two separate legislative requirements. The FNS–798 captures the required data and serves as an operational plan for State agencies. FNS must continuously forecast and reevaluate State agencies' funding needs, make timely funding and other management decisions, and assist State agencies with caseload and funds management. FNS needs the FNS–798A to determine if each State agency has met the statutory nutrition education and breastfeeding promotion and support minimum expenditure requirements found in 42 U.S.C. 1786(h)(3). The FNS–798A shows how much of each State agency's total nutrition services and administration (NSA) expenditures were made for nutrition education and for breastfeeding promotion and support activities.

Need and Use of the Information: FNS will use the information reported each month for program monitoring, funds allocation and management, budget projections, monitoring caseload, policy development, and responding to requests from Congress and the interested public. FNS also uses the data to determine if the State has met the 97 percent performance standard for food and 10 percent performance standard for NS.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 90.

Frequency of Responses: Reporting: Monthly.

Total Burden Hours: 4,523.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–24971 Filed 9–27–11; 8:45 am]
BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers To Be Used by the Alaska Region for Publication of Legal Notices of Proposed Actions and Legal Notices of Decisions Subject to Administrative Appeal

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that Ranger Districts, Forests, and the Regional Office of the Alaska Region will use to publish legal notice of all decisions subject to appeal under 36 CFR 215 and to publish legal notices for public comment on actions subject to the notice and comment provisions of 36 CFR 215, as updated on June 4, 2003. The intended effect of this action is to inform interested members of the public which newspapers will be used to publish legal notice of actions subject to public comment and decisions subject to appeal under 36 CFR 215, thereby allowing them to receive constructive notice of a decision or proposed action, to provide clear evidence of timely notice, and to achieve consistency in administering the appeals process.

DATES: Publication of legal notices in the listed newspapers begins on October 1, 2011. This list of newspapers will remain in effect until it is superceded by a new list, published in the **Federal Register**.

ADDRESSES: Robin Dale, Alaska Region Group Leader for Appeals, Litigation and FOIA; Forest Service, Alaska Region; P.O. Box 21628; Juneau, Alaska 99802–1628.

FOR FURTHER INFORMATION CONTACT: Robin Dale; Alaska Region Group Leader for Appeals, Litigation and FOIA; (907) 586–9344.

SUPPLEMENTARY INFORMATION: This notice provides the list of newspapers that Responsible Officials in the Alaska Region will use to give notice of decisions subject to notice, comment,

and appeal under 36 CFR 215. The timeframe for comment on a proposed action shall be based on the date of publication of the legal notice of the proposed action in the newspapers of record identified in this notice. The timeframe for appeal under 36 CFR 215 shall be based on the date of publication of the legal notice of the decision in the newspaper of record identified in this notice.

The newspapers to be used for giving notice of Forest Service decisions in the Alaska Region are as follows:

Alaska Regional Office

Decisions of the Alaska Regional Forester: Juneau Empire, published daily except Saturday and official holidays in Juneau, Alaska; and the Anchorage Daily News, published daily in Anchorage, Alaska.

Chugach National Forest

Decisions of the Forest Supervisor and the Glacier and Seward District Rangers: Anchorage Daily News, published daily in Anchorage, Alaska.

Decisions of the Cordova District Ranger: Cordova Times, published weekly in Cordova, Alaska.

Tongass National Forest

Decisions of the Forest Supervisor and the Craig, Ketchikan/Misty, and Thorne Bay District Rangers: Ketchikan Daily News, published daily except Sundays and official holidays in Ketchikan, Alaska.

Decisions of the Admiralty Island National Monument Ranger, the Juneau District Ranger, the Hoonah District Ranger, and the Yakutat District Ranger: Juneau Empire, published daily except Saturday and official holidays in Juneau, Alaska.

Decisions of the Petersburg District Ranger: Petersburg Pilot, published weekly in Petersburg, Alaska.

Decisions of the Sitka District Ranger: Daily Sitka Sentinel, published daily except Saturday, Sunday, and official holidays in Sitka, Alaska.

Decisions of the Wrangell District Ranger: Wrangell Sentinel, published weekly in Wrangell, Alaska.

Supplemental notices may be published in any newspaper, but the timeframe for making comments or filing appeals will be calculated based upon the date that notices are published in the newspapers of record listed in this notice.

Dated: September 1, 2011.

Beth G. Pendleton,

Regional Forester.

[FR Doc. 2011–24489 Filed 9–27–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Suspend the Postharvest Chemical Use Survey and All Associated Reports

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice of suspension of data collection and publication.

SUMMARY: This notice announces the intention of the National Agricultural Statistics Service (NASS) to suspend a currently approved information collection, the 2011 Postharvest Chemical Use Survey, and its associated publication.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333, or through the NASS OMB Clearance Officer at *ombofficer@nass.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Postharvest Chemical Use Survey.

OMB Control Number: 0535–0218.

Expiration Date of Approval: December 31, 2011.

Type of Request: To suspend a currently approved information collection.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to conduct surveys in order to prepare national, State, and county estimates of crop and livestock production, disposition, prices, and collect information on related environmental and economic factors. The Postharvest Chemical Use Survey is a part of the NASS chemical use program. This survey is used to collect and publish data on pesticide usage on selected crops after harvesting has been completed. The summarized data is available to other government agencies as well as the public. The surveys contain questions relating to the types of pesticides that are applied to selected crops after harvesting, how the chemicals are applied, when they are applied and how much was applied. Additional pest management practices are also studied. This information can be used when making decisions on food and worker safety issues.

COMMODITIES THAT WERE TARGETED DURING THE PAST 10 YEARS

Year	Crop(s)	Year	Crop(s)
2011	Corn [1]	2006	Oats and Potatoes.
2010	Wheat	2005	Peanuts.
2009	None [2]	2004	Oranges.
2008	None [2]	2003	Corn and Soybeans.
2007	None [2]	2002	Apples and Pears.

[1] Corn, is scheduled for 2011, but the survey will be suspended due to budget cuts.
[2] In 2007, 2008 and 2009 the Postharvest Chemical Use survey was suspended due to budget cuts.

NASS will suspend this information collection as of September 28, 2011 due to budget constraints. Also, NASS will not publish a Postharvest Chemical Use report in the Spring of 2012 unless there is a change in the anticipated budget shortfall.

Authority: These data were collected under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: There will be no further public reporting burden for this collection of information.

Signed at Washington, DC, August 31, 2011.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2011–24968 Filed 9–27–11; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: International Trade Administration (ITA).

Title: Foreign-Trade Zones Application.

Form Number(s): N/A.

OMB Control Number: 0625–0139.

Type of Request: Regular submission.

Burden Hours: 4,969.

Number of Respondents: 63.

Average Hours per Response: General-Purpose Zone Application, 148 hours; Special-Purpose Subzone Application, 113 hours; Reorganization/Expansion of General-Purpose Zone, 99 hours; and Request for Manufacturing Authority, 34 hours.

Needs and Uses: The Foreign-Trade Zone Application is the vehicle by which individual firms or organizations apply for foreign-trade zone (FTZ) status, for subzone status, manufacturing authority, or for expansion/reorganization of an existing zone. The FTZ Act and Regulations require that an application with a description of the proposed project be made to the FTZ Board (19 U.S.C. 81b and 81f; 15 CFR 400.24–26) before a license can be issued or a zone can be expanded. The Act and Regulations require that applications contain detailed information on facilities, financing, operational plans, proposed manufacturing operations, need, and economic impact. Manufacturing activity in zones or subzones, can involve issues related to domestic industry and trade policy impact. Such applications must include specific information on the customs tariff-related savings that result from zone procedures and the economic consequences of permitting such savings. The FTZ Board needs complete and accurate information on the proposed operation and its economic effects because the Act and Regulations authorize the Board to restrict or prohibit operations that are detrimental to the public interest.

The program revision involves the number copies submitted by applicants. They are now required to submit original and three copies instead of the previously required original and twelve copies.

Affected Public: State, local, or tribal government; not-for-profit institutions; business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–5167 or via the Internet at *Wendy_L._Liberante@omb.eop.gov.*

Dated: September 22, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–24879 Filed 9–27–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: International Trade Administration (ITA).

Title: Steel Import License.

OMB Control Number: 0625–0245.

Form Number(s): ITA–4141P.

Type of Request: Regular submission (extension of a currently approved information collection).

Burden Hours: 100,000.

Number of Respondents: 3,500.

Average Hours per Response: 10 minutes.

Needs and Uses: In order to monitor steel imports in real-time and to provide the public with real-time data, the Department of Commerce (DOC) must collect and provide timely aggregated summaries about these imports. The Steel Import License proposed by the Import Administration of the DOC is the tool used to collect the necessary information. The Census Bureau currently collects import data and disseminates aggregate information about steel imports. However, the time required to collect, process, and disseminate this information through Census can take up to 90 days after importation of the product, giving interested parties and the public far less time to respond to injurious sales.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–7285 or via the Internet at *Wendy_L._Liberante@omb.eop.gov.*

Dated: September 22, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–24880 Filed 9–27–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–821]

Polyethylene Retail Carrier Bags From Thailand: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 24, 2011, the Department of Commerce published the preliminary results of the 2009/2010 administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand. We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received and an examination of our calculations, we have made certain changes for the final results. The final weighted-average dumping margins for the respondents are listed below in the ''Final Results of Review'' section of this notice.

DATES: *Effective Date:* September 28, 2011.

FOR FURTHER INFORMATION CONTACT: Bryan Hansen or Dustin Ross, AD/CVD

Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3683 or (202) 482–0747, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 24, 2011, the Department of Commerce (the Department) published *Polyethylene Retail Carrier Bags From Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 30102 (May 24, 2011) (*Preliminary Results*), in the **Federal Register**. The administrative review covers 11 companies. The period of review is August 1, 2009, through July 31, 2010.

We invited parties to comment on the *Preliminary Results.* On June 23, 2011, we received case briefs from the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the petitioners), and the respondents, Thai Plastic Bags Industries Co., Ltd. (TPBI), and Landblue (Thailand) Co., Ltd. (Landblue). We also received case briefs from Inteplast Group Ltd. and Master Packaging Inc. which qualify as interested parties as importers of subject merchandise. On June 28, 2011, we received rebuttal briefs from the interested parties. We did not hold a hearing as the only request for a hearing was withdrawn. See the petitioners' letter dated June 29, 2011.

We have conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the antidumping duty order is polyethylene retail carrier bags (PRCBs) which may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.,* grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the order excludes (1) Polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, *e.g.,* garbage bags, lawn bags, trash-can liners.

Imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the Harmonized Tariff Schedule of the United States (HTSUS). Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in the case briefs by parties to this review are addressed in the Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the Period of Review August 1, 2009, through July 31, 2010 (Decision Memo), which is dated concurrently with this notice and hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded is in the Decision Memo and attached to this notice as an Appendix. The Decision Memo, which is a public document, is on file in the Department's Central Records Unit of the main Commerce building, Room 7046, and is accessible on the Web at *http://ia.ita.doc.gov/frn/index.html.* The paper copy and electronic version of the Decision Memo are identical in content.

Non-Selected Companies

As discussed in the *Preliminary Results,* 76 FR at 30103–30104, we preliminarily determined to apply the weighted-average margin we calculated using the public ranged U.S. sales values Landblue and TPBI submitted for the record of this review and their weighted-average margins to the firms not examined individually in this review. We received no comments on the use of this rate. Therefore, for these final results of review, we have applied the rate we have calculated using the weighted-average margins of Landblue and TPBI as applied to the public ranged U.S. sales values they submitted to the companies which were not selected for individual examination.

Changes Since the Preliminary Results

For our calculation of TPBI's margin for the final results, we revised the general and administrative and financial expenses of TPBI to reflect data in its 2010 financial statements. See the memoranda to the file entitled ''Polyethylene Retail Carrier Bags from Thailand—Thai Plastic Bags Industries Co., Ltd. (TPBI), Final Results Analysis Memorandum'' dated September 21, 2011, and ''Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Thai Plastic Bags Industries Co. (TPBI), Ltd.'' dated September 21, 2011, for details regarding these changes.

For our calculation of Landblue's margin for the final results, we made the following changes: (1) We adjusted Landblue's general and administrative (G&A) expense ratio to include in the numerator the unreconciled difference between the administrative expenses from the 2010 financial statements and those reflected in the 2010 trial balance, (2) we revised Landblue's G&A ratio to reflect the cost of goods sold from the 2010 financial statements, (3) we set Landblue's negative interest expense ratio to zero, (4) for constructed value (CV) selling expenses we used publicly available total selling expenses from a company not currently under review, Thantawan Industry Public Company Limited (Thantawan), adjusted to reflect Landblue's ratio of indirect expenses to total selling expenses, (5) we used data from the record of Thantawan's 2010 financial statements to calculate a revised ratio for CV profit which reflects Landblue's profit as a percentage of total costs for bag products only, and (6) we included management-benefits expenses from Thantawan's 2010 financial statements in the denominator of the revised ratio for CV profit for Landblue. See the memoranda to the file entitled ''Polyethylene Retail Carrier Bags from Thailand—Landblue (Thailand) Co., Ltd., Final Results Analysis Memorandum'' dated September 21, 2011, and ''Constructed Value Calculation Adjustments for the Final Results—Landblue Thailand Co., Ltd.'' dated September 21, 2011, for details regarding these changes.

We have corrected the spelling of the company name for ''Hi-Pak Company Limited'' which in the *Initiation Notice and Preliminary R*esults reflected the spelling provided by the petitioners in their request for review. We based the correction on the spelling Hi-Pak Company Limited provided in its statement of no shipments during the period of review.

Sales Below Cost in the Home Market

As explained in the *Preliminary Results,* 76 FR at 30104, in accordance with section 773(b) of the Act, the Department tested whether TPBI made sales at prices below the cost of production. For these final results of review and based on the statutory criteria concerning below-cost sales, the Department disregarded home-market sales by TPBI that failed the cost-of-production test.

Final Results of Review

As a result of our review, we determine that the following percentage weighted-average dumping margins exist for PRCBs from Thailand for the period August 1, 2009, through July 31, 2010:

Producer/exporter	Margin (percent)
First Pack Co. Ltd	28.59
Hi-Pak Company Limited	(1)
ITW Minigrip (Thailand) Co., Ltd	(2)
K International Packaging Co., Ltd	28.59
Landblue (Thailand) Co., Ltd	25.53
Praise Home Industry, Co. Ltd	28.59
Siam Flexible Industries Co., Ltd	28.59
Thai Jirun Co., Ltd	28.59
Thai Plastic Bags Industries Co., Ltd	35.71
Trinity Pac Co. Ltd	28.59
U. Yong Industry Co., Ltd	28.59

[1] No shipment or sales subject to this review. This firm has no individual rate from a previous segment of this proceeding.

[2] No shipment or sales subject to this review. This firm has no individual rate from a previous segment of this proceeding.

Assessment Rates

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries.

We calculated importer/customer-specific duty-assessment amounts with respect to sales by Landblue and TPBI by dividing the total dumping margins (calculated as the difference between normal value and the export price) for each importer or customer by the total number of kilograms Landblue and TPBI sold to that importer or customer. We will direct CBP to assess the resulting per-kilogram dollar amount against each kilogram of merchandise on each of that importer's or customer's entries during the period of review. See 19 CFR 351.212(b)(1).

Because the order on PRCBs from Thailand was revoked in part with respect to TPBI effective July 28, 2010, we will instruct CBP to assess antidumping duties with respect to TPBI on entries made through July 27, 2010. For further information, see *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags From Thailand,* 75 FR 48940 (August 12, 2010) (*Section 129 Determination*).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the period of review produced by Landblue, TPBI, Hi-Pak Company Limited, and ITW Minigrip (Thailand) Co., Ltd., for which they did not know that the merchandise they sold to an intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediary(ies) involved in the transaction. See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Dut*ies, 68 FR 23954 (May 6, 2003).

For the companies which were not selected for individual examination and which did not submit statements of no shipments, we will instruct CBP to apply the rates listed above to all entries of subject merchandise produced and/or exported by such firms.

We intend to issue liquidation instructions to CBP 15 days after publication of these final results of review.

Cash-Deposit Requirements

With the exception of TPBI as a result of the revocation, the following deposit requirements will be effective upon publication of these final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication consistent with section 751(a)(1) of the Act: (1) The cash-deposit rates for the companies subject to the review will be the rates shown above; (2) for previously investigated or reviewed companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this or a previous review or the original less-than-fair-value (LTFV) investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash-deposit rate for all other manufacturers or exporters will be 4.69 percent, the all-others rate from the amended final determination of the LTFV investigation revised as a result of the Section 129 determination published on August 12, 2010. See *Section 129 Determination.*

These deposit requirements shall remain in effect until further notice.

Notification Requirements

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(5).

Dated: September 21, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix

1. General and Administrative Expenses.
2. Financial Expense.
3. CV Profit.
4. CV Selling Expenses.
5. Zeroing.

[FR Doc. 2011–24998 Filed 9–27–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–854]

Certain Tin Mill Products From Japan; Final Results of the Second Expedited Sunset Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 1, 2011, the Department of Commerce (the Department) initiated the second sunset review of the antidumping duty order on certain tin mill products from Japan, pursuant to section 751(c) of the Tariff

Act of 1930, as amended (the Act). On the basis of a notice of intent to participate and adequate substantive responses filed on behalf of domestic interested parties and no response from respondent interested parties, the Department conducted an expedited (120-day) sunset review. As a result of this sunset review, the Department finds that revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping. The dumping margins are identified in the *Final Results of Review* section of this notice.

DATES: *Effective Date:* September 28, 2011.

FOR FURTHER INFORMATION: Angelica Mendoza or David Cordell, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone (202) 482–3019 or 202–482–0408 respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2011, the Department initiated the second sunset review of the antidumping duty order on certain tin mill products from Japan pursuant to section 751(c) of the Act. *See Initiation of Five-Year (''Sunset'') Review,* 76 FR 31588 (June 1, 2011). The Department received notices of intent to participate from three domestic interested parties, United States Steel Corporation, ArcelorMittal USA, LLC, and USS–POSCO Industries (collectively, domestic interested parties), within the deadline specified in 19 CFR 351.218(d)(1)(i). Domestic interested parties claimed interested party status under sections 771(9)(C) and (D) of the Act as U.S. producers of the domestic like product. We received complete substantive responses from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). However, we did not receive any response from any respondent interested parties. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited sunset review of the order.

Scope of the Order

The products covered by the antidumping duty order are tin mill flat-rolled products that are coated or plated with tin, chromium or chromium oxides. Flat-rolled steel products coated with tin are known as tin plate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such and scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material. All products that meet the written physical description are within the scope of the order unless specifically excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of the order:

—Single reduced electrolytically-chromium-coated steel with a thickness 0.238 mm (85 pound base box) (±10%) or 0.251 mm (90 pound base box) (±10%) or 0.255 mm (±10%) with 770 mm (minimum width) (±1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (±1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2; with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2; as type DOS, or 3.5 to 6.5 mg/m^2; as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

—Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.

—Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.

—Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur, 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (KG) 10.0 minimum, Br (KG) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

—Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).

—Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: Crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet

(4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of #1/8 inch, with a thickness tolerance of #0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg) with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

—Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

—Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. in., with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch × 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch × 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch × 34.125 inch scroll cut dimension.

—Tin-free steel coated with a metallic chromium layer between 100–200 mg/m² and a chromium oxide layer between 5–30 mg/m²; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (''Br'') of 10 kg minimum and a coercive force (''Hc'') of 3.8 Oe minimum.

—Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to the order is classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0000, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the ''Issues and Decision Memorandum'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, dated September 29, 2011 (Decision Memorandum), which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margin likely to prevail if the order were revoked. Parties can find a complete discussion of all issues raised in this sunset review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit of the main Department building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

We determine that revocation of the antidumping duty order on certain tin mill products from Japan would likely lead to continuation or recurrence of dumping at the following percentage weighted-average margins:

Manufacturers/exporters	Weighted-average margin (percent)
Kawasaki Steel Corporation	95.29
Nippon Steel Corporation	95.29
NKK Corporation	95.29
Toyo Kohan Co., Ltd.	95.29
All Others	32.52

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: September 21, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–24995 Filed 9–27–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Data Collection and Verification for the Marine Protected Areas Inventory

AGENCY: National Oceanic and Atmospheric Administration (NOAA), 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 November 28, 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 Lauren Wenzel, (301) 563–1136 or *lauren.wenzel@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

Executive Order 13158 directs the Department of Commerce (DOC) and the Department of the Interior (DOI) to work with partners to strengthen the protection of U.S. oceans and coastal resources by developing a national system of marine protected areas (MPAs). These departments are working closely with state, territorial, local, and tribal governments, as well as other stakeholders, to identify and inventory the nation's existing MPAs. Toward this end, the DOC's National Oceanic and Atmospheric Administration (NOAA) and DOI have created the Marine Protected Areas Inventory, an online spatial database that provides detailed information on MPAs nationwide. The inventory stores data on over 1,600 sites, across different management programs and all levels of government. In order to keep this data resource current and accurate with the latest status and information on MPAs nationwide, the MPA Center has created an online site data form, posted at *http://www.mpa.gov,* that can be used to provide feedback regarding the accuracy of the MPA Inventory data and a mechanism to receive updates, additions or changes to existing database information. The online form can be used to identify new sites that should be added to the database or to provide clarification on the data stored in the existing version of the online MPA Inventory. An additional nomination checklist form is also posted at *http://www.mpa.gov* to collect information from eligible federal, state, territorial, local and tribal governments seeking to nominate their MPA to be part of the national system of MPAs. MPA programs (approximately five new each year) provide information on how their nominated sites meet the goals and objectives of the national system of MPAs.

II. Method of Collection

The information will be collected via an online data form.

III. Data

OMB Control Number: 0648–0449.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: State, local or tribal governments.

Estimated Number of Respondents: 100 per year.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 50 hours.

Estimated Total Annual Cost to Public: $0.

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: September 22, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–24881 Filed 9–27–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA728

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings and hearings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold meetings of its 108th Scientific and Statistical Committee (SSC) and its 152nd Council meeting to take actions on fishery management issues in the Western Pacific Region.

DATES: The SSC will meet on October 17–19, 2011, between 8:30 a.m. and 5 p.m.; the Council's Executive and Budget Standing Committee will meet on October 19, 2011, between 8 a.m. and 10 a.m.; the Pelagic and International Fisheries Standing Committee will meet on October 19 between 10 a.m. and 12 noon; the 152nd Council meeting will meet on October 19–22, 2011. The 152nd Council Meeting will be held between 2 p.m. and 6 p.m. on October 19, 2011, between 9 a.m. and 6 p.m. on October 20–21, 2011, and between 8:30 a.m. and 1 p.m. on October 22, 2011. All meetings will be held in Honolulu.

For specific times and agendas, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The 108th SSC meeting, Council Executive and Budget Standing Committee and Pelagic and International Fisheries Standing

Committee will be held at the Council office, 1164 Bishop Street, Honolulu, HI 96813; *telephone:* (808) 522–8220. The 152nd Council meeting will be held at the Laniakea YWCA–Fuller Hall, 1040 Richards Street, Honolulu, HI 96813 Honolulu; *telephone:* (808) 538–7061.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; *telephone:* (808) 522–8220.

SUPPLEMENTARY INFORMATION: In addition to the agenda items listed here, the SSC and Council will hear recommendations from Council advisory groups. Public comment periods will be provided throughout the agendas. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for 108th SSC Meeting

8:30 a.m.–5 p.m., Monday, October 17, 2011

1. Introductions.
2. Approval of Draft Agenda and Assignment of Rapporteurs.
3. Status of the 107th SSC Meeting Recommendations.
4. Report from the Pacific Islands Fisheries Science Center Director.
5. Program Planning.
A. Specification of Acceptable Biological Catches (ACTION ITEM).
1. Species with No Maximum Sustainable Yield (MSY), Existing Quota, or Reference Points (Tier 5).
a. Coral Reef Fish for All Island Areas.
b. Vulnerable Species for All Island Areas.
c. Mollusks, Crustaceans, Other Invertebrates for All Island Areas.
2. Species with MSY, Existing Quota, or Reference Points (Tier 3 and 4).
a. Coastal Pelagics in Hawaii.
b. Non-Finfish for All Island Areas.
i. Lobster.
ii. Kona Crab.
iii. Deepwater Shrimp.
iv. Black Corals.
v. Precious Corals.
c. Bottomfish.
i. Bottomfish Management Unit Species (BMUS) in American Samoa, Guam, CNMI.
ii. Non Deep-7 BMUS for Hawaii.
B. Alternatives for Non-commercial Data Collection in Hawaii.
C. Report on Western Pacific Fisheries Information Network (WPacFIN) Program Data Review.
D. Essential Fish Habitat (EFH) and Habitat of Particular Concern (HAPC).
1. EFH/HAPC for Commonwealth of the Northern Mariana Islands (CNMI), Guam and American Samoa.
2. Hawaii Bottomfish EFH/HAPC draft Amendment (ACTION ITEM).
E. Status of Fisheries Ecosystem Plan (FEP) Amendments.
F. Review of the Council 5 Year Research Priorities.
G. Cooperative Research Priorities.
H. Report on Marianas Trench Marine National Monument Science and Expo Workshop.
I. Non-Commercial Fisheries Data Advisory Committee Recommendations.
J. Public Comment.
K. SSC Discussion and Recommendations.

8:30 a.m.–5 p.m., Tuesday, October 18, 2011

Video Presentation—Traditional Fishing on Guam

6. Pelagic Fisheries.
A. Action Items.
1. Amendment Options for American Samoa Swordfish Longline Fishery.
B. Information on Yellowfin Tuna Around the Hawaiian Islands—Management Implications.
C. Striped Marlin Catch Limit.
D. American Samoa and Hawaii Longline Quarterly Report.
E. International Fisheries Meetings.
1. Kobe III Meeting.
2. Kobe III Bycatch Working Group.
3. Western and Central Pacific Fisheries Commission (WCPFC) Science Committee.
4. WCPFC Northern Committee.
5. WCPFC Technical and Compliance Committee.
6. Inter-American Tropical Tuna Commission 82nd Meeting.
7. North Pacific Regional Fishery Management Organization Preparatory Conference (NPRFMO–PrepCon).
F. Public Comment.
G. SSC Discussion and Recommendations.
7. Protected Species.
A. Loggerhead Turtle Final Listing Rule and New Biological Opinion.
B. False Killer Whale Take Reduction Plan Proposed Rule and Take Reduction Team Meeting.
C. Proposed 2012 List of Fisheries and Draft 2011 Stock Assessment Report.
D. Analysis of Leatherback Turtle Bycatch Patterns in the Hawaii Longline Fishery.
E. Public Comment.
F. SSC Discussion and Recommendations.

8:30 a.m.–5 p.m., Wednesday, October 19, 2011

8. Other Meetings & Workshops.
A. Report on National SSC Workshop.
9. Other Business.
A. 109th SSC Meeting.
B. Future Format of the SSC.
C. Future SSC Membership.
10. Summary of SSC Recommendations to the Council.

8 a.m.–10 a.m., Wednesday, October 19, 2011

Executive and Budget Standing Committee.

10 a.m.–12 noon, Wednesday, October 19, 2011

Pelagic and International Standing Committee.

2 p.m.–6 p.m., Wednesday, October 19, 2011

1. Introductions.
2. Approval of the 152nd Agenda.
3. Approval of the 151st Meeting Minutes.
4. Executive Director's Report.
5. Agency Reports.
A. National Marine Fisheries Service.
1. Pacific Islands Regional Office.
2. Pacific Islands Fisheries Science Center.
B. NOAA Regional Counsel.
C. U.S. Fish and Wildlife Service.
D. Enforcement.
1. U.S. Coast Guard.
2. NMFS Office for Law Enforcement.
3. NOAA General Counsel for Enforcement and Litigation.
E. Public Comment.
F. Council Discussion and Action.

9 a.m.–6 p.m., Thursday, October 20, 2011

9 a.m.–1 p.m.

6. Program Planning and Research.
A. Specification of Acceptable Biological Catches (ACTION ITEM).
1. Species with No MSY, Existing Quota, or Reference Points (Tier 5).
a. Coral Reef Fish for All Island Areas.
b. Vulnerable Species for All Island Areas.
c. Mollusks, Crustaceans, Other Invertebrates for All Island areas.
2. Species with MSY, Existing Quota, or Reference Points (Tier 3 and 4).
a. Coastal Pelagics in Hawaii.
b. Non-Finfish for All Island Areas.
i. Lobster.
ii. Kona Crab.
iii. Deepwater Shrimp.
iv. Black Corals.
v. Precious Corals.
c. Bottomfish.
i. BMUS in American Samoa, Guam, CNMI.
ii. Non Deep 7 BMUS for Hawaii.
B. Report on EFH Review for American Samoa, Guam, Commonwealth of the Northern Mariana Islands (CNMI) Bottomfish and Other Management Unit Species (MUS).
C. Coastal Marine Spatial Planning.
1. Regional Initiatives.
2. Report on Coastal Marine Spatial Planning Workshop.

3. Indigenous Climate Change Summit.
D. Review of the Council 5-Year Research Priorities.
E. Cooperative Research Priorities.
F. Community Development Plan Proposal: Traditional Fishing Training Program and Exemption to the MHI Pelagic Longline Closed Area (Action Item).
G. Report on NMFS Bio-Sampling Program.
H. Update on National/Regional Marine Recreational Fishing.
I. Hawaii, Regional, National & International Education and Outreach.
J. SSC Recommendations.
K. Hawaii Plan Team and Bottomfish Advisory Review Board Recommendations.
L. Public Hearing.
M. Council Discussion and Action.

2 p.m.–6 p.m.

7. Marianas Archipelago.
A. Arongo Flaeey.
B. Isla Informe.
C. Legislative Report.
D. Enforcement Issues.
E. Report on Marianas Trench Marine National Monument Science and Expo Workshop.
F. Community Activities and Issues.
1. Marianas Military Range Complex Environmental Impact Statement (EIS) Scoping.
2. Education and Outreach Initiatives.
H. SSC Recommendations.
I. Public Comments.
J. Council Discussion and Action.
8. American Samoa Archipelago.
A. Motu Lipoti.
B. Fono Report.
C. Enforcement Issues.
D. Update on Community Fisheries Development.
E. Community Activities and Issues.
F. Education and Outreach Initiatives.
G. SSC Recommendations.
H. Public Comments.
I. Council Discussion and Action.
9. Public Comment on Non-Agenda Items.

Fishers Forum, Waikiki Aquarium 6 p.m.–9 p.m., Code of Conduct for Hawaii's Ocean Users

9 a.m.–6 p.m., Friday, October 21, 2011

9 a.m.–1 p.m.

10. Hawaii Archipelago.
A. Moku Pepa.
B. Legislative Report.
C. Enforcement Issues.
D. Recommendations on Hawaii Non-Commercial Data Collection (ACTION ITEM).
E. Bottomfish.
1. Update on Bottomfish Life History Information.
2. Draft Amendment for Hawaii Bottomfish EFH (ACTION ITEM).
F. Community Projects, Activities and Issues.
1. Report on Hawaii Regulatory Review Initiative.
2. Maunalei Ahupua'a Restoration Project.
3. Report on the Kona Integrated Ecosystem Assessment Workshop.
4. Report on Community Fish Aggregating Devices (FADs).
5. Update from State on Shark Fining Policy.
6. Report on Open Ocean Aquaculture Project.
G. Non-Commercial Fisheries Data Advisory Committee and Hawaii Plan Team Recommendations.
H. SSC Recommendations.
I. Public Hearing.
J. Council Discussion and Action.
11. Pelagic & International Fisheries.
A. Recommendations on American Samoa Swordfish Fishery (ACTION ITEM).
B. Striped Marlin Catch Limits (ACTION ITEM).
C. Information on Yellowfin Tuna Around the Hawaiian Islands—Management Implications.
D. American Samoa and Hawaii Longline Quarterly Reports.
E. International Fisheries Meetings.
1. Kobe III.
2. Kobe III Bycatch Working Group.
3. Western and Central Pacific Fishery Commission (WCPFC). Science Committee.
4. WCPFC Northern Committee.
5. WCPFC Technical and Compliance Committee.
6. North Pacific Regional Fishery Management Organization Preparatory Conference (NPRFMO PrepCon).
7. International Scientific Committee 11th Meeting.
F. Disapproved Amendments.
G. SSC Discussion and Recommendations.
H. Pelagics Standing Committee Recommendations.
I. Public Hearing.
J. Council Discussion and Action.

8:30 a.m.–1 p.m., Saturday, October 22, 2011

12. Protected Species.
A. Loggerhead Turtle Final Listing Rule and New Biological Opinion.
B. False Killer Whale Take Reduction Plan Proposed Rule and Take Reduction Team Meeting.
C. Proposed 2012 List of Fisheries and Draft 2011 Stock Assessment Report.
D. Endangered Species Act Section 4 (Listing and Critical Habitat) Update.
E. Update on Council Turtle Program.
F. SSC Recommendations.
G. Public Comment.
H. Council Discussion and Action.
13. Administrative Matters.
A. Financial Reports.
B. Administrative Reports.
C. Standard Operating Practices and Procedures (SOPP) Review and Changes.
D. Council Family Changes.
E. Meetings and Workshops.
F. Other Business.
G. Standing Committee Recommendations.
H. Public Comment.
I. Council Discussion and Action.
14. Appointment of Council Officers.
15. Other Business.

Non-Emergency issues not contained in this agenda may come before the Council for discussion and formal Council action during its 152nd meeting. However, Council action on regulatory issues will be restricted to those issues specifically listed in this document and any regulatory issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: September 23, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–24921 Filed 9–27–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Joint Europe Africa Deployment & Distribution Conference 2011: ''Adapting To Challenge and Change''

AGENCY: United States Africa Command, Department of Defense (DoD).

ACTION: Notice of conference.

SUMMARY: This document announces that U.S. Africa Command (AFRICOM) will convene their annual Joint Europe Africa Deployment and Distribution Conference (JEADDC), featuring a keynote address, panel discussions, and

working groups involving agency personnel, members of the trade community, academia, and other government agencies. Conference participants will focus on transportation and logistics strategy, capabilities, initiatives, issues, and concerns in Africa and Europe. The keynote speaker will be Lieutenant General (Retired) Claude V. ''Chris'' Christianson.

DATES: Monday, December 5, 2011 ('icebreaker' social—6 p.m.–9 p.m.). Tuesday, December 6, 2011 (opening remarks, keynote address, and panel discussions—8:15 a.m.–5 p.m.). Wednesday, December 7, 2011 (working groups—8:30 a.m.–5 p.m.). Thursday, December 8, 2011 (working groups working groups and out brief —8:30 a.m.–5 p.m.).

ADDRESSES: The JEADDC will be held at the Edelweiss Lodge and Resort at St. Martin Strasse 120, 82467 Garmisch-Partenkirchen, Germany. Instructions will be provided after registration to ensure non-installation pass holders may access the installation.

FOR FURTHER INFORMATION CONTACT: AFRICOM Deployment and Distribution Operations Center +49 711–729–3669, or at *raymond.hasenyager@africom.mil.* To obtain the latest information on JEADDC and to register on-line, visit the JEADDC Web site at *http://www.jeaddc.com.*

SUPPLEMENTARY INFORMATION: The agenda for JEADDC will be announced at a later date on the JEADDC Web site. There is no registration fee for the event. For attendees staying at the Edelweiss Lodge and Resort, the conference fee is included in the room rate when reservation code 1112JEADDC is used. Attendees using other accommodations will be charged $22.00 for the Monday, December 5, 2011 icebreaker event and a $42.50/day conference fee by the resort (the daily conference fee does not include any meals). Interested parties are requested to register for JEADDC by Tuesday, November 1, 2011. Attendees wishing to stay at the Edelweiss Lodge and Resort must reserve a room by Monday, October 3, 2011 using reservation code 1112JEADDC. Due to the overwhelming interest to attend past JEADDCs, each company is requested to limit their company's registrations to no more than three participants, in order to afford equal representation from all members of the defense deployment and distribution community. Uniform/dress for military attendees is uniform of the day (UOD–ABU/ACU) and business casual (tie optional) for civilian attendees. Hotel accommodations must be reserved separately from the conference registration. Hotel information: Edelweiss Lodge & Resort, +49 8821–9440, $190.50/night Monday, December 5, 2011 and $178.50/night Tuesday, December 6, 2011 through Friday, December 9, 2011—Edelweiss room rates include conference attendance, Monday evening 'icebreaker', and breakfast and lunch Tuesday, Wednesday, and Thursday. *http://www.edelweisslodgeandresort.com/home.html* or another hotel of the attendee's choosing.

Dated: September 23, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–24896 Filed 9–27–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE Demonstration Project for the Philippines

AGENCY: Department of Defense, Office of the Secretary of Defense (Health Affairs)/TRICARE Management Activity.

ACTION: Notice of a TRICARE demonstration project for the Philippines.

SUMMARY: This notice is to advise interested parties of a Military Health System demonstration project entitled ''TRICARE Demonstration Project for the Philippines.'' The purpose of this demonstration is to validate an alternative approach to providing healthcare services for those beneficiaries covered under the TRICARE Standard option in the Philippines, controlling costs, eliminating any balance billing issues, and ensuring that the billing practices comply with regulatory requirements. Under this demonstration, the overseas contractor in the Philippines will establish a dedicated list of providers in the Philippines who will file their claims with the contractor and be reimbursed under an established fee schedule. The providers will adhere to the quality of care requirements of the overseas contract. The beneficiaries will have overall lower costs because these providers will no longer require payments at the time of service nor will they subject beneficiaries to balanced billing of charges. Because of the geographic conditions in the Philippines and the realization that providers of the required specialties are not available in all areas, the contractor will not be required to develop a list of providers in all areas. However, in those areas where the contractor is able to develop a sufficient list of providers then all TRICARE Standard beneficiaries residing in those areas of the Philippines will be required to use these providers in order for their claims to be paid. Notice will be provided to the beneficiaries informing them of the areas participating and not participating in this demonstration.

DATES: *Effective Date:* Effective November 28, 2011.

ADDRESSES: TRICARE Management Activity (TMA), TRICARE Policy and Operations Directorate, 5111 Leesburg Pike, Suite 810, Falls Church, VA 22041–3206.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Talisnik, Office of the ASD (HA)—TMA, (703) 681–8723.

SUPPLEMENTARY INFORMATION:

A. Background

TRICARE has recognized the unique circumstances existing in the Philippines which made the provision of medical care to TRICARE beneficiaries through the TRICARE Overseas program operated in other overseas locations challenging. TRICARE has experienced dramatic increases in the amount billed for healthcare services rendered in the Philippines from $15 million in 1999 to $59 million in 2009 while the number of beneficiaries has remained constant. Administrative controls such as the validation of providers, implementation of a fee reimbursement schedule, duplicate claims edits and the impact of the cost-shares and deductibles have limited actual TRICARE expenditures to $17 million in 2009 for only approximately 11,000 beneficiaries.

In addition to these administrative controls, fraud and abuse activities in the Philippines have been a growing concern that necessitated prompt investigation and actions to reduce the number of fraudulent or abusive incidences. Measures were taken to prevent or reduce the level of fraud and abuse against TRICARE while concurrent investigations and prosecutions were conducted. In April 2008, seventeen individuals were convicted of defrauding the TRICARE program of more than $100 million.

As a result, prepayment review of claims is conducted to identify excessive charges and aberrant practices. Prepayment review is a tool typically used on a limited basis. Nevertheless, these efforts alone are not expected to control and eliminate the rising costs in the Philippines.

Because of this concern, the purpose of this demonstration is to validate an

alternative approach to providing healthcare services for those beneficiaries covered under the TRICARE Standard option in the Philippines, controlling costs, eliminating any balance billing issues, and ensuring that the billing practices comply with regulatory requirements.

B. Description of Demonstration Project

TMA proposes, utilizing the new overseas contract as the vehicle, to conduct a demonstration in the Philippines to validate that use of a well-certified and limited set of approved providers in overseas locations will result in a significant reduction in the level of claims billing issues, including beneficiaries being liable for balanced billing amounts and fraud by providers, while ensuring beneficiaries have sufficient access to high quality care. The demonstration would be conducted under 10 U.S.C. 1092.

Under the demonstration, the overseas contractor will establish an approved list of providers and inpatient facilities. The contractor will select these providers on the basis of their quality of care, cost of services, and lack of past fraudulent billing practices. The overseas contractor will apply the quality standards under the new overseas contract to providers seeking to be on the approved list. To be included on the approved list, a provider must agree to accept reimbursement at the lower of the usual and customary charges and the established fee schedule. They must agree to submit their claims to the overseas contractor for reimbursement and to charge TRICARE beneficiaries only the normal Standard deductible and copayment amounts. They must acknowledge they can be removed from the approved list and will have the right to appeal their removal to the Director, TRICARE Management Activity (TMA) or designee using a format and process determined by the Director, TMA.

TRICARE Standard beneficiaries who choose to access providers from the approved list will pay only their TRICARE annual deductible and cost-share amounts. Beneficiaries choosing to use a health care provider not on the approved list will, unless first obtaining an approved waiver from the overseas contractor, be responsible for all charges and will not be reimbursed by TRICARE.

TMA will provide the overseas contractor a list of those locations in the Philippines where eligible Standard beneficiaries reside and will specify areas where the contractor must establish an approved list of providers for them. To the extent practical, the overseas contractor will be required to ensure that Standard beneficiaries have access to primary care, specialty care, and inpatient services. A waiver process will be available for areas where the contractor is unable to find sufficient primary and/or specialty providers to care for the beneficiaries. Additionally, beneficiaries may seek waivers from the overseas contractor for care from providers not on the approved list.

This demonstration is not an expansion of the Prime benefit and beneficiaries are not entitled to benefits not otherwise payable under the TRICARE Standard program. Specifically, the overseas contractor will perform no beneficiary enrollment functions, no referral management services for specialty care, and no care authorizations for inpatient admissions except for the normal utilization management, benefits review and pre-authorizations required by all contractors for all Standard beneficiaries. The overseas contractor will merely develop the list of approved providers from which the beneficiaries may make their selection. The overseas contractor will also approve any waivers of the requirement to use providers on this list when approved providers are not available in a particular geographic location and will process and pay claims submitted by providers.

The government will require the overseas contractor to submit an implementation plan 180 days before the start of health care delivery under the demonstration. The implementation plan will consist of the contractor's strategy to develop a list of approved providers, including providers in all of the locations specified by the government; a quality assessment program which will meet, at a minimum, the requirements set forth by the overseas contract, and a description of the requirement to access only approved providers to be used for educating beneficiaries and providers regarding this initiative. The plan will list the number of providers (primary, specialty, and institutional), by location, the contractor intends to place on the approved list. The contractor's plan will also include the use of requests for waivers of the demonstration requirements for any areas on the Government's specified list where an approved provider list must be established. In those areas where the contractor will not have providers on the approved list, the contractor will provide the geographical areas where waivers will be granted. The contractor will provide TMA the approved list of providers by 120 days before the start of health care delivery under the demonstration. The Government, in conjunction with the contractor, will develop and implement a communication plan to inform and educate beneficiaries about the demonstration at least 60 days before the demonstration commences.

C. Implementation

This demonstration will begin 240 days after publication of the demonstration notice and will run for three years after implementation.

D. Exclusion to the Demonstration Project

This demonstration is limited to TRICARE Standard beneficiaries residing in the Philippines.

E. Evaluation

This demonstration will be evaluated using a combination of administrative and survey measures to determine adequacy of the access to health care by the beneficiaries. In addition, a cost analysis will be conducted to determine the impact to the costs for both the beneficiaries and the government. TRICARE beneficiaries will be asked to comment on the quality of their experiences getting the health care that they need. Costs under the demonstration will be compared to costs in the Philippines before implementation of the project. A review of the occurrence of fraudulent claims submitted by providers on the approved provider list compared to fraudulent claims submissions before the demonstration will be conducted.

Dated: September 23, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–24901 Filed 9–27–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2011–0023]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, Department of Defense (DoD).

ACTION: Notice to delete a system of records.

SUMMARY: The Department of the Army is deleting a system of records notice from its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on October 28, 2011 unless comments are received which result in a contrary determination.

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

• *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

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

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones, Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905, or by phone at (703) 428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The Department of the Army proposes to delete one system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: September 23, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DELETION:

A0621–1 DAPE, Army Continuing Education Program

REASON:

The A0621–1 DAPE, Army Continuing Education Program is now covered under a new system of records notice, A0621–1a DAPE, Student Loan Repayment Program Records, (September 6, 2011, 76 FR 55057–55059) due to major changes in system. The notice can therefore be deleted.

[FR Doc. 2011–24922 Filed 9–27–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education (ED).

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507(j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by 10/07/2011. A regular clearance process is also beginning. Interested persons are invited to submit comments on or before November 28, 2011.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (OMB) may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.,* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. ED invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on respondents, including through the use of information technology.

Dated: September 23, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Request for Elementary and Secondary Education Act Flexibility.

OMB #: Pending.

Abstract: The U.S. Department of Education plans to offer each State educational agency the opportunity to request flexibility on behalf of itself, its local educational agencies, and its schools, in order to better focus on improving student learning and increasing the quality of instruction. This voluntary opportunity will provide educators and State and local leaders with flexibility regarding specific requirements of the No Child Left Behind Act of 2001 in exchange for rigorous and comprehensive State-developed accountability plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction. This flexibility is intended to build on and support the significant State and local reform efforts already underway in critical areas such as transitioning to college- and career-ready standards and assessments; developing systems of

differentiated recognition, accountability, and support; and evaluating and supporting teacher and principal effectiveness.

Frequency: Annually.

Affected Public: State, Local, or Tribal Government.

Reporting and Recordkeeping Hour Burden:

Responses: 52.

Burden Hours: 17,472.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4728. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at –800–877–8339.

[FR Doc. 2011–24962 Filed 9–27–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before October 28, 2011.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: September 23, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Innovation and Improvement

Type of Review: New.

Title of Collection: Charter School Facilities National Questionnaire.

OMB Control Number: Pending.

Agency Form Number(s): N/A.

Frequency of Responses: Once.

Affected Public: State, Local or Tribal Government.

Total Estimated Number of Annual Responses: 369.

Total Estimated Annual Burden Hours: 1107.

Abstract: According to Part B section 5201 of the Elementary and Secondary Education Act, one of the established purposes of the Charter School Program office in the US Department of Education (ED) is ''encouraging the States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount the States have typically provided for traditional public schools''. Currently, there is no national database, report, or analysis on the state of charter school facilities. This collection will help to understand the state of charter school facilities nationwide.

In the summer of 2007, the Colorado League of Charter Schools (the League) launched its Facilities 2010 Task Force, which was established to address charter school facility needs. One of the initiatives of the Facilities 2010 Task Force was to develop a questionnaire that inventoried the facilities landscape in Colorado. This questionnaire has since been customized and administered in several additional states. ED is looking to use and administer this questionnaire in additional states and compile the data from all states into a national facilities database. ED has plans to conduct this survey in approximately three to four states per year. ED will use the information from the questionnaire to include in a national database that will provide comprehensive information about the facilities for charter schools and the issues that charter school face in trying to obtain adequate facilities. The data will then be used to develop a report and an analysis.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4645. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–24952 Filed 9–27–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing

collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 28, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: September 23, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Extension.

Title of Collection: Teacher Education Assistance for College and Higher Education Grant Program (TEACH Grant Program) Agreement to Serve.

OMB Control Number: 1845–0083.

Agency Form Number(s): N/A.

Frequency of Responses: On occasion.

Affected Public: State, Local or Tribal Government.

Total Estimated Number of Annual Responses: 37,266.

Total Estimated Annual Burden Hours: 18,633.

Abstract: As a condition for receiving a TEACH Grant, a student must sign an Agreement to Serve. A new Agreement to Serve must be signed for each award year during which a student wishes to receive a TEACH Grant. By signing the Agreement to Serve, a TEACH Grant recipient agrees to meet the teaching service obligation and other terms and conditions of the TEACH Grant Program that are described in the Agreement to Service. In accordance with these terms and conditions, if a TEACH Grant recipient does not fulfill the required teaching service obligation or otherwise fails to meet the requirements of the TEACH Grant Program, any TEACH Grant funds the individual received will be converted to a Direct Unsubsidized Loan that the grant recipient must repay in full, with interest. The Agreement to Serve also explains the repayment terms and conditions that will apply if a TEACH Grant is converted to a Direct Unsubsidized Loan.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4727. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–24966 Filed 9–27–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Secretary of Energy Advisory Board (SEAB). SEAB was reestablished pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) (the Act). This notice is provided in accordance with the Act.

DATES: Wednesday, October 12, 2011: 8 a.m.–3 p.m.

ADDRESSES: Lawrence Livermore National Laboratory, 7000 East Avenue, Livermore, CA 94550.

FOR FURTHER INFORMATION CONTACT: Amy Bodette, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (202) 586–0383 or facsimile (202) 586–1441; e-mail at: *seab@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Board was reestablished to provide advice and recommendations to the Secretary on the Department's basic and applied research, economic and national security policy, educational issues, operational issues, and other activities as directed by the Secretary.

Purpose of the Meeting: This is one of the quarterly meetings of the Board. This meeting will provide briefings to the Board and an opportunity for the subcommittees to report on their progress.

Tentative Agenda: The meeting will start at 8 a.m. on October 12, 2011, and will serve as an update meeting for the Board. The tentative meeting agenda includes opening remarks from the Secretary, briefings from the Lab, reports on planned activities from subcommittees, and an opportunity for public comment. The meeting will conclude at 3 p.m.

Public Participation: The meeting is open to the public. Individuals who would like to attend must RSVP to Amy Bodette no later than 5 p.m. on Friday, October 7, 2011, by e-mail at: *seab@hq.doe.gov.* Please provide your name, organization, citizenship, and contact information. Anyone attending the meeting will be required to present government issued identification. Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the meeting on Wednesday, October 12, 2011. Approximately 30 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak, but will not exceed 5 minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak are required to register and may

do so beginning at 8 a.m. on October 12, 2011.

Those not able to attend the meeting or have insufficient time to address the committee are invited to send a written statement to Amy Bodette, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington DC 20585, or e-mail to: *seab@hq.doe.gov.*

Minutes: The minutes of the meeting will be available on the SEAB Web site *http://www.energy.gov/SEAB* or by contacting Ms. Bodette. She may be reached at the postal address or e-mail address above.

Issued in Washington, DC on September 22, 2011.

LaTanya Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2011–24926 Filed 9–27–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Efficiency and Renewable Energy

State Energy Advisory Board (STEAB)

AGENCY: Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a teleconference call of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, October 20, 2011, 3:30 p.m. to 4:30 p.m. (To receive the call-in number and passcode, please contact the Board's Designated Federal Officer (DFO) at the address or phone number listed below.)

FOR FURTHER INFORMATION CONTACT: Gil Sperling, STEAB Designated Federal Officer, Senior Management Technical Advisor, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Ave., SW., Washington, DC, 20585. Phone number is (202) 287–1644.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Review and update accomplishment of STEAB's Sub-committee and Task Forces, discuss the upcoming live Board meeting, and provide an update to the Board on routine business matters and other topics of interest.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gil Sperling at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the meeting; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 60 days on the STEAB Web site: *www.steab.org.*

Issued at Washington, DC, on September 22, 2011.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2011–24928 Filed 9–27–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1786–003.

Applicants: Credit Suisse Energy LLC.

Description: Notice of Change in Status by Credit Suisse Energy LLC.

Filed Date: 09/20/2011.

Accession Number: 20110920–5119.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4575–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SGIA WDAT SERV AG SCE- SEPV1 LLC SEPV1 Project to be effective 9/21/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5074.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4576–000.

Applicants: PJM Interconnection, LLC, The Dayton Power and Light Company

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: PJM Transmission Owners revisions to the CTOA and related sections to the OATT to be effective 11/19/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5083.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4577–000.

Applicants: Bell Independent Power.

Description: Bell Independent Power submits tariff filing per 35.1: Baseline Market Based Rate Tariff to be effective 9/23/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5084.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4578–000.

Applicants: PJM Interconnection, LLC, The Dayton Power and Light Company

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: PJM Transmission Owners revisions to the CTOA and related sections to the OATT to be effective 11/19/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5096.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4579–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SGIA WDAT SERV AG SCE–SEPV 2 LLC SEPV 5 Project to be effective 9/21/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5099.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4580–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–09–20 CAISO CB Intertie Amendment Filing to be effective 11/28/2011.

Filed Date: 09/21/2011.

Accession Number: 20110921–5000.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 12, 2011.

Docket Numbers: ER11–4581–000.

Applicants: Power Bidding Strategies, LLC.

Description: Power Bidding Strategies, LLC submits notice of cancellation.

Filed Date: 09/21/2011.

Accession Number: 20110921–5018.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 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: September 21, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–24890 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–4307–001.

Applicants: Green Mountain Energy Company.

Description: Green Mountain Energy Company submits tariff filing per 35.17(b): Amendment—docket number inserted 09192011 to be effective 10/11/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5106.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4308–001.

Applicants: Reliant Energy Northeast LLC.

Description: Reliant Energy Northeast LLC submits tariff filing per 35.17(b): Amendment—docket number inserted 09192011 to be effective 10/11/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5107.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4558–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: PJM Queue No. NQ–047; Original Service Agreement No. 3055 to be effective 8/19/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5061.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4559–000.

Applicants: Black Hills/Colorado Electric Utility Company.

Description: Black Hills/Colorado Electric Utility Company, LP submits tariff filing per 35: OATT Compliance to be effective 8/16/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5065.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4560–000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: Northern States Power Company, a Minnesota corporation submits tariff filing per 35.13(a)(2)(iii: 2011–9–19_CAPX_Fargo_Phase-2_TCEA_Agmt to be effective 8/12/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5089.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4561–000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: Northern States Power Company, a Minnesota corporation submits tariff filing per 35.13(a)(2)(iii: 2011–9–19_CAPX_Fargo_Phase-2_OMA_Agmt_0.1.0 to be effective 8/12/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5091.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4562–000.

Applicants: Hawkeye Energy Greenport, LLC.

Description: Hawkeye Energy Greenport, LLC submits tariff filing per 35.12: Hawkeye Energy Greenport, LLC Baseline MBR Tariff to be effective 9/19/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5094.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4563–000.

Applicants: CenterPoint Energy Houston Electric, LLC.

Description: CenterPoint Energy Houston Electric, LLC submits tariff filing per 35.13(a)(1): TFO Tariff Interim Rate Revision to Conform with PUCT–Approved ERCOT Rate to be effective 9/6/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5098.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4564–000.

Applicants: Bollinger Energy Corporation.

Description: Report/Form of Bollinger Energy Corporation, Request to cancel market-based rate tariff in response the letter regarding Order No. 714 dated August 31, 2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5104.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4565–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: R34 Amended GIA (R65 and J191) to be effective 9/20/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5115.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4565–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: R34 Amended GIA (R65 and J191) to be effective 9/20/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5116.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4566–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Queue Position T133 & T134; Original Service Agreement No. 3049 to be effective 8/19/2011.

Filed Date: 09/19/2011.

Accession Number: 20110919–5117.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4567–000.

Applicants: Pypha Energy LLC.

Description: Pypha Energy LLC submits tariff filing per 35.1: Baseline MBR Tariff Filing to be effective 9/20/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5000.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4568–000.

Applicants: PacifiCorp.

Description: Termination of PacifiCorp Rate Schedule FERC No. 276, Nevada Power Interconnection Agreement in ER11–4568.

Filed Date: 09/19/2011.

Accession Number: 20110919–5131.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 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: September 20, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–24885 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–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: RP11–2573–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 09/21/11 Negotiated Rates—Citigroup Energy Inc. to be effective 11/1/2011.

Filed Date: 09/21/2011.

Accession Number: 20110921–5067.

Comment Date: 5 p.m. Eastern Time on Monday, October 03, 2011.

Docket Numbers: RP11–2574–000.

Applicants: Sabine Pipe Line LLC.

Description: Sabine Pipe Line LLC submits tariff filing per 154.204: Revised Imbalance Language to be effective 10/1/2011.

Filed Date: 09/21/2011.

Accession Number: 20110921–5090.

Comment Date: 5 p.m. Eastern Time on Monday, October 03, 2011.

Docket Numbers: RP11–2575–000.

Applicants: Monroe Gas Storage Company, LLC.

Description: Monroe Gas Storage Company, LLC submits tariff filing per 154.204: Monroe Gas Storage Tariff Revised 9.2.11 to be effective 9/21/2011.

Filed Date: 09/21/2011.

Accession Number: 20110921–5095.

Comment Date: 5 p.m. Eastern Time on Monday, October 03, 2011.

Docket Numbers: RP11–2576–000.

Applicants: Transwestern Pipeline Company, LLC.

Description: Petition of Transwestern Pipeline Company, LLC for Approval of Stipulation and Agreement of Settlement and Request for Expedited Action.

Filed Date: 09/21/2011.

Accession Number: 20110921–5124.

Comment Date: 5 p.m. Eastern Time on Monday, October 03, 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: September 22, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–24883 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2694–002.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company Submits Joint Progress Report and Request for Extension.

Filed Date: 08/31/2011.

Accession Number: 20110831–5217.

Comment Date: 5 p.m. Eastern Time on Thursday, September 22, 2011.

Docket Numbers: ER11–3572–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: 09–20–11 Schedule 27 Amendment to be effective 5/14/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5076.

Comment Date: 5 p.m. Eastern Time on Monday, September 26, 2011.

Docket Numbers: ER11–3980–000; ER11–3980–001.

Applicants: ORNI 14 LLC.

Description: Attachment A to Petition Amendment of ORNI 14 LLC.

Filed Date: 09/20/2011.

Accession Number: 20110920–5032.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 04, 2011.

Docket Numbers: ER11–4569–000.

Applicants: CBK Group, LTD.

Description: CBK Group, LTD submits notice of cancellation of its market-based rate tariff.

Filed Date: 09/19/2011.

Accession Number: 20110919–0033.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4570–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits tariff filing per 35.15: Cancellation of Tariff Volume No. 8 to be effective 10/4/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5035.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4571–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: Bountiful City Amended and Restated Parrish Sub Expansion Construction Agreement to be effective 11/20/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5049.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4572–000.

Applicants: NV Energy, Inc.

Description: NV Energy, Inc. submits tariff filing per 35.13(a)(2)(iii: Service Agreement No. 09–01804 Copper Mtn Interconnection to be effective 9/23/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5057.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4573–000.

Applicants: Evergreen Community Power LLC.

Description: Evergreen Community Power LLC submits tariff filing per 35.1: Baseline Tariff Filing to be effective 9/20/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5062.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 2011.

Docket Numbers: ER11–4574–000.

Applicants: PJM Interconnection, LLC, Trans-Allegheny Interstate Line Company.

Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: TrAILCo submits revisions to PJM Tariff Attachment H–18 to be effective 11/19/2011.

Filed Date: 09/20/2011.

Accession Number: 20110920–5067.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 11, 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: September 20, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–24884 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF11–12–000]

Southeastern Power Administration; Notice of Filing

Take notice that on September 8, 2011, the Southeastern Power Administration submitted its Rate Order No. SEPA–54 concerning rate and repayment data for the Jim Woodruff System, for confirmation and approval on a final basis, effective September 20, 2011, and ending September 19, 2016.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on October 11, 2011.

Dated: September 21, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–24957 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF11–13–000]

Southeastern Power Administration; Notice of Filing

Take notice that on September 14, 2011, the Southeastern Power Administration submitted its Rate Order No. SEPA–55 concerning rate and repayment data for the Cumberland System, for confirmation and approval on a final basis, effective October 1, 2011, and ending September 30, 2013.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on October 14, 2011.

Dated: September 21, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–24956 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2280–013; Project No. 13889–000]

FirstEnergy Generation Corporation; Seneca Nation of Indians; Notice of Tribal Consultation Meeting

The Commission will hold a Government to Government/Tribal Consultation meeting on September 28, 2011, at 9:30 a.m. The meeting will be held at the following location: Seneca Allegheny Administration Building, 90 Ohio:yo' Way, Salamanca, NY 14779.

The meeting will be transcribed by a court reporter, so that the transcript can be placed in the record of this proceeding.

If you have any questions, contact Gaylord Hoisington at (202) 502–6032 or

gaylord.hoisington@ferc.gov for more information.

Dated: September 21, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–24958 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14252–000]

Bellwood Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On August 9, 2011, Bellwood Hydro, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Bellwood Pumped Storage Project to be located on Tipton Run in Blair County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) A new 3,700-foot-long, 275-foot-high rock or earth fill main dam and a new 2,500-foot-long, 60-foot-high rock or earth fill saddle dam forming an upper reservoir having a surface area of 101 acres and a total storage capacity of 10,600 acre-feet at a normal maximum operating elevation of 2,440 feet mean sea level (msl); (2) a new 1,530-foot-long, 185-foot-high rock or earth fill dam forming a lower reservoir having a surface area of 120 acres and a total storage capacity of 9,400 acre-feet at a normal maximum operating level of 1,460 feet msl; (3) a 30-foot-diameter, 2,570-foot-long steel or concrete power tunnel that extends from the upper reservoir to a 1,200-foot-long vertical shaft connecting the power tunnel to the penstock; (4) a 1,000-foot-long steel-lined penstock; (5) a 290-foot-long by 140-foot-wide by 120-foot-high underground powerhouse containing three turbine units with a rated capacity of 250 megawatts each; (6) a 40-foot-diameter, 4,000-foot-long tailrace tunnel connecting the turbine draft tubes with the lower reservoir; (7) a 500-kilovolt, 7.3-mile-long transmission line; and (8) appurtenant facilities. The project would have an annual generation of 1,973 gigawatt-hours.

Applicant Contact: Vincent Lamarra, Bellwood Hydro, LLC, 975 South State Highway 89/91, Logan, UT 84321; *phone:* (435) 752–2580.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14252–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 21, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–24959 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–545–000]

Tennessee Gas Pipeline Company; Notice of Request Under Blanket Authorization

Take notice that on September 9, 2011, Tennessee Gas Pipeline Company (Tennessee), 1001 Louisiana Street, Houston, Texas 77002 filed a prior notice request in accordance with sections 157.205, 157.216(b) of the Federal Energy Regulatory Commission's (Commission) Regulations under the Natural Gas Act and Tennessee's authorization in Docket No. CP82–413–000, to abandon in place and by removal an inactive supply lateral designated as Line No. 524C–900 (Supply Lateral) and associated meters and appurtenances located in Lafourche Parish, Louisiana and extending into the state waters of offshore Louisiana in the Bay Marchand Area, all as more fully set forth in the application, which is open to the public for inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding the application should be directed to Thomas G. Joyce, Manager, Certificates & Compliance, Tennessee Gas Pipeline Company, 1001 Louisiana Street, or telephone (713) 420–3299, or fax (713) 420–160 or by e-mail *tom.joyce@elpaso.com*.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Dated: September 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–24961 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL10–4–000]

Technical Conference on Penalty Guidelines; Notice of Technical Conference on Penalty Guidelines

The staff of the Federal Energy Regulatory Commission (Commission) will hold a conference on November 17, 2011, to discuss the Penalty Guidelines, which the Commission issued on September 17, 2010.[1] The conference will be held from 1:00 p.m. to 4:30 p.m. Eastern Standard Time in the Commission Meeting Room at the Commission's headquarters located at 888 First Street, NE., Washington, DC 20426.

[1] *Enforcement of Statutes, Orders, Rules, and Regulations,* 132 FERC ¶ 61,216 (2010).

The purpose of the conference is to discuss the impact of the Penalty Guidelines on compliance and enforcement matters. More information on the topics to be explored and the number and composition of the panels will be provided in subsequent notices.

All interested persons are invited to attend the conference, and there is no registration fee to attend. The conference will not be transcribed but will be webcast. A free webcast of this event will be available through *http://www.ferc.gov.* Anyone with Internet access who desires to view this event can do so by navigating to *http://www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the webcasts and offers access to the meeting via phone bridge for a fee. If you have any questions, you may visit *http://www.CapitolConnection.org.*

FERC conferences and meetings are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or 202–502–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

Questions about the technical conference may be directed to Jeremy Medovoy by e-mail at *Jeremy.Medovoy@ferc.gov* or by telephone at 202–502–6768.

Dated: September 21, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–24960 Filed 9–27–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Intent To Prepare a Supplemental Environmental Impact Statement (SEIS) for the Production of Tritium in a Commercial Light Water Reactor

AGENCY: National Nuclear Security Administration (NNSA), U.S. Department of Energy (DOE).

ACTION: Notice of intent to prepare a supplemental environmental impact statement and conduct public scoping meetings.

SUMMARY: The Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (NEPA) and DOE's NEPA implementing regulations require the preparation of a supplement to an environmental impact statement (EIS) when there are substantial changes to a proposal or when there are significant new circumstances or information relevant to environmental concerns. DOE may also prepare a SEIS at any time to further the purposes of NEPA. Pursuant to these provisions, the NNSA, a semi-autonomous agency within DOE, intends to prepare a SEIS to update the environmental analyses in DOE's 1999 EIS for the Production of Tritium in a Commercial Light Water Reactor (CLWR EIS; DOE/EIS–0288). The CLWR EIS addressed the production of tritium in Tennessee Valley Authority (TVA) reactors using tritium-producing burnable absorber rods (TPBARs). In the Record of Decision (ROD) for the CLWR EIS, NNSA selected TVA's Watts Bar Unit 1 and Sequoyah Units 1 and 2, located in Spring City and Soddy-Daisy, Tennessee, respectively, for tritium production. TVA has been producing tritium for NNSA at Watts Bar Unit 1 since 2004.

After several years of tritium production experience at TVA's Watts Bar Unit 1, NNSA has determined that tritium permeation through TPBAR cladding into the reactor cooling water occurs at a higher rate than previously projected. The proposed SEIS will analyze the potential environmental impacts associated with increased tritium permeation levels observed since 2004; DOE's revised estimate of the maximum number of TPBARs required to support the current Nuclear Posture Review tritium supply requirements; and proposed changes to TVA facilities that may be used for future tritium production. TVA will be participating as a cooperating agency in the preparation of the SEIS. Any other agency that would like to be a cooperating agency in the preparation of the SEIS is requested to contact the SEIS Document Manager as noted in this Notice under **ADDRESSES**.

DATES: NNSA invites comments on the scope of the SEIS. The public scoping period starts with the publication of this Notice in the **Federal Register** and will continue until November 14, 2011. NNSA will consider all comments received or postmarked by that date in defining the scope of the SEIS. Comments received or postmarked after that date will be considered to the extent practicable. A public scoping meeting is scheduled to be held on October 20, 2011, from 6:30 p.m. to 10 p.m.

ADDRESSES: The public scoping meeting will be held at the Southeast Tennessee Trade and Conference Center, Athens, TN. NNSA will publish additional notices on the date, time, and location of the scoping meeting in local newspapers in advance of the scheduled meeting. Any necessary changes will be announced in the local media. The scoping meeting will provide the public with an opportunity to present comments, ask questions, and discuss issues with NNSA officials regarding the SEIS.

Written comments or suggestions concerning the scope of the SEIS or requests for more information on the SEIS and public scoping process should be directed to: Mr. Curtis Chambellan, Document Manager for the SEIS, U.S. Department of Energy, National Nuclear Security Administration, Box 5400, Albuquerque, New Mexico 87185–5400; facsimile at 505–845–5754; or e-mail at: *tritium.readiness.seis@doeal.gov.* Mr. Chambellan may also be reached by telephone at 505–845–5073.

FOR FURTHER INFORMATION CONTACT: For general information on the NNSA NEPA process, please contact: Ms. Mary Martin, NNSA NEPA Compliance Officer, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, or telephone 202–586–9438. For general information about the DOE NEPA process, please contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, or telephone 202–586–4600, or leave a message at 1–800–472–2756. Additional information about the DOE NEPA process, an electronic archive of DOE NEPA documents, and other NEPA resources are provided at *http://energy.gov/nepa.*

SUPPLEMENTARY INFORMATION: NNSA is responsible for supplying nuclear materials for national security needs and ensuring that the nuclear weapons stockpile remains safe and reliable. Tritium, a radioactive isotope of hydrogen, is an essential component of every weapon in the U.S. nuclear weapons stockpile. Unlike other nuclear materials used in nuclear weapons, tritium decays at a rate of 5.5 percent per year. Accordingly, as long as the Nation relies on a nuclear deterrent, the tritium in each nuclear weapon must be replenished periodically. The last reactor used for tritium production during the Cold War was shut down in 1988. Since then, tritium requirements for the stockpile have largely been met from the existing original inventory through the harvest and recycle of tritium gas during the dismantlement of weapon systems, and the replacement of tritium-containing weapons components as part of Limited Life Component Exchange programs. In December 1999, a new tritium production capability was established through an Interagency Agreement with TVA in which TPBARs are irradiated in the Watts Bar Unit 1 commercial nuclear power reactor and undergo extraction at the Tritium Extraction Facility (TEF) located at DOE's Savannah River Site (SRS) in South Carolina. In order to continue to provide the required supply, irradiation will increase from today's 544 TPBARs per fuel cycle to a projected steady state rate of approximately 1,700 TPBARs per fuel cycle, *i.e.,* approximately every 18 months.

To provide sufficient capacity to ensure the ability to meet projected future stockpile requirements, NNSA and TVA anticipate requesting authorization for TPBAR irradiation to be increased in fiscal year 2016 to a level that is beyond currently licensed rates for one reactor. Meeting the increased demand will require a license amendment from the Nuclear Regulatory Commission (NRC) to permit the irradiation of a greater number of TPBARs per reactor than can currently be irradiated at either the Watts Bar or Sequoyah site. License amendments are reactor specific. NNSA and TVA will supplement the 1999 CLWR EIS with analyses supporting the anticipated license amendment requests that also evaluate a higher level of tritium permeation through TPBAR cladding into the reactor cooling water than was previously analyzed. The tritium releases associated with the proposed increase in the number of TPBARs that could be irradiated at Watts Bar, Sequoyah, or both sites (compared to the number currently authorized by the NRC) would remain below Environmental Protection Agency (EPA) and NRC regulatory limits. Subsequently, TVA plans to adopt the SEIS for use in obtaining the necessary NRC license amendment(s).

The production of tritium in a CLWR is technically straightforward. All of the Nation's supply of tritium has been produced in reactors. Most commercial pressurized water reactors were designed to utilize 12-foot-long rods containing an isotope of boron (boron-10) in ceramic form. These rods are sometimes called burnable absorber rods. The rods are inserted in the reactor fuel assemblies to absorb excess neutrons produced by the uranium fuel in the fission process for the purpose of controlling power in the core at the beginning of an operating cycle. DOE's tritium program developed TPBARs in which neutrons are absorbed by a lithium aluminate ceramic rather than boron ceramic. While the two types of rods function in a very similar manner to absorb excess neutrons in the reactor core, there is one notable difference: When neutrons strike the lithium aluminate ceramic material in a TPBAR, tritium is produced inside the TPBAR. These TPBARs are placed in the same locations in the reactor core as the standard boron burnable absorber rods. There is no fissile material (uranium or plutonium) in the TPBARs. Tritium produced in TPBARs is captured almost instantaneously in a solid zirconium material in the rod, called a ''getter.'' The getter material that captures the tritium is very effective. During each reactor refueling cycle, the TPBARs are removed from the reactor and transported to SRS. At SRS, the TPBARs are heated in a vacuum at the TEF to extract the tritium from the getter material.

DOE's May 1999 Consolidated Record of Decision for Tritium Supply and Recycling (64 FR 26369) announced the selection of TVA's Watts Bar Unit 1, Sequoyah Unit 1 and Sequoyah Unit 2 for use in irradiating TPBARs and stated that a maximum of approximately 3,400 TPBARs would be irradiated per reactor during each 18-month fuel cycle. Since then, the projected need for tritium has decreased significantly. NNSA has determined that tritium demand to supply the Nuclear Weapons Stockpile could be satisfied using a maximum of approximately 2,500 TPBARs per fuel cycle, with a projected steady state number of approximately 1,700 TPBARs per fuel cycle.

Purpose and Need

Although NNSA's projected need for tritium to support the nuclear weapons stockpile today is less than originally planned, a higher than expected rate of permeation of tritium from TPBARs into reactor coolant water and subsequent release to the environment has restricted the number of TPBARs irradiated at TVA's Watts Bar Unit 1. Before TVA increases tritium production rates to meet expected national security requirements, the environmental analyses in the CLWR EIS are being updated to analyze and evaluate the effects of the higher tritium permeation, as well as any potential effects related to other changes in the regulatory and operating environment since publication of the original CLWR EIS.

As a cooperating agency in the preparation of the SEIS, TVA plans to use the SEIS in pursuing NRC licensing amendments to increase TPBAR

irradiation at TVA's Watts Bar Nuclear Plant (WBN) at Spring City, Tennessee, and/or the Sequoyah Nuclear Plant at Soddy-Daisy, Tennessee, beyond levels set in 2002. Four alternatives are expected to be analyzed in the SEIS: The No Action Alternative and three action alternatives, one using only the Watts Bar site, one using only the Sequoyah site, and one using both the Watts Bar and Sequoyah sites. As a matter of note, in a separate proceeding, DOE and TVA are also analyzing the potential use of mixed oxide fuel during some fuel cycles at the Sequoyah Nuclear Plant as part of the U.S. program for surplus plutonium disposition (75 FR 41850. July 19, 2010).

Proposed Action and Alternatives

The CLWR EIS assessed the potential impacts of irradiating up to 3,400 TPBARs per reactor unit operating on 18 month fuel cycles. It included TPBAR irradiation scenarios using multiple reactor units to achieve a maximum level of 6,000 TPBARs every 18 months. Subsequently, tritium production requirements have been reduced such that irradiation of approximately 1,700 TPBARs every reactor fuel cycle is expected to be sufficient to fulfill current requirements, consistent with the 2010 Nuclear Posture Review. To provide flexibility in future tritium supply decisions, the revised environmental analysis is expected to consider irradiation of up to a total of 2,500 TPBARs every 18 months. This approach would provide sufficient reserve capacity to accommodate potential future changes in requirements and to allow for production above currently expected annual requirement levels for short durations (i.e., several years) to recover from potential future shortfalls should that become necessary.

In the CLWR EIS, the permeation of tritium through the TPBAR cladding into the reactor coolant systems of potential tritium production reactors was estimated to be less than or equal to one tritium curie/TPBAR/year. After several years of tritium production experience at Watts Bar Unit 1, NNSA has determined that tritium permeation through TPBAR cladding is approximately three to four times higher than this estimate; nevertheless, tritium releases have been below regulatory limits. To conservatively bound the potential environmental impacts, the SEIS will assess the impacts associated with tritium production in CLWRs based on a permeation rate of approximately five tritium curies/TPBAR/year.

An assessment of tritium mitigation and management measures will be included as part of the environmental analyses in the SEIS. Mitigation and management measures include an assessment of technologies commercially available to treat tritiated effluents, transportation of tritiated effluents and/or low level radioactive waste streams, and other applicable effluent management actions.

The SEIS, which will supplement the 1999 CLWR EIS, will support agency deliberations regarding potential changes in the tritium production at NRC licensed TVA facilities in order to meet the requirements of TVA's agreement with NNSA. These changes also require TVA to pursue an NRC license amendment request for these facilities. Accordingly, the SEIS is expected to substantially meet NRC requirements for an environmental report necessary to support TVA's license amendment request(s) for tritium production at the Watts Bar and/or Sequoyah Nuclear Plants.

No Action Alternative: Produce tritium at currently approved TVA facilities (Watts Bar Unit 1 and Sequoyah Units 1 and 2) at appropriate levels to keep permeation levels within currently approved NRC license and regulatory limits.

Alternative 1: Utilize TVA's Watts Bar site only to a maximum level of 2,500 TPBARs every reactor fuel cycle (18 months).

Alternative 2: Utilize TVA's Sequoyah site only to a maximum level of 2,500 TPBARs every 18 months.

Alternative 3: Utilize both the Watts Bar and Sequoyah sites to a maximum total level of 2,500 TPBARS every 18 months. The level of production per site would be determined by TVA. This alternative would provide the ability to supply stockpile requirements at either site independently, or using both sites with each supplying a portion of the supply.

Preliminary Identification of Environmental Issues

NNSA has tentatively identified the issues for analysis in the SEIS. Additional issues may be identified as a result of the scoping comment process. The SEIS will analyze the potential impacts on:

1. Air, water, soil, and visual resources.

2. Plants and animals, and their habitats, including state and Federally-listed threatened or endangered species and their critical habitats.

3. Irretrievable and irreversible consumption of natural resources and energy, including transportation issues.

4. Cultural resources, including historical and pre-historical resources and traditional cultural properties.

5. Infrastructure and utilities.

6. Socioeconomic conditions.

7. Human health under routine operations and accident conditions, including potential impacts from seismic events.

8. Minority and low-income populations (Environmental Justice).

9. Intentional Destructive Acts, including terrorist acts.

10. Other past, present, and reasonably foreseeable actions (cumulative impacts).

SEIS Process and Invitation to Comment. The SEIS scoping process provides an opportunity for the public to assist the NNSA in determining issues and alternatives to be addressed in the SEIS. One public scoping meeting will be held as noted under **DATES** in this Notice. The purpose of the scoping meeting is to provide attendees with an opportunity to present comments, ask questions, and discuss issues regarding the SEIS with NNSA officials. Comments can also be mailed to Mr. Chambellan as noted in this Notice under **ADDRESSES**. The SEIS scoping meeting will include an informal open house from 6:30–7 p.m. to facilitate dialogue between NNSA and the public. Once the formal scoping meeting begins at 7:00 pm, NNSA will present a brief overview of the SEIS process and provide individuals the opportunity to give written or oral statements. NNSA welcomes specific scoping comments or suggestions on the SEIS. Copies of written comments and transcripts of oral comments provided to NNSA during the scoping period will be available on the Internet at *http://nnsa.energy.gov/nepa/clwrseis*.

After the close of the public scoping period, NNSA will begin preparing the Draft SEIS. NNSA expects to issue the Draft SEIS for public review in 2012. A **Federal Register** Notice of Availability, along with notices placed in local newspapers, will provide dates and locations for public hearings on the Draft SEIS and the deadline for comments on the draft document. Persons who submit comments with a mailing address during the scoping process will receive a copy of or link to the Draft SEIS. Other persons who would like to receive a copy of or link to the Draft SEIS for review should notify Mr. Chambellan at the address noted under **ADDRESSES**. NNSA will include all comments received on the Draft SEIS, and responses to those comments in the Final SEIS.

Issuance of the Final SEIS is currently anticipated to take place in 2013. NNSA

will issue a ROD no sooner than 30 days after publication of EPA's Notice of Availability of the Final SEIS.

Issued in Washington, DC, this 23rd day of September 2011.

Thomas P. D'Agostino,

Administrator, National Nuclear Security Administration.

[FR Doc. 2011–24947 Filed 9–27–11; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2002–0091, FRL–9472–8]

Agency Information Collection Activities: Proposed Collection; Comment Request; Ambient Air Quality Surveillance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that the EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on April 30, 2012. Before submitting the ICR to the OMB for review and approval, the EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before November 28, 2011.

ADDRESSES: Submit your comments, identified by Docket ID number OAR–2002–0091, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket, Mail Code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0091. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the 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, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Laurie Trinca, Air Quality Assessment Division, Environmental Protection Agency; *telephone number:* (919) 541–0520; *fax number:* (919) 541–1903; *e-mail address: trinca.laurie@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I access the docket and/or submit comments?

The EPA has established a public docket for this ICR under Docket ID No. EPA–OAR–2002–0091, which is available for online viewing at *http://www.regulations.gov,* or in-person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, the EPA is requesting comments from very small businesses (those that employ less than 25 people) on examples of specific additional efforts that the EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What should I consider when I prepare my comments for the EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under **DATES**.

7. To ensure proper receipt by the EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What information collection activity or ICR does this apply to?

Affected Entities: Entities potentially affected by this action are those state,

local air pollution control agencies, and tribal entities which collect and report ambient air quality data for the criteria pollutants to the EPA as well as other supporting measurements.

Title: Ambient Air Quality Surveillance

ICR numbers: EPA ICR No. 0940–25, OMB Control No. 2060–0084.

ICR status: This ICR is currently scheduled to expire on April 30, 2012. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR includes ambient air monitoring data and other supporting measurements reporting and recordkeeping activities associated with the 40 CFR part 58 Ambient Air Quality Surveillance rule. These data and information are collected by various state and local air quality management agencies and reported to the Office of Air Quality Planning and Standards within the Office of Air and Radiation, U.S. EPA.

This ICR reflects revisions of the previous ICR update of 2009, and it covers the period of 2012–2014. The number of monitoring stations, sampling parameters, and frequency of data collection and submittal is expected to remain stable for 2012–2014.

The data collected through this information collection consist of ambient air concentration measurements for the seven air pollutants with national ambient air quality standards (i.e., ozone, sulfur dioxide, nitrogen dioxide, lead, carbon monoxide, and particulate matter ($PM_{2.5}$ and PM_{10})), ozone precursors, meteorological variables at a select number of sites and other supporting measurements. Accompanying the pollutant concentration data are quality assurance/quality control data and air monitoring network design information.

The U.S. EPA and others (e.g., state and local air quality management agencies, tribal entities, environmental groups, academic institutions, industrial groups) use the ambient air quality data for many purposes. Some of the more prominent uses include informing the public and other interested parties of an area's air quality, judging an area's (e.g., county, city, neighborhood) air quality in comparison with the established health or welfare standards (including both national and local standards), evaluating an air quality management agency's progress in achieving or maintaining air pollutant levels below the national and local standards, developing and revising State Implementation Plans (SIPs) in accordance with 40 CFR part 51, evaluating air pollutant control strategies, developing or revising national control policies, providing data for air quality model development and validation, supporting enforcement actions, documenting episodes and initiating episode controls, air quality trends assessment, and air pollution research.

The state and local agencies and tribal entities with responsibility for reporting ambient air quality data and information as requested in this ICR submit these data electronically to the U.S. EPA's Air Quality System (AQS) database. Quality assurance/quality control records and monitoring network documentation are also maintained, by each state and local agency, in AQS electronic format where possible.

Although the state and local air pollution control agencies and tribal entities are responsible for the operation of the air monitoring networks, the EPA funds a portion of the total costs through federal grants. These grants generally require an appropriate level of contribution, or ''match,'' from the state/local agencies or tribal entities. The costs shown in this renewal are the total costs incurred for the monitoring program regardless of the source of the funding. This practice of using the total cost is consistent with prior ICR submittals and renewals.

This Information Collection is estimated to involve 168 respondents for a total cost of approximately $195,490,206 (total capital, and labor and non-labor operation and maintenance) plus a total burden of 2,105,714 hours. The labor cost associated with the hours is $125,341,493. Included in the total are other costs of non-labor operations and maintenance of $12,347,105 and equipment and contract costs of $57,801,607. In addition to the costs at the state and local air pollution control agencies and tribal entities, there is a burden to the EPA of 135,793 hours and $13,204,166.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 12,534 hours per respondent. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 168.

Frequency of response: Data submissions are required quarterly, but may occur more frequently.

Estimated total annual burden hours: 2,105,714 hours.

Estimated total annual costs: $195,490,206. This includes an estimated labor burden cost of $125,341,493 and an estimated cost of $57,801,607 for equipment and contract costs.

What is the next step in the process for this ICR?

The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to the OMB for review and approval pursuant to 5 CFR 1320.12. At that time, the EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to the OMB and the opportunity to submit additional comments to the OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: September 22, 2011.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2011–24981 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0877; FRL–8890–7]

Endocrine Disruptor Screening Program; Weight-of-Evidence Guidance Document; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's Endocrine Disruptor Screening Program (EDSP) is announcing the availability of a final guidance document titled, ''Weight-of-Evidence: Evaluating Results of EDSP Tier 1 Screening to Identify the Need for Tier 2 Testing.'' This weight-of-evidence (WoE) guidance document was revised based on public and peer review comments and existing peer-reviewed EPA guidelines. This guidance document provides basic principles and criteria for application of a WoE approach to evaluate results from the battery of Tier 1 screening assays along with other scientific and technical information relevant to Tier 1 screening to determine whether or not a chemical has the potential to interact with the estrogen, androgen, or thyroid (E, A, or T) hormonal pathways of the endocrine system. The combined results and information will also be used to identify which tests and information may be needed for Tier 2 testing.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Don Bergfelt, Office of Science Coordination and Policy (7203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (202) 564–8472; *e-mail address: bergfelt.don@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; *telephone number:* (202) 554–1404; *e-mail address: TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. You may be potentially affected by this action if you produce, manufacture, use, consume, work with, or import pesticide chemicals. To determine whether you or your business may be affected by this action, you should carefully examine section 408(p) of FFDCA, 21 U.S.C. 346a(p).

Potentially affected entities may include, but are not limited to:

- Chemical manufacturers, importers and processors (NAICS code 325), *e.g.,* persons who manufacture, import or process chemical substances.
- Pesticide, fertilizer, and other agricultural chemical manufacturers (NAICS code 3253), *e.g.,* persons who manufacture, import or process pesticide, fertilizer and agricultural chemicals.
- Scientific research and development services (NAICS code 5417), *e.g.,* persons who conduct testing of chemical substances for endocrine effects.

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

B. How can I get a copy of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2010–0877; FRL–8890–7. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

II. Overview of Revision Process

The Agency submitted a draft WoE guidance document for evaluating the results of EDSP Tier 1 screening for public review and comment as described in a **Federal Register** notice issued November 4, 2010 (75 FR 67963) (FRL–8849–8). Initially the commenting period was for 60 days, but was extended for an additional 30 days following a request from the chemical industry. Public comments were compiled and grouped according to the commonality among individual submissions so that they could be more readily and fully considered by EPA during revision of the WoE document. Comments were provided to the Agency from 13 different affiliations that mostly included the chemical industry as well as research organizations, and environmental and animal welfare advocates. In general, there were four main categories of comments considered relevant to the WoE guidance document that requested additional detail and clarification of the following:

1. Tier 1 battery of assays.
2. Assay endpoints.
3. Other scientifically relevant information.
4. WoE analysis.

The Agency considered specific comments within these categories and revised respective sections in the document. The Agency also considered peer review comments received from senior scientists across EPA with expertise in toxicology, reproductive physiology, and endocrinology encompassing health and ecological effects and made revisions. Also incorporated into the revised document are the fundamental principles and criteria for weighing and integrating different lines of evidence in a WoE evaluation articulated in existing peer-reviewed EPA guidelines. The Agency acknowledges the contribution that public and peer review comments have had in helping to expand the quantity and enhance the quality of guidance provided in this final version of the WoE document that will assist in evaluating the results of EDSP Tier 1 screening to identify the need for Tier 2 testing.

List of Subjects

Environmental protection, Endocrine disruptors, Screening assays, Weight-of-evidence.

Dated: September 22, 2011.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2011–24893 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9472–7]

National Environmental Justice Advisory Council; Notification of Public Meeting and Public Comment

AGENCY: Environmental Protection Agency.

ACTION: Notification of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 92–463, the U.S. Environmental Protection Agency (EPA) hereby provides notice that the National Environmental Justice Advisory Council (NEJAC) will meet on the dates and times described below. All meetings are open to the public. Members of the public are encouraged to provide comments relevant to the specific issues being considered by the NEJAC. For additional information about registering for public comment, please see **SUPPLEMENTARY INFORMATION**. Due to limited space, seating at the NEJAC meeting will be on a first-come, first-served basis.

DATES: The NEJAC meeting will convene Tuesday, October 25, 2011, from 9 a.m. until 10 p.m.; and will reconvene on Wednesday, October 26, 2011, from 9 a.m. to 5 p.m. All noted times are in Mountain Time.

One public comment period relevant to the specific issues being considered by the NEJAC (see **SUPPLEMENTARY INFORMATION**) is scheduled for Tuesday, October 25, 2011, from 4 p.m. to 5:15 p.m., and 6:30 p.m. to 10 p.m. Mountain Time. Members of the public who wish to participate during the public comment period are highly encouraged to pre-register by Noon, Mountain Time, Friday, October 7, 2011.

ADDRESSES: The NEJAC meeting will be held at The Albuquerque Marriott Hotel located at 2101 Louisiana Boulevard, NE., Albuquerque, New Mexico 87110. *Telephone:* 505–881–6800 or 1–800–334–2086; *Fax:* 505–888–2982.

FOR FURTHER INFORMATION CONTACT: Questions concerning the meeting should be directed to Mr. Aaron Bell, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., (MC2201A), Washington, DC 20460; by telephone at 202–564–1044, via e-mail at *Bell.Aaron@epa.gov;* or by fax at 202–501–0936. Additional information about the meeting is available at the following Web site address: *http://www.epa.gov/environmentaljustice/nejac/meetings.html.*

Registration is required for all participants. Pre-registration by Noon Mountain Time, Friday, October 7, 2011, for all attendees is highly recommended. To register online, visit the Web site address above. Registration forms should be faxed to Ms. Estela Rosas, EPA Contractor, APEX Direct, Inc., at 877–773–0779, or e-mailed to *Meetings@AlwaysPursuingExcellence.com.* Please remember to specify which meeting you are registering to attend (*e.g.,* NEJAC October 2011). Please also state whether you would like to be put on the list to provide public comment, and whether you are submitting written comments before the October 7, 2011, deadline. Non-English speaking attendees wishing to arrange for a foreign language interpreter may make appropriate arrangements in writing using the above telephone number.

SUPPLEMENTARY INFORMATION: The Charter of the NEJAC states that the advisory committee shall provide independent advice to the EPA Administrator about areas that may include, among other things, ''advice about broad, cross-cutting issues related to environmental justice, including environment-related strategic, scientific, technological, regulatory, and economic issues related to environmental justice.''

The meeting shall be used to receive comments, and discuss and provide recommendations regarding these primary areas: (1) Implementation of EPA Plan EJ 2014; (2) EPA's tribal program; (3) EPA's hazardous waste rules, and (4) the U.S.-Mexico Environmental Program (Border 2020).

A. Public Comment: Individuals or groups making oral presentations during the public comment periods will be limited to a total time of five minutes. To accommodate the large number of people who want to address the NEJAC, only one representative of a community, organization, or group will be allowed to speak. The suggested format for written public comments is as follows: Name of Speaker; Name of Organization/Community; City and State; E-mail address; and a brief description of the concern and what you want the NEJAC to advise EPA to do. Written comments received by Noon Mountain Time, Friday, October 7, 2011, will be included in the materials distributed to the members of the NEJAC. Written comments received after that date and time will be provided to the NEJAC as time allows. All information should be sent to the mailing address, e-mail address, or fax number listed in the **FOR FURTHER INFORMATION, CONTACT** section above.

B. Information about Services for Individuals with Disabilities: For information about access or services for individuals with disabilities, please contact Ms. Estela Rosas, EPA Contractor, APEX Direct, Inc., at 877–773–0779 or *Meetings@AlwaysPursuingExcellence.com.* To request special accommodations for a disability, please contact Ms. Rosas at least seven (7) working days prior to the meeting, to give EPA sufficient time to process your request. All other requests specifically related to the meeting should be sent to the mailing address, e-mail address, or fax number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Dated: September 21, 2011.

Victoria J. Robinson,

Designated Federal Officer, National Environmental Justice Advisory Council.

[FR Doc. 2011–24982 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0005; FRL–8888–5]

Pesticide Products; Receipt of Applications To Register New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this notice of such application, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before October 28, 2011.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number specified in Unit II., by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One

Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number specified for the pesticide of interest as shown in Unit II. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: The contact person is listed in Unit II., and may be contacted by telephone or e-mail. The mailing address is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number). If you are commenting on a docket that addresses multiple products, please indicate the registration numbers that apply to your comment.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications for New Uses

EPA received applications as follows to register pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA, and is publishing this Notice of such applications pursuant to section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Registration Number/File Symbol: 66222–ERT. *Docket Number:* EPA–HQ–OPP–2010–0466. *Company name and address:* Makhteshim Agan of North America, Inc., 4515 Falls of Neuse Rd., Raleigh, NC 27609. *Active ingredient:* Novaluron. *Proposed Use:* First residential use. *Contact:* Jennifer Gaines, Registration Division, (703) 305–5967; *e-mail address: gaines.jennifer@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 15, 2011.

Daniel J. Rosenblatt,

Acting, Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–24374 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–1017; FRL–8889–7]

Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Tables 1, 2, and 3 of Unit II., pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows an August 5, 2011 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 4 of Unit II. to voluntarily cancel these product registrations. In the August 5, 2011 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective September 28, 2011.

FOR FURTHER INFORMATION CONTACT: Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 347–0123; *fax number:* (703) 308–8090; *e-mail address: tatinclaux.maia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–1017. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of 45 products registered under FIFRA section 3. These registrations are listed in sequence by registration number in Tables 1, 2, and 3 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

EPA Reg. No.	Product name	Active ingredients
000239–02373	Bug-Geta Snail and Slug Pellets	Metaldehyde
000279–03053	Command 4EC Herbicide	Clomazone
000279–03071	Command 4E Herbicide	Clomazone
000538–00199	Scotts Turf Manager for St. Augustine Grass	Paclobutrazol
000538–00201	Scotts Turf Manager II	Paclobutrazol
001270–00254	Zep FS CIP Acid Sanitizer	Phosphoric Acid Dodecybenzenesulfonic acid
001448–00047	Busan 52	Carbamodithioic acid, methyl-, monopotassium salt
001448–00389	D–33–5	Potassium dimethyldithiocarbamate
001448–00390	D–33–6	Potassium dimethyldithiocarbamate
001448–00391	D–33–7	Potassium dimethyldithiocarbamate
001448–00392	D–33–8	Potassium dimethyldithiocarbamate
001448–00429	Diald 25P	Glutaraldehyde
001448–00430	Diald 15P	Glutaraldehyde
001448–00431	Diald 45P	Glutaraldehyde
002596–00132	Hartz Sumithrin Carpet Powder	MGK–264 Sumithrin
002724–00697	Permanone H and G Insect Control	Permethrin
004822–00531	Raid 1000	Triethylene glycol
006959–00082	Cessco Accudose Aerosol Insecticide	Pyrethrins Piperonyl butoxide
047000–00171	SMCP Pyrethrum Dust 1%	Pyrethrins
061483–00086	10% Permectrin Pour-On Insecticide	Permethrin
069592–00002	Laginex AS	Lagenidium giganteum, mycelium or oospores
069592–00003	Technical Laginex	Lagenidium giganteum, mycelium or oospores
070506–00202	Penncozeb EG Raincote	Mancozeb

TABLE 1—PRODUCT CANCELLATIONS—Continued

EPA Reg. No.	Product name	Active ingredients
080490–00002	Promeris Spot on for Dogs	Amitraz 4-{(2Z)-2-({[4-(Trifluoromethoxy) Anilin-o]Carbonyl}Hydrazono)-2-[3-(Trifluoromethyl) Phenyl]Ethyl}Benzonitrile Metaflumizone
080490–00003	Promeris Spot on for Cats	4-{(2Z)-2-({[4-(Trifluoromethoxy) Anilin-o]Carbonyl}Hydrazono)-2-[3-(Trifluoromethyl) Phenyl]Ethyl}Benzonitrile Metaflumizone
080490–00004	Promeris for Dogs—Flea Control	4-{(2Z)-2-({4-(Trifluoromethoxy) Anilin-o]Carbonyl}Hydrazono)-2-[3-(Trifluoromethyl) Phenyl]Ethyl}Benzonitrile Metaflumizone
081598–00010	Glyphosate Acid Technical	Glyphosate
083100–00029	Glyphosate 62% Manufacturing Concentrate	Glyphosate-isopropylammonium
087650–00001	Fipronil Technical	Fipronil
CA920028	Devrinol 50–DF Selective Herbicide	Napropamide
CO100002	Endigo ZC	Thiamethoxam lambda-Cythalothrin
ND900005	Vitavax-200 Flowable Fungicide (Vitavax with Thiram)	Thiram Carboxin

TABLE 2—PRODUCT CANCELLATIONS CONTAINING METHYL BROMIDE OR CHLOROPICRIN

EPA Reg. No.	Product name	Active ingredients
005785–00017	Chlor-O–Pic	Chloropicrin
005785–00025	Terr-O–Gas 33 Preplant Soil Fumigant	Chloropicrin Methyl bromide
008536–00012	Methyl Bromide 99.5%	Methyl bromide
CA900038	Methyl Bromide 99.5%	Methyl bromide
CA900045	Methyl Bromide 99.5%	Methyl bromide
CA910003	Methyl Bromide 99.5%	Methyl bromide
CA910020	Methyl Bromide 99.5%	Methyl bromide
CA970017	Methyl Bromide 99.5%	Methyl bromide
ID070004	MBC Concentrate Soil Fumigant	Methyl bromide

TABLE 3—PRODUCT CANCELLATIONS CONTAINING CARBOFURAN

EPA Reg. No.	Product name	Active ingredients
000279–02712	Furadan 10 G Insecticide/Nematicide	Carbofuran
000279–02876	Furadan 4F Insecticide/Nematicide	Carbofuran
000279–03023	Furadan 15 G Insecticide/Nematicide	Carbofuran
000279–03310	Furadan LFR Insecticide/Nematicide	Carbofuran

Table 4 of this unit includes the names and addresses of record for all registrants of the products in Tables 1, 2, and 3 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Tables 1, 2, and 3 of this unit.

TABLE 4—REGISTRANTS OF CANCELLED PRODUCTS

EPA Co. No.	Company name and address
239	The Scotts Company, P.O. Box 190, Marysville, OH 43040.
279	FMC Corp. Agricultural Products Group, ATTN: Michael C. Zucker, 1735 Market St., Rm. 1978, Philadelphia, PA 19103.
538	The Scotts Company, 14111 Scottslawn Rd., Marysville, OH 43041.
1270	ZEP, Inc., 1310 Seaboard Industrial Blvd., NW., Atlanta, GA 30318.

TABLE 4—REGISTRANTS OF CANCELLED PRODUCTS—Continued

EPA Co. No.	Company name and address
1448	Buckman Laboratories, Inc., 1256 North McLean Blvd., Memphis, TN 38108.
2596	The Hartz Mountain Corp., 400 Plaza Dr., Secaucus, NJ 07094.
2724	Wellmark International, 1501 E. Woodfield Rd., Suite 200 West, Schaumburg, IL 60173.
4822	S.C. Johnson and Son Inc., 1525 Howe St., Racine, WI 53403.
5785	Great Lakes Chem Corp., Agent: Chemtura Corporation, 1801 Highway 52 West, West Lafayette, IN 47906.
6959	Cessco, Inc., 3609A River Rd., John's Island, SC 29455.
8536	Soil Chemicals Corp., P.O. Box 782, Hollister, CA 95024.
47000	Chem-Tech, Ltd., 4515 Fleur Dr., #303, Des Moines, IA 50321.
61483	KMG–Bernuth, Inc., 9555 W. Sam Houston Pkwy South, Suite 600, Houston, TX 77099.
69592	Agraquest, Inc., 1540 Drew Ave., Davis, CA 95618–6320.
70506	United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
80490	Fort Dodge Animal Health, 7000 Portage Rd., KZO 300–403 SW., Kalamazoo, MI 49001.
81598	Rotam Limited Agent: IPM Resources LLC, 4032 Crockers Lake Blvd., Suite 818, Sarasota, FL 43238.
83100	Rotam Agrochemical Company, Ltd., Agent: IPM Resources LLC, 4032 Crockers Lake Blvd., Suite 818, Sarasota, FL 43238.
87650	Fipronex Solutions, Inc., Agent: Technology Sciences Group, Inc., 1150 18th St., NW., Suite 1000, Washington, DC 20036.
CA900038;CA900045;CA910003; CA910020; CA970017.	Soil Chemicals Corp., P.O. Box 782, Hollister, CA 95024.
CA920028	Easter Lily Research Foundation, P.O. Box 907, Brookings, OR 97415.
CO100002	Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300.
ID070004	TriCal, Inc., P.O. Box 1327, Hollister, CA 95024–1327.
ND900005	Chemtura Corp., 199 Benson Rd. (2–5), Middlebury, CT 06749.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the August 5, 2011 **Federal Register** notice (76 FR 47579) (FRL–8882–9) announcing the Agency's receipt of the requests for voluntary cancellations of products listed in Tables 1, 2, and 3 of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Tables 1, 2, and 3 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Tables 1, 2, and 3 of Unit II. are cancelled. The effective date of the cancellations that are subject of this notice is September 28, 2011. Any distribution, sale, or use of existing stocks of the products identified in Tables 1, 2, and 3 of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be cancelled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** issue of August 5, 2011. The comment period closed on September 6, 2011.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Upon cancellation of the products identified in Tables 1, 2, and 3 of Unit II., EPA will allow existing stocks provisions as follows:

A. Registrations Listed in Table 1 of Unit II Except Nos. 080490–00002, 080490–00003, 080490–00004

The Agency will allow registrants to sell and distribute existing stocks of these products until September 28, 2012. Thereafter, registrants are prohibited from selling or distributing the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

B. Registration Nos. 080490–00002, 080490–00003, 080490–00004

The Agency will allow registrants to sell and distribute existing stocks of these products through September 30, 2011. Thereafter, registrants are prohibited from selling or distributing these pesticide products, except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

C. Registrations Listed in Table 2 of Unit II

The effective date of cancellation of these products is September 28, 2011. The registrants are allowed to sell and distribute existing stocks until December 31, 2011. Thereafter, registrants are prohibited from selling or distributing these pesticide products, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant will be allowed to sell and distribute existing stocks through April 30, 2012. After this date, remaining existing stocks may be

used until exhausted, provided that such use complies with the EPA-approved label and labeling of the product.

D. Registrations Listed in Table 3 of Unit II

The effective date of cancellation of these products is September 28, 2011. EPA will not allow the continued sale and distribution of existing stocks of these products after the effective date of this cancellation for several reasons. First, there are currently no tolerances in effect for any of the food or feed crops associated with the domestic use of these products, and there have been none since the 2009 tolerance revocations took effect on December 31, 2009 (May 15, 2009, 74 FR 23046; FRL–8413–3). In addition, the Agency believes that little, if any existing stock remains in the hands of retailers, based on the sole registrant's repeated representation that no carbofuran products have been released for shipment since January 2010, and that they have offered to buy back unused carbofuran products. Consequently, sale of existing stocks of carbofuran is prohibited as of September 28, 2011. Users may only use those carbofuran products labeled for non-food use (ornamentals, spinach grown for seed, and pine seedlings) on those specific crops and in accordance with all geographical restrictions. Any food or feed crops with carbofuran residues after this date will be considered adulterated and subject to seizure.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 21, 2011.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2011–24832 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0553; FRL–8887–3]

Notice of Receipt of Requests for Amendments To Delete Uses in Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request for amendments by registrants to delete uses in certain pesticide registrations. Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any request in the **Federal Register**.

DATES: The deletions in Table 2 are effective March 26, 2012, and the deletion in Table 1 is effective October 28, 2011. If the Agency receives a written withdrawal request on or before March 26, 2012 for the pesticides in Table 2 or October 28, 2011 for the pesticide in Table 1, the deletions will not become effective. The Agency will consider a withdrawal request postmarked no later than March 26, 2012 for the deletions in Table 2, and no later than October 28, 2011 for the deletion in Table 1.

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant on or before March 26, 2012 for the products in Table 2, or October 28, 2011 for the product in Table 1.

ADDRESSES: Submit your withdrawal request, identified by docket identification (ID) number EPA–HQ–OPP–2011–0553, by one of the following methods:

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

FOR FURTHER INFORMATION CONTACT: Christopher Green, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 347–0367; *e-mail address: green.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. Although, this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2011–0553. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What action is the Agency taking?

This notice announces receipt by the Agency of applications from registrants to delete uses in certain pesticide registrations. These registrations are listed in Table 1 of this unit by registration number, product name, active ingredient, and specific uses deleted.

The request listed in the following Table 1 has a 30-day comment period because the registrant requested a waiver of the 180-day comment period.

TABLE 1—REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA Registration No.	Product name	Active ingredient	Delete from label
1021–0088	MGK 264 Insecticide Synergist.	MGK 264	Terrestrial food and non-food crops; Aquatic uses; Greenhouse food crops; Forestry uses; Post-harvest use on food crops; Food producing animals or fowl (direct application to meat and dairy animals or their premises while occupied); & All outdoor uses except building perimeters (spot treatments).

The requests listed in the following Table 2 have a 180-day comment period.

TABLE 2—REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA Registration No.	Product name	Active ingredient	Delete from label
1021–1765	Multicide Multi-Purpose Spry 27373	MGK–264, Prallethrin, & Cyphenothrin	Outdoor Use.
5481–96	DDVP Technical Grade Organophosphorus Insecticide.	Dichlorvos	Swine Use.
5481–462	Amvos Liquitech	Dichlorvos	Swine Use.

Users of the products in Table 2 who desire continued use on crops or sites being deleted should contact the applicable registrant before March 26, 2012 and users of the product in Table 1 who desire continued use on crops or sites being deleted should contact the registrant before October 28, 2011, to discuss withdrawal of the application for amendment. This 180-day or 30-day period will also permit interested members of the public to intercede with registrants prior to the Agency's approval of the deletion.

Table 3 of this unit includes the names and addresses of record for all registrants of the products listed in Tables 1 and 2 of this unit, in sequence by EPA company number.

TABLE 3—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA company number	Company name and address
1021	McLaughlin Gormley King Company, 8810 Tenth Avenue North, Minneapolis, MN 55427–4319.
5481	AMVAC Chemical Corporation, 4695 MacArthur Court, Suite 1250, Newport Beach, CA 92660.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. The FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for use deletion must submit the withdrawal in writing to Christopher Green using the methods in **ADDRESSES**. The Agency will consider written withdrawal requests postmarked no later than March 26, 2012 for the registrations in Table 2 or October 28, 2011, for registrations in Table 1, for which the registrant requested a waiver of the 180-day comment period.

V. Provisions for Disposition of Existing Stocks

The Agency has authorized the registrants to sell or distribute product under the previously approved labeling for a period of 18 months after approval of the revision, unless other restrictions have been imposed, as in special review actions.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 1, 2011.

Oscar Morales,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2011–24642 Filed 9–27–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Issuance Technical Bulletin 2011–2, Extended Deferral of the Effective Date of Technical Bulletin 2006–1

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October, 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued Technical Bulletin 2011–2, Extended Deferral of the Effective Date of Technical Bulletin 2006–1.

The Technical Bulletin is available on the FASAB Web site at *http://www.fasab.gov/pdffiles/handbook* tech bulletin 2011 1.pdf.

Copies of Technical Bulletin 2011–2 can also be obtained by contacting FASAB at (202) 512–7350.

FOR FURTHER INFORMATION CONTACT: Wendy Payne, Executive Director, at (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: September 23, 2011.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. 2011–24987 Filed 9–27–11; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before November 28, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0161.

Title: Section 73.61, AM Directional Antenna Field Strength Measurements.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities.

Number of Respondents and Responses: 2,268 respondents and 2,268 responses.

Estimated Time per Response: 4–50 hours.

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 36,020 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR Section 73.61 requires that each AM station using directional antennas to make field strength measurement as often as necessary to ensure proper directional antenna system operation. Stations not having approved sampling systems make field strength measurements every three months. Stations with approved sampling systems must take field strength measurements as often as necessary. Also, all AM station using directional signals must take partial proofs of performance as often as necessary. The FCC staff used the data in field inspections/investigations. AM licensees with directional antennas use the data to ensure that adequate interference protection is maintained between stations and to ensure proper operation of antennas.

OMB Control Number: 3060–0991.

Title: AM Measurement Data.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 1,900 respondents; 4,568 responses.

Estimated Hours per Response: 0.50–25 hours.

Frequency of Response: Recordkeeping requirement, Third party disclosure requirement, On occasion reporting requirement.

Total Annual Burden: 30,795 hours.

Total Annual Cost: $1,371,500.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 154(i) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Directional AM stations use antennas which suppress radiated field in some directions and enhance it in others. Under our current rules, an AM licensee operating with a directional antenna must perform a proof of performance to demonstrate that the antenna pattern conforms to the station's authorization. An AM station must perform a full proof to verify the pattern shape when a new directional antenna system is authorized. Partial proofs, which require fewer measurements, are occasionally necessary to show that an array continues to operate properly. Typically, a full proof requires measurement of the AM station's field strength on six to twelve critical bearings, ranging to distances of 15 kilometers or more from the antenna. Subsequent graphical analysis of proof measurements also requires substantial time and expense. In contrast, the computer modeling techniques authorized in the Second Report and Order are based on internal measurements, making the proof process less time-consuming and expensive for AM licensees.

In order to control interference between stations and assure adequate community coverage, AM stations must conduct various engineering measurements to demonstrate that the antenna system operates as authorized. The following rule sections are included with this information collection.

OMB Control Number: 3060–0703.

Title: Determining Costs of Regulated Cable Equipment and Installation, FCC Form 1205.

Form Number: FCC Form 1205.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit.

Number of Respondents and Responses: 4,000 respondents; 6,000 responses.

Estimated Time per Response: 4–12 hours.

Frequency of Response: Recordkeeping requirement, Annual reporting requirement, Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 301(j) of the Telecommunications Act of 1996 and 623(a)(7) of the

Communications Act of 1934, as amended.

Total Annual Burden: 52,000 hours.

Total Annual Cost: $1,800,000.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: Information derived from FCC Form 1205 filings is used to facilitate the review of equipment and installation rates. This information is then reviewed by each cable system's respective local franchising authority. Section 76.923 records are kept by cable operators in order to demonstrate that charges for the sale and lease of equipment for installation have been developed in accordance with the Commission's rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–24861 Filed 9–27–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2011–N–11]

Notice of Order: Revisions to Enterprise Public Use Database Incorporating High-Cost Single-Family Securitized Loan Data Fields and Technical Data Field Changes

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of Order.

SUMMARY: Section 1127 of the Housing and Economic Recovery Act of 2008 (HERA) amended section 1326 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) by requiring that, subject to privacy considerations as described in section 304(j) of the Home Mortgage Disclosure Act of 1975 (HMDA), the Director of the Federal Housing Finance Agency (FHFA) shall make public certain data related to high-cost single-family loans purchased and securitized by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) collected by the Director under section 1324(b)(6) of the Safety and Soundness Act, as amended by HERA. *See* 12 U.S.C. 4544(b)(6), 4546(d).

FHFA has adopted an Order that implements the changes required by HERA by revising the single-family matrix in FHFA's Public Use Database (PUDB) to include data fields for the high-cost single-family securitized loans data in a new National File C, effective for 2010 and beyond. The Order also makes technical changes to the single-family and multifamily data matrices of the PUDB, effective for 2010 and beyond, to conform the data fields to existing PUDB data reporting practices and HERA changes. This Notice of Order sets forth FHFA's Order with accompanying Appendix containing the revised single-family and multifamily matrices, and describes the new and revised data fields.

DATES: *Effective Date of the Order:* The Order with accompanying Appendix is effective on September 21, 2011.

FOR FURTHER INFORMATION CONTACT: For questions on data or methodology, *contact:* Brian Doherty, Supervisory Policy Analyst, (202) 408–2991, or Ian Keith, Senior Program Analyst, (202) 408–2949, Office of Housing & Regulatory Policy, 1625 Eye Street, NW., Washington, DC 20006. *mailto:Ian.Keith@fhfa.gov.* For legal questions, contact: Sharon Like, Managing Associate General Counsel, (202) 414–8950, Office of General Counsel, 1700 G Street, NW., Fourth Floor, Washington, DC 20552. These are not toll free numbers. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Enterprises

The Enterprises are government-sponsored enterprises chartered by Congress for the purpose of establishing secondary market facilities for residential mortgages. *See* 12 U.S.C. 1716 *et seq.;* 12 U.S.C. 1451 *et seq.* Congress established the Enterprises to provide stability in the secondary market for residential mortgages, respond appropriately to the private capital market, provide ongoing assistance to the secondary market for residential mortgages, and promote access to mortgage credit throughout the nation. *Id.*

FHFA is responsible for ensuring that the Enterprises operate in a safe and sound manner, including maintenance of adequate capital and internal controls, that their operations and activities foster liquid, efficient, competitive, and resilient national housing finance markets, and that they carry out their public policy missions through authorized activities. *See* 12 U.S.C. 4513.

On September 6, 2008, the Director of FHFA (Director) appointed FHFA as conservator of the Enterprises in accordance with the Safety and Soundness Act, as amended by HERA, to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. The Enterprises remain under conservatorship at this time.

B. Statutory Requirements

Section 1127 of HERA amended section 1326 of the Safety and Soundness Act by adding a new paragraph (d) which states that, subject to the privacy restrictions described in section 304(j) of HMDA,[1] the Director shall, by regulation or order, make public certain information relating to single-family mortgage data of the Enterprises: (1) The same data from the Enterprises that is required of insured depository institutions under HMDA; and (2) information collected by the Director under section 1324(b)(6). *See* 12 U.S.C. 4544(b)(6), 4546(d). Section 1324(b)(6), in turn, part of a section describing the contents of FHFA's Annual Housing Activities Report (AHAR) to Congress, requires FHFA to ''compare the characteristics of high-cost loans purchased and securitized, [by each Enterprise] where such securities are not held on portfolio to loans purchased and securitized, where such securities are either retained on portfolio or repurchased by the [E]nterprise, including such characteristics as—(A) The purchase price of the property that secures the mortgage; (B) the loan-to-value ratio of the mortgage, which shall reflect any secondary liens on the relevant property; (C) the terms of the mortgage; (D) the creditworthiness of the borrower; and (E) any other relevant data, as determined by the Director.'' *See* 12 U.S.C. 4544(b)(6).

Section 1323, as amended, also includes a new paragraph (d) which states that data submitted under this section by an Enterprise shall be made publicly available no later than September 30 of the year following the

[1] Section 304(j) of HMDA addresses Loan Application Register (LAR) information and describes, among other things, the manner in which an applicant's privacy interests are to be protected in response to a request for disclosure from the public, including removal of the applicant's name and identification number, the date of the application, and the date of any determination by the institution with respect to such application. In addition, the disclosure of information must ensure that depository institutions are protected froM, liability under any Federal or State privacy laws.

year to which the data relates. 12 U.S.C. 4543(d).[2]

HERA also amended the Safety and Soundness Act to make changes to the Enterprise housing goals and related definitions. The previous low- and moderate-income housing goal, special affordable housing goal, and underserved areas housing goal are no longer effective commencing in 2010. *See* 12 U.S.C. 4561 through 4563. HERA required the Director of FHFA to establish new housing goals effective for 2010 and beyond. The new housing goals include four goals for single-family, owner-occupied housing, one multifamily special affordable housing goal, and one multifamily special affordable housing subgoal. The single-family housing goals target purchase money mortgages for low-income families, families that reside in low-income areas, and very low-income families, and refinancing mortgages for low-income families. *See* 12 U.S.C. 4562. The multifamily special affordable housing goal targets multifamily housing affordable to low-income families, and the multifamily special affordable housing subgoal targets multifamily housing affordable to very low-income families. *See* 12 U.S.C. 4563. HERA amended the definition of ''very low-income'' from 60 percent or less of area median income (AMI) to 50 percent or less of AMI. *See* 12 U.S.C. 4502(24).

C. Description of Enterprise Reporting and Current PUDB Matrices

The PUDB matrices are data dictionaries that describe the data fields provided in the public release of the data in the PUDB. The PUDB contains Enterprise single-family and multifamily mortgage loan-level data reported to FHFA by the Enterprises, including data elements that have been determined to lose their proprietary character when categorized in ranges or otherwise adjusted or recoded. For single-family mortgage data, there currently are three separate files: A Census Tract File that identifies the census tract location of the mortgaged properties; a National File A containing loan-level data on owner-occupied one-unit properties but without census tract identifiers; and a National File B containing unit-level data on all single-family properties without census tract identifiers. For multifamily data, there are two separate files: A Census Tract File that identifies the census tract location of the mortgaged properties; and a National File that does not identify the location of the mortgaged properties but contains mortgage-level data and unit class-level data on all multifamily properties. The Enterprises also separately report to FHFA certain single-family and multifamily mortgage data for safety and soundness and other regulatory purposes.

II. Summary of Order's Revisions to Single-Family and Multifamily Matrices in PUDB

FHFA has adopted the Order below which revises the PUDB single-family matrix to incorporate a new National File C containing new data fields applicable to 2010 and subsequent years for the single-family high-cost securitized loans purchased and securitized by the Enterprises. Specifically, National File C contains the following data fields related to the section 1324(b)(6) high-cost securitized loan characteristics: Purchase Price; Loan-to-Value Ratio (LTV) at Origination (also released in National File A); Product Type; Term of Mortgage at Origination; Amortization Term; Interest Rate at Origination; Credit Score; Portfolio Flag; and Percent Repurchased. In addition, National File C includes the following other relevant data fields also released in mortgage-level National File A: Enterprise Flag; Loan Number; 2000 Census Tract—Percent Minority; Tract Income Ratio; Borrower Income Ratio; Purpose of Loan; and Federal Guarantee. A more detailed discussion of National File C is contained in Section III. below.

In addition, the Order makes technical changes to the single-family and multifamily data matrices of the PUDB applicable to 2010 and subsequent years to conform the data fields to existing PUDB data reporting practices and HERA changes.

Both the Order and Appendix containing the revised single-family and multifamily matrices are set forth at the end of this Notice of Order. PUDB Data Dictionaries that further describe the revised single-family PUDB files and the new National File C, along with the revised multifamily PUDB files, will be made available on FHFA's public Web site at *http://www.fhfa.gov/Default.aspx?Page=137.*

III. Revisions to Single-Family Matrix in PUDB for High-Cost Securitized Loans

As discussed above, sections 1324(b)(6) and 1326(d)(2) of the Safety and Soundness Act require FHFA to publicly disclose the following data characteristics of single-family high-cost loans purchased and securitized by the Enterprises that are not held on portfolio, or are retained on portfolio or repurchased by the Enterprises: (A) The purchase price of the property that secures the mortgage; (B) the loan-to-value ratio of the mortgage, which shall reflect any secondary liens on the relevant property; (C) the terms of the mortgage; (D) the creditworthiness of the borrower; and (E) any other relevant data, as determined by the Director. Section 1324(b)(6) does not define the term ''high-cost'' or the other loan characteristic terms in paragraphs (A) through (D), necessitating that FHFA define the terms in order to implement the requirements of HERA. The data fields added in National File C for these high-cost loans and their definitions are described below.

The new data fields are not subject to regulatory and statutory processes for proprietary determinations that might otherwise apply to the release of such data, since the disclosure of these data is explicitly required by HERA. However, certain data fields are recoded differently from other single-family PUDB Files, or disclosed in National File C by ranges or categories, in order to minimize the possibilities for cross-linking of data elements with data fields in the other single-family PUDB Files and any resulting disclosure of confidential or proprietary information or personally identifiable information.

The Safety and Soundness Act, as amended by HERA, does not define the term ''high-cost.'' Accordingly, FHFA has discretion to define the term. There is no direct HERA legislative history providing guidance on the meaning of the term from which FHFA might draw in exercising that discretion. There are a variety of loan attributes in FHFA's databases that could be used, singularly or in some combination, to define the ''high-cost'' loans selected for inclusion in the PUDB. These loan characteristics include the HMDA rate spread, original mortgage interest rate, LTV, and borrower credit score. Another option is to define ''high-cost'' loan using the Home Ownership and Equity Protection Act (HOEPA) ''high-cost mortgage'' definition.

After considering these various options, FHFA has decided to define ''high-cost'' loans by reference to the HMDA rate spread. The HMDA rate spread is a data field reported by lenders pursuant to HMDA that is released annually by the Federal Financial Institutions Examination Council (FFIEC). These loans are identified in Federal Reserve Board (FRB) analyses as ''higher-priced''

[2] FHFA's Order revises the single-family and multi-family data matrices, effective for 2010 and beyond. The Enterprises' HMDA rate spread submissions for 2008–2009 indicate that the HMDA rate spread is of questionable value for those years. See discussion in section V. below.

loans.[3] For 2010 and beyond, the HMDA rate spread represents the difference between the Annual Percentage Rate (APR) and a survey-based estimate of APRs currently offered on prime mortgage loans of a comparable type. For mortgage loans with an application date prior to October 1, 2009, the minimum rate spread that must be reported by lenders for first liens is generally 3.0 percent. For mortgage loans with an application date on or after October 1, 2009, the minimum rate spread that must be reported by lenders for first liens is 1.5 percent.[4] *See* 12 CFR 203.4(a)(12). FHFA will use the HMDA rate spread data in FHFA's databases to select the ''high-cost'' loans for inclusion in National File C.

FHFA has adopted the HMDA rate spread definition as the definition of ''high-cost'' because it has a logical relation to heightened cost by virtue of being a rate spread, is simple and widely understood, and because the Enterprises have purchased significant numbers of such loans, it appears to divide loans into categories in a way that meaningfully implements the statutory purpose.[5] Further, because the Enterprises may continue to purchase loans with HMDA rate spreads, the Enterprises and FHFA have processes to capture this loan data for inclusion in the PUDB and for performing the comparative analysis, thereby enabling implementation of the HERA requirement.

Based on the data reported by the Enterprises, in 2010, Freddie Mac did not purchase and securitize any first mortgages with a HMDA rate spread at or above 1.5 percent. Fannie Mae purchased and securitized a total of 13,841 first mortgages (with an unpaid principal balance (UPB) of $2.08 billion) with a HMDA rate spread. Of these total loans, 834 loans (with a UPB of $139.9 million) were repurchased as of year-end, and 13,007 loans (with a UPB of $1.94 billion) were not repurchased as of year-end. The 834 loans repurchased represent 6 percent of the total loans (6.7 percent of UPB) with a validly identified rate spread that were purchased and securitized during 2010.

FHFA considered whether to define ''high-cost'' loan according to the HOEPA ''high-cost mortgage'' definition in section 103(aa) of the Truth in Lending Act (TILA), as added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[6] Prior to the Dodd-Frank Act, the term ''high-cost'' was not used in section 103(aa) with respect to mortgages subject to HOEPA, and residential mortgage transactions were exempted from coverage. However, the term ''high-cost'' mortgage had been used in previous proposed amendments to TILA, and has been used by federal regulators for many years to refer to HOEPA loans. Section 103(aa) of TILA define a ''high cost mortgage'' generally as a consumer credit transaction that is secured by a first mortgage on the consumer's principal dwelling, including residential mortgage transactions, where the APR is more than 6.5 percentage points above the average prime offer rate (APOR) for a comparable transaction.[7] Loans meeting the ''high-cost mortgage'' definition are subject to other requirements of HOEPA. The new 6.5 percentage points rate spread trigger is lower than the 8 percentage points trigger (based on the yield on Treasury securities having a comparable period of maturity) in FRB's regulation in effect prior to enactment of the Dodd-Frank Act.[8]

However, the Enterprises do not, and, at the time HERA was under consideration in Congress, did not, acquire HOEPA loans other than the few loans purchased through lender errors, which are then subject to recourse.[9] In addition, the Enterprise housing goals regulation does not give credit for Enterprise purchases of HOEPA loans and, in fact, discourages their purchase by including these loans in housing goal denominators.[10] Thus, using the HOEPA definition, there would be no loan data for FHFA to analyze and publicly release, and FHFA would not be implementing the HERA high-cost loan requirements. More significantly, using the HOEPA definition would appear to defeat the purpose of the statutory provision, which appears to assume that there is a meaningful population of loans to be distinguished and which was adopted at a time when there was no meaningful population of Enterprise HOEPA loans.

FHFA also considered whether to define ''high-cost'' loan based on some appropriate combination of high original mortgage interest rate, low credit score, and high LTV, which data is available in FHFA's databases. For example, a ''high-cost'' loan could be defined as a loan with an interest rate above 6 percentage points, a borrower credit score below 660, and an LTV greater than 80 percent. These loan characteristics, at specific cutoff values, can be associated with loans that would be considered high-cost by many analysts. However, this definition would not conform with either the HOEPA ''high-cost mortgage'' or the HMDA ''higher-priced'' loan definitions, and may differ from industry usage of the term. The specific cutoff values adopted by FHFA would be subjective, and other cutoff values may be equally defensible. The current economic environment may also influence the selection of the cutoffs, *e.g.,* periods of declining interest rates, as in 2008–2009, would result in a different cutoff than periods where interest rates are rising. In addition, credit scores would not be directly comparable across years. For example, a credit score of 660 in one year may be ''better'' or ''worse'' than the same score in a different year. Finally, the loan characteristics could also be expected to vary by product type, *e.g.,* fixed rate mortgage *v.* adjustable rate mortgage.

A. Single-Family Data Field 61: Purchase Price

Section 1324(b)(6)(A), in conjunction with section 1326(d)(2), requires public disclosure of the purchase price of the property with respect to the high-cost securitized loan. New data field 61 in National File C designates the purchase price of the property for the high-cost securitized loan, as reported by the Enterprises to FHFA. Where the purchase price is not available, FHFA will attempt to estimate the purchase price by dividing the origination unpaid principal balance (UPB) field by the LTV at origination. The reported or estimated values will be rounded to the nearest $1,000, consistent with the release of HMDA data fields in the PUDB. The value ''999999999=Missing'' will be used where the purchase price cannot be obtained through either method and is then considered missing.

B. Single-Family Data Field 19: Loan-to-Value Ratio (LTV) at Origination (or CLTV Where Available)

Section 1324(b)(6)(B), in conjunction with section 1326(d)(2), requires public

[3] *http://federalreserve.gov/pubs/bulletin/2010/pdf/2009_HMDA_final.pdf* at page A39 for example.

[4] *http://www.ffiec.gov/ratespread/newcalc.aspx.*

[5] Defining ''high cost'' as the HMDA rate spread is not, in and of itself, a statement as to whether the loan was originated through subprime lending channels.

[6] Public Law. No. 111–203 (July 21, 2010).

[7] 15 U.S.C. 1602(aa) (as amended). The definition of ''high-cost mortgage'' in TILA, as amended, includes a separate rate spread trigger for subordinate mortgages and mortgages secured by personal property dwellings, as well as for mortgages with certain other features, such as points and fees, that exceed specified thresholds.

[8] *See* 12 CFR 226.32(a)(1)(i).

[9] The Enterprises' Seller/Servicer Guides specifically prohibit the purchase of HOSPA loans. *See* Fannie Mae's 2010 Selling Guide, section A3–2–02, and Freddie Mac's Single-Family Seller/Servicer Guide, Volume 1, Chapter 22.33.

[10] *See* 12 CFR 1282.16(d).

disclosure of ''the loan-to-value ratio of the mortgage, which shall reflect any secondary liens on the relevant property,'' with respect to the high-cost securitized loan. Combined LTV (CLTV) is the ratio of the total loan amount to the value of the property, with the total loan amount consisting of the UPB at origination of the first lien and any subordinate liens. Data field 19 in National File C designates the LTV at origination, or CLTV where available, for the high-cost securitized loan. Consistent with the recoding in National File A, the data will be released in National File C using the following values: 1 = >0–<=60%; 2 = >60–<=80%; 3 = >80–<=90%; 4 = >90–<=95%; 5 = >95%; 9 = Missing. Both Enterprises currently collect and report CLTV to FHFA and will be required to continue reporting this data for purposes of the PUDB and comparative analysis in subsequent years.

In recent years, the Enterprises' purchases of single-family secondary liens have been statistically insignificant in number as they have purchased few, if any, such liens. Secondary liens are priced and underwritten very differently from first liens, and their LTVs are not always available or reported by originators in a consistent manner. In addition, inclusion of secondary lien LTVs in National File C could allow for cross-linking with other single-family PUDB Files and the potential release of personally identifiable information. For these reasons, FHFA is not including single-family secondary liens in National File C.

C. Terms of the Mortgage—Single-Family Data Field 26: Product Type; Single-Family Data Field 29: Term of Mortgage at Origination; Single-Family Data Field 30: Amortization Term; Single-Family Data Field 62: Interest Rate at Origination

Section 1324(b)(6)(C), in conjunction with section 1326(d)(2), requires public disclosure of ''the terms of the mortgage'' with respect to the high-cost securitized loan. The terms of a mortgage in the housing finance industry are generally based on product type, interest rate, and duration (term of mortgage at origination and amortization term). Accordingly, data based on product type, interest rate and duration will be released in the PUDB under the data fields further described below.

1. Single-Family Data Field 26: Product Type

Data field 26, released in National File C, designates the product type for the high-cost securitized loan, which will be released using the following values: 1 = Fixed-Rate Mortgage; 2 = ARM (Adjustable Rate Mortgage); 3 = Other; 9 = Missing. ''Other'' can include products such as graduated equity or graduated payment mortgages, balloon mortgages, and home equity conversion mortgages.

2. Single-Family Data Field 29: Term of Mortgage at Origination

Data field 29, released in National File C, designates the term of the high-cost securitized loan at origination, which will be released using the following values: 1 = 30-year; 2 = 15-year; 3 = Other terms; 9 = Missing.

3. Single-Family Data Field 30: Amortization Term

Data field 30, released in National File C, designates the amortization term of the high-cost securitized loan, which will be released using the following values: 1 = 30-year; 2 = 15-year; 3 = Other terms including non-amortizing loans; 9 = Missing.

4. Single-Family Data Field 62: Interest Rate at Origination

New data field 62, released in National File C, designates the contract interest rate of the high-cost securitized loan at origination, which will be released as ranges using the following values: 1 = less than 4.00%; 2 = 4.00–<4.50%; 3 = 4.50–<5.00%; 4 = 5.00–<5.50%; 5 = 5.50–<6.00%; 6 = 6.00–<6.50%; 7 = 6.50–<7.00%; 8 = 7.00–<7.50%; 9 = 7.50–< 8.00%; 10 = 8.00% or greater; 99 = Missing. The Enterprises collect and report the note's original interest rate.

D. Creditworthiness of the Borrower—Single-Family Data Field 60: Credit Score

Section 1324(b)(6)(D), in conjunction with section 1326(d)(2), references ''creditworthiness of the borrower'' as a loan characteristic required to be publicly disclosed with respect to the high-cost securitized loan. FHFA believes that borrower credit score best captures the concept of creditworthiness of the borrower, as the common regulatory and industry definitions of creditworthiness gravitate towards the use of proprietary credit scores computed by credit reporting companies.

FHFA currently receives multiple borrower credit score information in the form of credit scores from the Enterprises, representing each borrower, credit reporting agency and date associated with the credit score issuance. New data field 60, released in National File C, designates the borrower credit score most applicable to the high-cost securitized loan. This credit score is derived by first selecting from all of the borrower's credit scores only the scores between 300 and 1000, which FHFA views as a reasonable range of credit score values. The earliest credit score date of those scores, *i.e.,* the date closest to the loan origination date, is then identified, and only those scores having that date are selected. The lowest borrower number of those remaining scores, which represents the primary borrower, is then identified and only those scores having that borrower number are selected. Finally, the lowest credit score of those remaining scores is selected as the score most likely to be reflected in determining the loan's interest rate and resulting HMDA rate spread. The data will be released using the following values: 1 = less than 620; 2 = 620–<660; 3 = 660–<700; 4 = 700–<760; 5 = 760 or greater; 9 = Missing.

E. Other Relevant Data

Section 1324(b)(6)(E), in conjunction with section 1326(d)(2), requires public disclosure of any other relevant data with respect to the high-cost securitized loan, as determined by the Director. Inclusion in National File C of certain fields that are also included in other PUDB Files will allow useful comparisons of the high-cost securitized loan data to data in those other Files.

Specifically, the following fields will be released in National File C: Data field 0: Enterprise Flag (indicating whether the loan was purchased by Fannie Mae or Freddie Mac); data field 1: Loan Number (released as Sequential Number); data field 11: 2000 Census Tract-Percent Minority (minority population in the census tract where the property securing the loan is located); data field 14: Tract Income Ratio (ratio of tract median income to the applicable AMI); data field 17: Borrower Income Ratio (ratio of borrower's income to the applicable area median income); data field 22: Purpose of Loan (home purchase or refinance/other); and data field 27: Federal Guarantee (conventional loan or Federally guaranteed or insured).

The data will be included in National File C without providing sufficient linking variables to associate the more sensitive data (credit score and interest rate) to loans at the tract level in the Census Tract File. In particular, the HMDA rate spread field will not be released in National File C as this field is already released in the Census Tract File as required by HERA.

F. Not Held on Portfolio or Retained on Portfolio—Single-Family Data Field 63: Portfolio Flag; Single-Family Data Field 64: Percent Repurchased

Section 1324(b)(6) requires FHFA to compare the characteristics discussed above of high-cost loans purchased and securitized, where such securities are not held on portfolio to loans purchased and securitized, where such securities are either retained on portfolio or repurchased by the Enterprise.

1. Single-Family Data Field 63: Portfolio Flag

New data field 63, released in National File C, designates the following values:

1 = Not held on portfolio: Indicates the security backed by the high-cost loan was sold in its entirety by the Enterprise during the calendar year and not repurchased as of year-end.

2 = Retained on portfolio: Indicates the security backed by the high-cost loan was sold in its entirety by the Enterprise during the calendar year, but that all or a portion of the security collateralized by such high-cost loan was repurchased by the Enterprise during such calendar year and held at year-end.

These two data field values are intended to categorize the universe of loans with a HMDA rate spread that are purchased and securitized by the Enterprises.

2. Single-Family Data Field 64: Percent Repurchased

To accurately reflect the economic value of the high-cost securitized loans retained on portfolio, new data field 64, released in National File C, identifies the percentage of the outstanding balance of the security collateralized by the high-cost loan that the Enterprise repurchased during the calendar year and held at year-end. Where the Enterprise did not repurchase any portion of the security (portfolio flag = 1), the value will be 0. Where the Enterprise repurchased all of the security (portfolio flag = 2), the value will be 1. Where the Enterprise repurchased a portion of the security collateralized by the high-cost loan (portfolio flag = 2), the value will be the percentage of the security repurchased by the Enterprise represented as a decimal between 0 and 1.

IV. Technical Revisions to Data Fields in the PUDB Matrices

A. Revisions To Conform to Existing PUDB Reporting Practices

FHFA has made technical revisions to certain data fields in the PUDB matrices to conform the data fields to existing PUDB data reporting practices, as further discussed below.

1. Single-Family Data Field 23: Cooperative Unit Mortgage

This data field identifies single-family housing units that are part of a cooperative building secured by a mortgage or ''blanket loan.'' FHFA no longer requires the Enterprises to report this data for housing goals purposes. Accordingly, footnote (7) to this data field in the single-family matrix indicates that this data field is not applicable for 2010 and beyond.

2. Single-Family Data Field 28: RTC/FDIC

This data field identifies loans purchased by the Enterprises that were made by the Resolution Trust Corporation (RTC) or the Federal Deposit Insurance Corporation (FDIC) and met certain other statutory criteria. FHFA no longer requires the Enterprises to report this data for housing goals purposes. Accordingly, footnote (7) to this data field in the single-family matrix indicates that the data field is not applicable for 2010 and beyond.

3. Single-Family and Multifamily Data Fields 31 and 30: Lender Institution Name; Single-Family and Multifamily Data Fields 32 and 31: Lender City; Single-Family and Multifamily Data Fields 33 and 32: Lender State

These data fields identify the name, city and state of the lender that sold the loan to the Enterprise. FHFA no longer requires the Enterprises to report this data for housing goals purposes. Accordingly, footnotes (7) and (5) to this data field in the single-family and multifamily matrices, respectively, indicate that this data field is not applicable for 2010 and beyond.

4. Single-Family Data Field 37: Mortgage Purchased Under Enterprise's Community Lending Program

This data field identifies mortgages purchased under Enterprise-specific landing programs. FHFA no longer requires the Enterprises to report this data for housing goals purposes. Accordingly, footnote (7) to this data field in the single-family matrix indicates that this data field is not applicable for 2010 and beyond.

5. Single-Family Data Field 39 and Multifamily Data Field 37: Enterprise Real Estate Owned

This data field identifies properties owned by an Enterprise as a result of foreclosure or other impairment. FHFA no longer requires the Enterprises to report this data for housing goals purposes. Accordingly, footnotes (7) and (5) to this data field in the single-family and multifamily matrices, respectively, indicate that the data field is not applicable for 2010 and beyond.

6. Multifamily Data Field 38: Public Subsidy Program

This data field identifies the type of public subsidy, if applicable, provided in connection with a multifamily loan purchased by an Enterprise. FHFA no longer requires the Enterprises to report this data for housing goals purposes. Accordingly, footnote (5) to this data field in the multifamily matrix indicates that this data field is not applicable for 2010 and beyond.

B. Revisions to Conform to HERA Changes

1. Single-Family Data Field 17: Borrower Income Ratio

This data field identifies the ratio of the borrower's annual income (data field 15) to the AMI (data field 16). Effective for 2010 and beyond, HERA eliminated the previous low- and moderate-income housing goal (100 percent of AMI or below) and special affordable housing goal (which includes units affordable at 60 percent of AMI or below) and, among other things, established new single-family housing goals for low-income families (80 percent of AMI or below) and very low-income families (defined by HERA as 50 percent of AMI). Accordingly, footnote (7) to data field 17 in the single-family matrix indicates that the pre-HERA income categories therein are not applicable to 2010 and beyond. FHFA has revised the income categories in data field 17a to reflect the new HERA income limits effective for 2010 and beyond, as indicated in footnote (8) of the single-family matrix.

2. Multifamily Data Field 16: Affordability Category

This data field identifies loans purchased by an Enterprise secured by multifamily properties having a mix of other affordable units such that those units in the property affordable at more than 60 percent but at or below 80 percent of AMI received credit under the pre-HERA special affordable housing goal regardless of property location. Specifically, category 1 of the data field specifies: >=20% are especially-low-income, and <40% are very-low-income. Prior to HERA, the term ''especially-low-income'' was defined by regulation as 50 percent or less of AMI. *See* 24 CFR 81.17(d), 81.18(d), 81.19(d). The term ''very-low-income'' was defined in the Safety and

Soundness Act as 60 percent or less of AMI. The mix of units at or below 50 percent or 60 percent of AMI also indicates that a property may be eligible for Low-Income Housing Tax Credits (LIHTC). The affordability category of ''50 percent or less of AMI'' previously referred to as ''especially low-income'' was redefined by HERA as ''very low-income.'' To avoid confusion between these terms while at the same time maintain the affordability definitions for the purpose of identifying properties that may be eligible for LIHTC, FHFA has revised category 1 as follows: 1= >=20% of the units in the property are affordable at or below 50% of AMI, and <40% are affordable at or below 60% AMI.

3. Single-Family Data Field 25 and Multifamily Data Field 24: Special Affordable, Seasoned Loan: Are Proceeds Recycled?

This data field identifies categories of seasoned (originating at least 365 days prior to acquisition by the Enterprise) loans eligible for the special affordable housing goal. Effective for 2010 and beyond, HERA eliminated the special affordable housing goal and the provisions on giving full housing goals credit under the goal to Enterprise purchases or refinancings of existing, seasoned portfolios of loans in conjunction with the origination of additional goals-eligible loans. Accordingly, footnotes (7) and (5) to this data field in the single-family and multifamily matrices, respectively, indicate that the data field is not applicable for 2010 and beyond. In light of the HERA changes, the obsolete regulatory cites in the data fields have also been removed.

4. Single-Family Data Field 27 and Multifamily Data Field 34: Federal Guarantee

This data field identifies the source of the Federal guarantee or insurance of the loan acquired by the Enterprise. In light of changes made by HERA, the obsolete regulatory cites in the data fields have been removed.

5. Single-Family Data Field 55 and Multifamily Data Field 43: Geographically Targeted Indicator

This data field identifies whether a loan purchased by an Enterprise is located in an area defined to be ''underserved,'' for purposes of meeting the underserved areas housing goal. HERA eliminated the underserved areas housing goal effective for 2010 and beyond. Accordingly, footnotes (7) and (5) to this data field in the single-family and multifamily matrices, respectively, indicate that the data field is not applicable for 2010 and beyond.

V. Applicability of National File C to 2010 and Subsequent Years

FHFA has determined that the new National File C should apply to the Enterprises for 2010 and subsequent years. The Enterprises' HMDA rate spread submissions for 2008–2009 indicate that the HMDA rate spread field is of questionable value for those years because some lenders reported actual APR instead of HMDA rate spread.

For the convenience of the affected parties, the Order is recited below in its entirety. You may access this Order from FHFA's Web site at *http://www.fhfa.gov/Default.aspx?Page=43.* The Order will be available for public inspection and copying at the Federal Housing Finance Agency, Fourth Floor, 1700 G St., NW., Washington, DC 20552. To make an appointment, call (202) 414–6924.

VI. Order

Revisions to Enterprise Public Use Database Incorporating High-Cost Single-Family Securitized Loan Data Fields and Technical Data Field Changes

Whereas, section 1323(a)(1) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), as amended, 12 U.S.C. 4543(a)(1), requires the Director of the Federal Housing Finance Agency (FHFA) to make available to the public the non-proprietary single-family and multifamily loan-level mortgage data elements submitted to FHFA by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) in their mortgage reports;

Whereas, the mortgage data submitted by Fannie Mae and Freddie Mac are contained in their reports required under section 309(m) of the Federal National Mortgage Association Charter Act, as amended, 12 U.S.C. 1723a(m), and section 307(e) of the Federal Home Loan Mortgage Corporation Act, as amended, 12 U.S.C. 1456(e), respectively (hereafter, Charter Acts), and include mortgage data characteristics of single-family and multifamily mortgagors and data on the Enterprises' single-family and multifamily mortgage purchases;

WHEREAS, the Enterprises also separately report to FHFA certain single-family and multifamily mortgage data for safety and soundness and other regulatory purposes;

Whereas, section 1127 of the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. 110–289 (July 30, 2008), amended section 1326 of the Safety and Soundness Act by requiring that, subject to privacy considerations as described in section 304(j) of the Home Mortgage Disclosure Act of 1975 (HMDA), the Director of FHFA shall, by regulation or order, make public certain data related to high-cost single-family loans purchased and securitized by the Enterprises collected by the Director under section 1324(b)(6) of the Safety and Soundness Act, as amended by HERA, *see* 12 U.S.C. 4544(b)(6), 4546(d);

Whereas, to comply with sections 1324(b)(6) and 1326(d) of the Safety and Soundness Act, as amended, it is necessary to revise the single-family matrix of FHFA's Public Use Database (PUDB) by adding a new National File C incorporating the high-cost securitized loan data elements required thereunder;

Whereas, high-cost single-family securitized loan data containing the characteristics set forth in section 1324(b)(6), as further specified in the new National File C, are available in FHFA and Enterprise databases for 2010;

Whereas, technical revisions to certain data fields in the single-family and multifamily matrices of the PUDB are necessary in order to conform the data fields to HERA amendments to the Safety and Soundness Act that eliminated the previous low- and moderate-income housing, special affordable housing, and underserved areas housing goals and established new housing goals and related definitions effective for 2010 and beyond, *see* 12 U.S.C. 4561 through 4563;

Whereas, additional technical revisions to certain data fields in the single-family and multifamily matrices of the PUDB are necessary in order to conform the data fields to existing PUDB reporting practices;

Now, Therefore, it is hereby ordered as follows:

1. The matrices in FHFA's PUDB are revised, as set forth in the attached Appendix which is incorporated herein by reference, to include: (a) A new single-family National File C containing new data fields applicable to 2010 and subsequent years for the high-cost securitized single-family loan data; and (b) revised data fields in the single-family and multifamily matrices applicable to 2010 and subsequent years to conform to changes made by HERA and existing PUDB reporting practices;

2. The Enterprises shall provide FHFA with the mortgage data required to populate the data fields described in the revised single-family and multifamily matrices in the Appendix; and

3. This Order modifies the FHFA Order of July 1, 2010 (75 FR 41180, 41189 (July 15, 2010)) and shall be effective until such time as FHFA determines that it is necessary and/or appropriate to withdraw or modify it.

Signed at Washington, DC, this 21st day of September, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

Dated: September 21, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

BILLING CODE 8070–01–P

APPENDIX

ENTERPRISE MORTGAGE DATA AND AHAR INFORMATION: PROPRIETARY INFORMATION/PUBLIC-USE DATA

Notes: The following matrices distinguish proprietary from public-use mortgage data elements. A "YES" designation indicates that the data element is proprietary and not included in the public use data base in the format indicated. A "NO". "NO. Added field". "Yes, but recode", and "YES, but redefine and recode as" indicate that the data element is included in the public use data base. Certain data are coded as missing or not available either because the data was not submitted or because the data is proprietary.

Enterprise Single-Family Mortgage Data
Owner- and Renter-Occupied 1- to 4-Unit Properties
Proprietary Information/Public-Use Data

The "Census Tract File" contains mortgage-level data on all single-family properties.
The "National File A" contains mortgage-level data on owner-occupied 1-unit properties.
The "National File B" contains unit-level data on all single-family properties.
The "National File C" contains mortgage-level data on all high-cost mortgages securitized by the Enterprises for single-family properties.

#	Field Description	Values	Census Tract File	National File A	National File B	National File C
0	Enterprise Flag	1=Fannie Mae 2=Freddie Mac	NO	NO	NO	NO
1	Loan Number		Yes, but recode as a Sequential Number (1)	Yes, but recode as a Sequential Number (1)	Yes, but recode as a Sequential Number (1)	Yes, but recode as a Sequential Number (1)
2	US Postal State	00=Missing	NO	YES	YES	YES
3	US Postal Zip Code		YES	YES	YES	YES
4	MSA Code	00000=Missing 99999=non-metropolitan area other=specific metropolitan area	NO	YES but recode as: 1= metropolitan area 0=non-metropolitan area	YES but recode as: 1= metropolitan area 0=non-metropolitan area	YES
5	Place Code - FIPS		YES	YES	YES	YES
6	County - 2000 Census	000=Missing	NO	YES	YES	YES
7	Census Tract - 2000 Census	000000=Missing	NO	YES	YES	YES
8 (2)	Census Tract Geographic Designation	1=Tract Entirely Within Central City 2=Tract Entirely Outside Central City 3=Central City Split Tract 9=Not Able To Code	NO	YES	YES	YES
9 (2)	Central City Flag 1	9999=Not Able To Code	NO	YES	YES	YES
10 (2)	Central City Flag 2	9998=Not Available 9999=Not Applicable	NO	YES	YES	YES
11	2000 Census Tract - Percent Minority	9999=Not Available	NO	YES, but recode as: 1 = >=0, <10% 2 = >=10, <30% 3 = >=30, <=100% 9 = Missing	YES, but recode as: 1 = >=0, <10% 2 = >=10, <30% 3 = >=30, <=100% 9 = Missing	YES, but recode as: 1 = >=0, <10% 2 = >=10, <30% 3 = >=30, <=100% 9 = Missing
12	2000 Census Tract - Median Income	999999=Not Available	NO	YES	YES	YES
13	2000 Local Area Median Income	999999=Not Available	NO	YES	YES	YES
14	Tract Income Ratio	9999=Not Applicable	NO	YES, but recode as: 1 = >0, <=80% 2 = >80, <=120% 3 = >120% 9 = Missing	YES, but recode as: 1 = >0, <=80% 2 = >80, <=120% 3 = >120% 9 = Missing	YES, but recode as: 1 = >0, <=80% 2 = >80, <=120% 3 = >120% 9 = Missing
15	Borrower's (or Borrowers') Annual Income	9999999=Not Available	YES, but recode in terms of dollars for year of acquisition and round to nearest $1,000.	YES	YES	YES
16	Area Median Family Income	999999=Not Available	YES, but recode in terms of dollars for year of acquisition.	YES	YES	YES
17 (3)(7)	Borrower Income Ratio	9999=Not Applicable or Not Available	NO	YES, but recode as: 1 = >=0, <=60% 2 = > 60, <=100% 3 = >100 9 = Not Applicable	YES, but redefine and recode as: (3) 1 = >=0, <=60% 2 = > 60, <=100% 3 = >100 9 = Not Applicable	YES, but recode as: 1 = >=0, <=60% 2 = > 60, <=100% 3 = >100 9 = Not Applicable
17a (3)(8)	Borrower Income Ratio	9999=Not Applicable or Not Available	NO	YES, but recode as: 1 = >=0, <=50% 2 = >50, <=80% 3 = >80 9 = Not Applicable	YES, but redefine and recode as: (3) 1 = >=0, <=50% 2 = >50, <=80% 3 = >80 9 = Not Applicable	YES, but recode as: 1 = >=0, <=50% 2 = >50, <=80% 3 = >80 9 = Not Applicable
18	Acquisition UPB		YES, but recode as: actual values rounded to nearest $1,000	YES	YES	YES

#	Field Description	Values	Census Tract File	National File A	National File B	National File C
19	Loan to Value Ratio (LTV) at Origination (or Combined LTV (CLTV) where available)	999=Not Applicable	YES	YES, but recode as: 1 = >0, <=60% 2 = >60, <=80% 3 = >80, <=90% 4 = >90, <=95% 5 = > 95% 9 = Missing	YES YES, but recode as: 1=Originated same calendar year as acquired 2=Originated prior to calendar year of acquisition 9=Missing	YES, but recode as: 1 = >0, <=60% 2 = >60, <=80% 3 = >80, <=90% 4 = >90, <=95% 5 = > 95% 9 = Missing
20	Date of Mortgage Note		YES	YES	YES, but recode as: 1=Originated same calendar year as acquired 2=Originated prior to calendar year of acquisition 9=Missing	YES
21	Date of Acquisition		YES	YES	YES	YES
22	Purpose of Loan	1=Purchase 2=Refinancing 3=Second Mortgage (Purchase Mortgage) 4=Home Improvement/Rehabilitation (Purchase Mortgage) 5=Second Mortgage (not Purchase Mortgage) 6=Home Improvement/Rehabilitation (not Purchase Mortgage) 9=Not Applicable/Not Available	YES but recode as: 1=Purchase 2=Refinancing 4=Home Improvement/Rehabilitation 9=Not Applicable/Not Available	YES but recode as: 1=Purchase 8=Other 9=Not Applicable/Not Available	YES but recode as: 1=Purchase 2=Refinancing 3=Second Mortgage 4=Home Improvement/Rehabilitation 9=Not Applicable/Not Available	YES but recode as: 1=Purchase 2=Refinancing/Other
23 (7)	Cooperative Unit Mortgage	1=Yes 2=No 8=Not Available 9=Not Applicable	YES	YES	YES	YES
24 (2)	Refinancing Loan from Own Portfolio	1=Yes 2=No 9=Not Applicable	YES	YES	YES	YES
25 (7)	Special Affordable, Seasoned Loan; Acq Proceeds Recycled?	1=a state housing finance agency 2=an affordable housing loan consortium 3=a qualifying Federally insured credit union 4=a community development financial institution, public loan fund, or non-profit mortgage lender 5=a member of another class of mortgage lenders determined by FHFA to qualify 6=a qualifying BIF- or SAIF-insured depository institution with a satisfactory performance evaluation rating under the Community Reinvestment Act 7=an institution which the Enterprise has determined to meet the requirements in 12 U.S.C. 4563(b)(1)(B) (2009) 8=the mortgage is a federally related mortgage where the Enterprise has provided documentation to FHFA that supports eligibility to count toward the special affordable housing goal 9=the mortgage is a federally related mortgage which is eligible to count toward the special affordable housing goal. 12 U.S.C. 4563(b)(1) (2009) 4=the mortgage is not eligible to count toward the special affordable housing goal under any of the above provisions.	YES	YES	YES	YES
26	Product Type	01=Fixed Rate 02=ARM 03=Balloon 04=GPM/GEM 05=Reverse Annuity Mortgage 06=Other 07, 98=Est Other Distinct Products 99=Not Available	YES	YES	YES	YES, but recode as: 1=Fixed Rate Mortgage 2=ARM 3=Other 9=Missing
27	Federal Guarantee	1=originated under HUD's Home Equity Conversion Mortgage (HECM) Insurance Program 2=covered under the Rural Housing Service's Guaranteed Rural Housing Loan Program 3=on a property on a tribal land and insured under FHA's Section 248 program, HUD's Section 184 program, or the Title VI program 5=involves Federal guarantees, insurance or other Federal obligation, where the Enterprise has submitted supporting documentation to FHFA 6=the mortgage is awarded half credit toward the pre-2010 special affordable housing goal because it is insured under HUD's Title I program 7=it otherwise has a federal guarantee from the Federal Housing Administration (FHA) 8=it otherwise has a federal guarantee from the Department of Veterans Affairs (VA) 9=it has some other type of federal guarantee 0=the mortgage has no federal guarantee	YES, but recode as: 1=Conventional/Other 2=FHA Insured 3=VA Guaranteed 4=FSA/RHS Guaranteed	YES, but recode as: 1=FHA/VA 2=FSA/RHS Guaranteed 3=HECMs 4=No Federal Guarantee 5=Title 1 FHA	YES, but recode as: 1=FHA/VA 2=FSA/RHS-Guaranteed 3=HECMs 4=No Federal Guarantee 5=Title 1 FHA	YES, but recode as: 1=Conventional 2=Other
28 (7)	RTC/FDIC	1=Yes 2=No	YES	YES	YES	YES

#	Field Description	Values	Census Tract File	National File A	National File B	National File C
29	Term of Mortgage at Origination		YES	YES	YES	YES, but recode as: 1=30-year 2=15 year 3=Other terms 9=Missing
30	Amortization Term	998=Non-Amortizing Loan 999=Not Available	YES	YES	YES	YES, but recode as: 1=30-year 2=15-year 3=Other terms including non-amortizing loans 9=Missing
31 (4)(7)	Lender Institution Name		YES	YES	YES	YES
32 (4)(7)	Lender City		YES	YES	YES	YES
33 (4)(7)	Lender State		YES	YES	YES	YES
34	Type of Seller Institution	1=Mortgage Company 2=SAIF Insured Depository Institution 3=BIF Insured Depository Institution 4=NCUA Insured Credit Union 5=Life insurance company 6=State or local housing finance agency 7,8=other type of lender 9=unknown	YES	YES	YES, but recode as: 1=Mortgage Company 2=SAIF Insured Depository Institution 3=BIF Insured Depository Institution 4=NCUA Insured Credit Union 5=Other	YES
35	Number of Borrowers	99=Missing	NO	YES	YES	YES
36	First-Time Home Buyer	1=Yes 2=No 9=Not Available	NO	YES	YES	YES
37 (7)	Mortgage Purchased under Enterprise's Community Lending Program	1=FNMA's Community Homebuyer Program 2=FNMA's Community Lending Other 3=FNMA's Other Housing Impact Programs OR 1=FHLMC's Affordable Gold 2=FHLMC's Alternative Qualifying 9=Not Applicable (either Enterprise)	YES	YES	YES	YES
38	Acquisition Type	11=credit enhancement of a State or local mortgage revenue bond 12=credit enhancement of all or portion of a Real Estate Mortgage Investment Conduit (REMIC) security 13=credit enhancement of all or portion of a Financial Asset Securitization Investment Trust (FASIT) security 14=credit enhancement of an obligation issued by a Real Estate Investment Trust (REIT) 15-29=credit enhancement of another type of financing activity 31=mortgage acquisition under a risk-sharing arrangement with a federal agency 41=purchase of a State or local mortgage revenue bond 42=purchase of all or a portion of an Asset Backed Security (ABS) 43=purchase of all or a portion of a Commercial Mortgage Backed Security (CMBS) 44=purchase of all or a portion of a Real Estate Mortgage Investment Conduit (REMIC) security 45=purchase of all or a portion of a Financial Asset Securitization Investment Trust (FASIT) security 46-59=other purchase of a security 62=seasoned mortgage purchase for cash 63=current year mortgage purchase for cash 64=seasoned swap purchase 65=current year swap purchase	YES	YES	YES	YES
39 (7)	Enterprise Real Estate Owned	1=Yes 2=No 3=Not Available	YES	YES	YES	YES
40 (2)	Public Subsidy Programs	1=Federal only 2=State or Local only 3=Other/Private Subsidy only 4=Federal and State or Local 5=Federal and Other 6=State or Local and Other 7=Federal, State or Local and Other 9=Data Not Provided	YES	YES	YES	YES

#	Field Description	Values	Census Tract File	National File A	National File B	National File C
41a–41e (6)	Borrower Race or National Origin 1-5	1=American Indian or Alaskan Native 2=Asian 3=Black or African American 4=Native Hawaiian or Other Pacific Islander 5=White 6=Information Not Provided by Applicant in Mail, Internet, or Telephone Application 7=Not Applicable 9=Not Available	NO	YES, but recode fields 41a–41f as a single field 41 as: 1=American Indian or Alaskan Native 2=Asian 3=Black or African American 4=Native Hawaiian or Other Pacific Islander 5=White 6=Two or more races 7=Hispanic or Latino 9=Not available/not applicable	YES, but recode fields 41a–41f as a single field 41 as: 1=American Indian or Alaskan Native 2=Asian 3=Black or African American 4=Native Hawaiian or Other Pacific Islander 5=White 6=Two or more races 7=Hispanic or Latino 9=Not available/not applicable	YES
41f (6)	Borrower Ethnicity	1=Hispanic or Latino 2=not Hispanic or Latino 3=Information Not Provided by Applicant in Mail, Internet, or Telephone Application 4=Not Applicable 9=Not Available	NO	YES	YES	YES
42a–42e (6)	Co-Borrower Race or National Origin 1-5	1=American Indian or Alaskan Native 2=Asian 3=Black or African American 4=Native Hawaiian or Other Pacific Islander 5=White 6=Information Not Provided by Applicant in Mail, Internet, or Telephone Application 7=Not Applicable 8=No co-borrower 9=Not Available	NO	YES, but recode fields 42a–42f as a single field 42 as: 1=American Indian or Alaskan Native 2=Asian 3=Black or African American 4=Native Hawaiian or Other Pacific Islander 5=White 6=Two or more races 7=Hispanic or Latino 9=Not available/not applicable	YES, but recode fields 42a–42f as a single field 42 as: 1=American Indian or Alaskan Native 2=Asian 3=Black or African American 4=Native Hawaiian or Other Pacific Islander 5=White 6=Two or more races 7=Hispanic or Latino 9=Not available/not applicable	YES
42f (6)	Co-Borrower Ethnicity	1=Hispanic or Latino 2=not Hispanic or Latino 3=Information Not Provided by Applicant in Mail, Internet, or Telephone Application 4=Not Applicable 5=No co-borrower 9=Not Available	NO	YES	YES	YES
43	Borrower Gender	1=Male 2=Female 3=Information Not Provided by Applicant in Mail, Internet, or Telephone Application 4=Not Applicable 9=Not Available	NO	NO	NO	YES
44	Co-Borrower Gender	1=Male 2=Female 3=Information Not Provided by Applicant in Mail, Internet, or Telephone Application 4=Not Applicable 9=Not Available	NO	NO	NO	YES
45	Age of Borrower	999=Data Not Provided	NO	YES	YES	YES
46	Age of Co-Borrower	999=Data Not Provided	NO	YES	YES	YES
47 (5)	Occupancy Code	1=Principal Residence/Owner-Occupied 2=Second Home 3=Investment Property (Rental) 9=Not Available	YES, but redefine and recode as: 1=Owner-Occupied property 2=Investment Property 9=Not Available	YES	YES, but redefine and recode as: 1=Owner Occupied 2=Rental Unit in an Owner-Occupied Property 3=Investment Property (Rental) 9=Not Available	YES
48	Number of Units		YES	NO	NO	YES
49	Unit - Number of Bedrooms	99=Data Not Provided	YES	YES	YES	YES
50	Unit - Owner Occupied	1=Yes 3=No	YES	YES	NO	YES
51	Unit - Affordability Category	1=Low-Income Family (but not Very Low-Income) in a Low-Income Area 2=Very Low-Income Family in a Low-Income Area 3=Very Low-Income Family, Not in a Low-Income Area 4=Other 9=Not Available 0=Missing	YES	NO	NO	YES

#	Field Description	Values	Census Tract File	National File A	National File B	National File C
52	Unit - Reported Rent Level	99999=Not Applicable	YES	YES	YES	YES
53	Unit - Reported Rent Plus Utilities	99999=Not Applicable	YES	YES	YES	YES
54 (2)	Fannie Mae Exclusions	1=Excluded from Goal Reporting	YES	YES	YES	YES
55 (4)(7)	Geographically Targeted Indicator	1=Yes 2=No 99=Not Applicable	NO. Added Field	NO. Added Field	NO. Added Field	
56 (6)	Rate Spread	0 = Not applicable, not reported, or less than 3.0 for 1st liens (or less than 5.0 for subordinate liens) (for 2009 the thresholds are 1.5 and 3.5 respectively)	NO	YES	YES	YES
57 (6)	HOEPA Status	1 = Yes 2 = No 9 = Not available, not applicable	NO	YES	YES	YES
58 (6)	Property Type	1 = One to four family (other than manufactured housing) 2 = manufactured housing 9 = unknown	NO	YES	YES	YES
59 (6)	Lien Status	1 = secured by a first lien 2 = secured by a subordinate lien 3 = not secured by a lien 4 = not applicable	NO	YES	YES	YES
60 (8)	Credit Score	1 = Less than 620 2 = 620 - < 660 3 = 660 - < 700 4 = 700 - < 760 5 = 760 or greater 9 = Missing	YES	YES	YES	NO
61 (8)	Purchase Price	999999999 = Missing	YES	YES	YES	YES, but recode as: actual values rounded to nearest $1,000
62 (8)	Interest Rate at Origination	1 = Less than 4.00% 2 = 4.00 - < 4.50% 3 = 4.50 - < 5.00% 4 = 5.00 - < 5.50% 5 = 5.50 - < 6.00% 6 = 6.00 - < 6.50% 7 = 6.50 - < 7.00% 8 = 7.00 - < 7.50% 9 = 7.50 - < 8.00% 10 = 8.00% or greater 99 = Missing	YES	YES	YES	NO
63 (8)	Portfolio Flag	1 = Not held on portfolio 2 = Retained on portfolio	YES	YES	YES	NO
64 (8)	Percent Repurchased	9999=Not available	YES	YES	YES	NO

Notes:
(1) The sequential number is randomized between each of the tract and national files.
(2) Not applicable to 1996 and beyond data sets. Central city is as defined by the Office of Management and Budget.
(3) The borrower income ratio field is defined for rental units in National File B to reflect the affordability of units based on rent data submitted by the Enterprises.
(4) Not applicable to 1993-1995 data sets.
(5) National File B is recoded so that rental and owner-occupied units of 2-4 unit properties can be distinguished.
(6) Not applicable to 1993-2007 data sets.
(7) Not applicable to 2010 and beyond data sets.
(8) Not applicable to 1993-2009 data sets.

Enterprise Multifamily Mortgage Data
Property Level
Proprietary Information/Public-Use Data

The "Census Tract File" contains mortgage-level data on all multifamily properties.
The "National File" consists of two parts: one part contains mortgage level data and the other consists of unit-class-level data for all multifamily properties.

#	Field Description	Values	Census Tract File	National File
0	Enterprise Flag	1=Fannie Mae	NO	NO
		2=Freddie Mac		
1	Loan Number		Yes, but recode as a Sequential Number (1)	Yes, but recode as a Sequential Number (1)
2	US Postal State	00=Missing	NO	YES
3	US Postal Zip Code		YES	YES
4	MSA Code	00000=Missing	NO	YES
		99999=non-metropolitan area		
		other=specific metropolitan area		
5	Place Code - FIPS		YES	YES
6	County - 2000 Census	000=Missing	NO	YES
7	Census Tract - 2000 Census	000000=Missing	NO	YES
8 (2)	Census Tract Geographic Designation	1=Tract Entirely Within Central City	NO	YES
		2=Tract Entirely Outside Central City		
		3=Central City Split Tract		
		9=Not Able To Code		
9 (2)	Central City Flag 1	9999=Not Able To Code	NO	YES
10 (2)	Central City Flag 2	9998=Not Available	NO	YES
		9999=Not Applicable		
11	2000 Census Tract - Percent Minority	9999=Not Available	NO	YES, but recode as:
				1 = >=0, <10%
				2 = >=10, <30%
				3 = >=30, <=100%
				9 = Missing
12	2000 Census Tract - Median Income	999999=Not Available	NO	YES
13	2000 Local Area Median Income	999999=Not Available	NO	YES
14	Tract Income Ratio	9999=Not Applicable	NO	YES, but recode as:
				1 = >0, <=80%
				2 = >80, <=120%
				3 = >120%
				9 = Missing
15	Area Median Family Income	999999=Not Available	NO	YES
16	Affordability Category	1= >=20% of the units in the property are affordable at or below 50% of Area Median Income (AMI), and <40% are affordable at or below 60% AMI	YES	NO
		2= <20% and >=40%		
		3= >=20% and >=40%		
		4= <20% and <40%		
		8= Not Available		
		9= Not Eligible		
		0= Missing		

#	Field Description	Values	Census Tract File	National File
17	Acquisition UPB		YES, but recode as: actual values rounded to nearest $1,000	YES
18	Participation Percent		YES	YES
19	Date of Mortgage Note		YES	YES, but recode as: 1=Originated same calendar year as acquired 2=Originated prior to calendar year of acquisition 9=Missing
20	Date of Acquisition		YES	YES
21	Purpose of Loan	1=Purchase 2=Refinancing 3=New Construction 4=Home Improvement/Rehabilitation 9=Not Applicable/Not Available	YES, but recode as: 1=Purchase 2=Refinancing 4=Home Improvement/Rehabilitation 9=Not Applicable/Not Available/Other	NO
22	Cooperative Project Loan	1=Yes 2=No 8=Not Available 9=Not Applicable	YES	YES
23 (2)	Refinancing Loan from Own Portfolio	1=Yes 2=No 9=Not Applicable	YES	YES
24 (5)	Special Affordable, Seasoned Loan: Are Proceeds Recycled?	1=a state housing finance agency 2=an affordable housing loan consortium 3=a qualifying Federally insured credit union 4=a community development financial institution, public loan fund, or non-profit mortgage lender 5=a member of another class of mortgage lenders determined by FHFA to qualify 6=a qualifying BIF- or SAIF-insured depository institution with a satisfactory performance evaluation rating under the Community Reinvestment Act 7=an institution which the Enterprise has determined to meet the requirements in 12 U.S.C. 4563(b)(1)(B) (2009) 8=the mortgage is a federally related mortgage where the Enterprise has provided documentation to FHFA that supports eligibility to count toward the special affordable housing goal 9=the mortgage is a federally related mortgage which is eligible to count toward the special affordable housing goal, 12 U.S.C. 4563(b)(1) (2009) 0=the mortgage is not eligible to count toward the special affordable housing goal under any of the above provisions.	YES	YES
25	Mortgagor Type	1=Individual 2=For Profit Entity 3=Nonprofit Entity 4=Public Entity 5=Other	YES	YES
26	Term of Mortgage at Origination		YES	YES
27	Loan Type	1=Fixed Rate 2=ARM 3=GPM	YES	YES

#	Field Description	Values	Census Tract File	National File
28	Construction Loan	1=Yes	YES	YES
		2=No		
29	Amortization Term	998=Non-Amortizing Loan	YES	YES
		999=Not Available		
30 (3)(5)	Lender Institution		YES	YES
31 (3)(5)	Lender City		YES	YES
32 (3)(5)	Lender State		YES	YES
33	Type of Seller Institution	1=Mortgage Company	YES but recode as:	YES but recode as:
		2=SAIF Insured Depository Institution	1=Mortgage Company	1=Mortgage Company
		3=BIF Insured Depository Institution	2=SAIF Insured Depository Institution	2=SAIF- or BIF-Insured
		4=NCUA Insured Credit Union	3=BIF Insured Depository Institution	depository institution
		5=Life insurance company	4=NCUA Insured Credit Union	3=NCUA Insured Credit Union
		6=State or local housing finance agency	5=Other	4=Other
		7,8=other type of lender		
		9=unknown		
34	Federal Guarantee	1=originated under HUD's Home Equity Conversion Mortgage (HECM) Insurance Program	YES but recode as:	YES but recode as:
			1=Conventional/Other	1=Yes
		2=covered under the Rural Housing Service's Guaranteed Rural Housing Loan Program	2=FHA-Insured	2=No
			3=VA-Guaranteed	3=FHA Risk Sharing
		3=on a property on a tribal land and insured under FHA's Section 248 program, HUD's Section 184 program, or the Title VI program	4=FSA/RHS-Guaranteed	9=Not Available
		4=its purchase by the Enterprise assists in maintaining the affordability of assisted units in eligible multifamily housing projects with expiring contracts		
		5=involves Federal guarantees, insurance or other Federal obligation, where the Enterprise has submitted supporting documentation to FHFA		
		6=the mortgage is awarded half credit toward the pre-2010 special affordable housing goal because it is insured under HUD's Title I program		
		7=it otherwise has a federal guarantee from the Federal Housing Administration (FHA)		
		8=it otherwise has a federal guarantee from the Department of Veterans Affairs (VA)		
		9=it has some other type of federal guarantee		
		0=the mortgage has no federal guarantee		
35	FHA Risk Share Percent		YES	YES

#	Field Description	Values	Census Tract File	National File
36	Acquisition Type	11=credit enhancement of a State or local mortgage revenue bond	YES	YES
		12=credit enhancement of all or portion of a Real Estate Mortgage Investment Conduit (REMIC) security		
		13=credit enhancement of all or portion of a Financial Asset Securitization Investment Trust (FASIT) security		
		14=credit enhancement of an obligation issued by a Real Estate Investment Trust (REIT)		
		15-29=credit enhancement of another type of financing activity		
		31=mortgage acquisition under a risk-sharing arrangement with a federal agency		
		41=purchase of a State or local mortgage revenue bond		
		42=purchase of all or a portion of an Asset Backed Security (ABS)		
		43=purchase of all or a portion of a Commercial Mortgage Backed Security (CMBS)		
		44=purchase of all or a portion of a Real Estate Mortgage Investment Conduit (REMIC) security		
		45=purchase of all or a portion of a Financial Asset Securitization Investment Trust (FASIT) security		
		46-59=other purchase of a security		
		61=asset management refinance		
		62=seasoned mortgage purchase for cash		
		63=current year mortgage purchase for cash		
		64=seasoned swap purchase		
		65=current year swap purchase		
37 (5)	Enterprise Real Estate Owned	1=Yes	YES	YES
		2=No		
		3=Not Available		
38 (5)	Public Subsidy Program	1=Federal only	YES	YES
		2=State or Local only		
		3=Other/Private Subsidy only		
		4=Federal and State or Local		
		5=Federal and Other		
		6=State or Local and Other		
		7=Federal, State or Local and Other		
		9=Data Not Provided		
39	Total Number of Units		YES	NO
40 (2)	Special Affordable - 45 Percent	0=Missing or Not Applicable	YES	NO
41 (2)	Special Affordable - 55 Percent	0=Missing or Not Applicable	YES	NO
42 (2)	Fannie Mae Exclusions	1=Excluded from Goal Reporting	YES	YES
43 (3)(5)	Geographically Targeted Indicator	1=Yes	NO, Added Field	NO, Added Field
		2=No		
		9=Not Applicable		

#	Field Description	Values	Census Tract File	National File
50 (4)	Lien Status	1 = secured by a first lien	NO	YES
		2 = secured by a subordinate lien		
		3 = not secured by a lien		
		4 = not applicable		
	Notes:			
	(1) The sequential number is randomized between the tract and national files.			
	(2) Not applicable to 1996 and beyond data sets. Central city is as defined by the Office of Management and Budget.			
	(3) Not applicable to 1993-1995 data sets.			
	(4) Not applicable to 1993-2007 data sets.			
	(5) Not applicable to 2010 and beyond data sets.			
	Enterprise Multifamily Mortgage Data			
	Unit Class Level			
	Proprietary Information/Public-Use Data			
0	Enterprise Flag	1=Fannie Mae	YES	NO
		2=Freddie Mac		
1	Loan Number		YES	Yes, but recode as a Sequential Number (6)
44	Unit Type XX-Number of Bedrooms		YES	YES, but recode as:
				1=0-1 Bedroom
				2= 2 or more Bedrooms
45	Unit Type XX-Number of Units		YES	NO
46	Unit Type XX-Average Rent Level		YES	YES
47	Unit Type XX-Average Rent Plus Utilities		YES	YES
48	Unit Type XX-Affordability Level		YES	YES, but recode as:
				1 = >=0, <=50%
				2 = >50, <=60%
				3 = >60, <=80%
				4 = >80, <=100%
				5 = >100%
				9 = Not Available
49	Unit Type XX-Tenant Income Indicator	0=No or Not Provided	YES	NO
		1=Yes		
	Notes:			
	(6) This number will match the property level sequential number in the national file.			

[FR Doc. 2011–24791 Filed 9–27–11; 8:45 am]

BILLING CODE 8070–01–C

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 012098–001.

Title: Mitsui CSAV/''K'' Line Mexico/U.S. Atlantic Space Charter Agreement.

Parties: Compania Sud American de Vapores S.A. and Kawasaki Kisen Kaisha, Ltd.

Filing Parties: John P. Meade, Esq.; Vice-President; K- Line America, Inc.; 6009 Bethlehem Road; Preston, MD 21655.

Synopsis: The amendment allows for the reciprocal chartering of space between the parties.

By Order of the Federal Maritime Commission.

Dated: September 23, 2011.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2011–24976 Filed 9–27–11; 8:45 am]

BILLING CODE 6730–01–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 October 13, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *CNBO Bancorp, Inc.,* Pryor, Oklahoma; to acquire 32.67 percent of the voting shares of Century Home Mortgage of Oklahoma, LLC, Tulsa, Oklahoma (to be known as Oklahoma Mortgage Lenders), a series of The Lending Partners, Ltd., Plano, Texas, and thereby continue to engage in mortgage lending activities, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, September 23, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–24945 Filed 9–27–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice and request for comment.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3521, the FTC is seeking public comments on its proposal to extend through October 31, 2014, the current PRA clearance for information collection requirements contained in its Trade Regulation Rule entitled Power Output Claims for Amplifiers Utilized in Home Entertainment Products (''Amplifier Rule'' or ''Rule''), 16 CFR part 432 (OMB Control Number 3084–0105). That clearance expires on October 31, 2011. The FTC will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review.

DATES: Comments must be received on or before October 28, 2011.

ADDRESSES: Interested parties may submit written comments by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Comment in electronic form should be submitted by using this Web link: *https://ftcpublic.commentworks.com/ftc/amplifierrulepra2.* Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the collection of information and supporting documentation should be addressed to Jock K. Chung, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, M–8133, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2984.

SUPPLEMENTARY INFORMATION:

Title: Amplifier Rule, 16 CFR part 432.

OMB Control Number: 3084–0105.

Type of Review: Extension of a currently approved collection.

Abstract: The Amplifier Rule assists consumers by standardizing the measurement and disclosure of power output and other performance characteristics of amplifiers in stereos and other home entertainment equipment. The Rule also specifies the test conditions necessary to measure the disclosures that the Rule requires.

On July 11, 2011, the Commission sought comment on the information collection requirements associated with the Amplifier Rule. 76 FR 40731. No comments were received. Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule.

Estimated Annual Hours Burden: 450 hours (300 testing-related hours; 150 disclosure-related hours).

Likely Respondents and Estimated Burden:

(a) Testing—High fidelity manufacturers—300 new products/year × 1 hour each = 300 hours; and

(b) Disclosures—High fidelity manufacturers—[(300 new products/year × 1 specification sheet) + (300 new products/year × 1 brochure)] × 15 minutes each = 150 hours.

Frequency of Response: Periodic.

Total Annual Labor Cost: $18,300 per year ($12,900 for testing + $5,400 for disclosures).

Request for Comment:

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before October 28, 2011. Write ''Amplifier Rule: FTC File No. P974222''

on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, like medical records or other individually identifiable health information. In addition, don't include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *, '' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/amplifierrulepra2,* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Amplifier Rule: FTC File No. P974222'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before October 28, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.shtm.*

Comments on the information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395–5167.

David C. Shonka,

Acting General Counsel.

[FR Doc. 2011–24909 Filed 9–27–11; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0025; Docket 2011–0079; Sequence 10]

Federal Acquisition Regulation; Submission for OMB Review; Trade Agreements Certificate

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning trade agreements certificate. Two comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Two comments were received. One comment is not relevant to this collection. The other comment supports the extension of this collection.

DATES: Submit comments on or before October 28, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0025, Trade Agreements Certificates, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0025, Trade Agreements Certificate'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0025, Trade Agreements Certificate''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0025, Trade Agreements Certificate'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. *Attn:* Hada Flowers/IC 9000–0025, Trade Agreements Certificate.

Instructions: Please submit comments only and cite Information Collection 9000–0025, Trade Agreements

Certificate, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Procurement Analyst, Acquisition Policy Division, GSA (202) 219–0202 or e-mail *Cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Under the Trade Agreements Act of 1979, unless specifically exempted by statute or regulation, agencies are required to evaluate offers over a certain dollar limitation not to supply an eligible product without regard to the restrictions of the Buy American program. Offerors identify excluded end products on this certificate.

The contracting officer uses the information to identify the offered items which are domestic end products. Items having components of unknown origin are considered to have been mined, produced, or manufactured outside the United States, a designated country, Caribbean Basin country or Free Trade Agreement Country.

B. Annual Reporting Burden

Respondents: 1,140.

Responses per Respondent: 10.

Total Responses: 11,400.

Hours per Response: .109.

Total Burden Hours: 1,243.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0025, Trade Agreements Certificate, in all correspondence.

Dated: September 21, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

[FR Doc. 2011–24904 Filed 9–27–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0024; Docket 2011–0079; Sequence 9]

Federal Acquisition Regulation; Submission for OMB Review; Buy American Act Certificate

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding a revision to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning the Buy American Act certificate. This information collection requirement collects data for compliance with 41 U.S.C., Buy American.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before October 28, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0024, Buy American Act Certificate, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0024, Buy American Act Certificate'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0024, Buy American Act Certificate.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0024, Buy American Act Certificate'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. *Attn:* Hada Flowers/IC 9000–0024, Buy American Act Certificate.

Instructions: Please submit comments only and cite Information Collection 9000–0024, Buy American Act Certificate, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Procurement Analyst, Acquisition Policy Division, GSA (202) 219–0202 or e-mail *cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The Buy American Act requires that only domestic end products be acquired for public use unless an exception is specifically authorized by statute or regulation, provided that the cost of the domestic products is reasonable. FAR provision 52.225–2, Buy American Act Certificate, as prescribed at 25.1101(a)(2), requires the offeror to certify that all end products are domestic end products, except for foreign end products listed in paragraph (b). For other than commercially available off-the-shelf items, components of unknown origin are considered to have been supplied from outside the United States.

The contracting office uses the information to determine compliance with 41 U.S.C. chapter 83, Buy American.

A request for public comments was published in the **Federal Register** at 76 FR 24027, on April 29, 2011. One comment was received.

B. Annual Reporting Burden

Respondents: 3,125.
Responses per Respondent: 15.
Total Responses: 46,875.
Hours per Response: .109.
Total Burden Hours: 5,109.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275

First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0024, Buy American Act Certificate, in all correspondence.

Dated: September 23, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

[FR Doc. 2011–24905 Filed 9–27–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0001; Docket No. 2011–0079; Sequence 8]

Submission for OMB Review; Federal Acquisition Regulation; Standard Form 28, Affidavit of Individual Surety

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for a extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Standard Form 28, Affidavit of Individual Surety. A request for public comments was published in the **Federal Register** at 76 FR 22706, on April 22, 2011. Two comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before October 28, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0001, Standard Form 28, Affidavit of Individual Surety, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0001, Standard Form 28, Affidavit of Individual Surety'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0001, Standard Form 28, Affidavit of Individual Surety''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0001, Standard Form 28, Affidavit of Individual Surety'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. *ATTN:* Hada Flowers/IC 9000–0001, Standard Form 28, Affidavit of Individual Surety.

Instructions: Please submit comments only and cite Information Collection 9000–0001, Standard Form 28, Affidavit of Individual Surety, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Procurement Analyst, Federal Acquisition Policy Division, GSA (202) 219–0202 or *Cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The Affidavit of Individual Surety (Standard Form (SF) 28) is used by all executive agencies, including the Department of Defense, to obtain information from individuals wishing to serve as sureties to Government bonds. To qualify as a surety on a Government bond, the individual must show a net worth not less than the penal amount of the bond on the SF 28. It is an elective decision on the part of the maker to use individual sureties instead of other available sources of surety or sureties for Government bonds.

The information on SF 28 is used to assist the contracting officer in determining the acceptability of individuals proposed as sureties.

A notice published in the **Federal Register** at 76 FR 22706, April 22, 2011 and two comments were received. Both commenters support the extension of this information collection. In addition to supporting the extension, both commenters suggested some revisions/enhancements to the current Standard Form 28. These suggestions will be taken into consideration.

The decrease in the total burden hours is a result of the change in the ''Response per Respondent'' and ''Hours per Response'' categories. The 1.43, responses per respondent, has been lowered to 1. to adequately reflect this category. A respondent has to respond completely not partially when submitting this form. The ''Hours per Response'' category has been decreased to .3 (18 minutes) from .4 (24 minutes) to reflect the benefit of the electronic capability of fillable-fileable forms. Respondents no longer have to print, scan, and then electronically submit or print and then physically mail forms through the post office, they can now submit electronically.

B. Annual Reporting Burden

Respondents: 500.
Responses Per Respondent: 1.
Total Responses: 500.
Hours Per Response: 0.3.
Total Burden Hours: 150.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0001, Standard Form 28, Affidavit of Individual Surety, in all correspondence.

Dated: September 21, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

[FR Doc. 2011–24906 Filed 9–27–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Medicaid Program: Money Follows the Person Rebalancing Demonstration Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice creates an expansion to an existing award under the Money Follows the Person

Demonstration grant. The program supports the movement of Medicaid beneficiaries with disabling and chronic conditions from institutions into the community. The award expands already funded tasks related to quality technical assistance provided to State grantees.

DATES: *Effective Date:* The program expansion is effective on the date of award (before September 30, 2011 through April 15, 2013).

FOR FURTHER INFORMATION CONTACT:

Anita Yuskauskas, (410) 786–0268.
Arun Natarajan, (410) 786–7455.

SUPPLEMENTARY INFORMATION:

I. Background

The need for additional funds is the result of an increase in the number of Money Follows the Person (MFP) State Grantees through the Patient Protection and Affordable Care Act (Affordable Care Act) (Pub. L. 111–148, enacted on March 23, 2010). Fifteen additional States received new MFP funds in January, 2011 under the Affordable Care Act. The increase in the number of States and programs resulting from the Affordable Care Act place more demand on the need for technical assistance to States developing and implementing quality improvement strategies, particularly given the complexity and vulnerability of the populations being served in MFP and the Congress' commitment to the Grant Program's success. The expansion was not calculated in the original National Quality Enterprise (NQE) budget because at the time of the original award, the Affordable Care Act money was not included in CMS' budget allocation.

The additional resources are necessary to assure the success of the individual placements, specifically, by facilitating sufficient quality mechanisms to address the unique needs of the populations with disabling and chronic conditions. These are the most vulnerable populations and a lack of quality and oversight mechanisms in place, may place individuals at risk.

II. Provisions of the Notice

We solicited a proposal from Thomson Reuters Healthcare to expand the National Home and Community-Based Services (HCBS) Quality Enterprise beyond the grant's present scope. The expansion was created by section 2403 of the Affordable Care Act, which amended section 6071 of the Deficit Reduction Act of 2005, the Money Follows the Person Rebalancing Demonstration. The provision expanded previous legislation to support State and CMS efforts to improve quality in a ''rebalanced'' long-term support system, and to demonstrate the ongoing benefits from and need for an effective HCBS QI Enterprise. The grant offered $1.2 million over 2 years through a program expansion supplement.

We requested that the Thomson Reuters Healthcare submit an abbreviated application addressing the expansion of the existing grant. The Grantee provided an updated quality technical assistance model and work plan focused on the following four major goals:

- Development of a process demonstrating consistency between the Grantee and CMS, and across all Grantee staff and subcontractors for providing technical assistance (Project Management, 1.1).
- The provision of technical assistance to states related to quality in home and community-based services programs (Technical Assistance, 2.1b).
- The provision of technical assistance to CMS staff related to the oversight of quality in HCBS programs (Technical Assistance, 2.1c).
- The ongoing development and maintenance of a national HCBS quality web-based technical assistance site and quality TA manuscripts (Technical Assistance, 2.1d and e).

As part of the application, based on the four major goals listed above, the Grantee submitted a 3 page project narrative describing the activities, and an accompanying budget revision, related to Grant #1LICMS030329/01, entitled ''The National HCBS Quality Enterprise: Assisting States to Achieve Enhanced Quality in a Rebalanced Environment''.

The documents included the following:

- *Cover Letter*—The letter included the current project director's name and a brief summary of the proposed project, submitted and signed by the authorized representative for this grant.
- *SF–424a (Budget Information—Non Construction Programs)*—The applicant provided the total costs for the remainder of the project for $1.2 million, with a break out of those costs in Section B ''Budget Categories'' of the SF–424a form. The costs proposed were for the additional costs only (not the cumulative total costs of the entire grant).
- *Detailed Budget Narrative*—The applicant provided a detailed breakdown of the aggregate numbers for the budget recorded on the Standard Form 424a ''Budget Information—Non Constructions Programs,'' including allocations for each major set of activities or proposed tasks. The proposed budget justification clearly described each cost element in the related budget category.
- *Project Narrative*—The project narrative (approximately 3 pages in length) provided a concise and complete description of the proposed project. It contained the information necessary for CMS to fully understand the additional work of the project. It covered all aspects of the project requirements (see criteria for writing the project narrative—four major goals).

Authority: Section 6071 Deficit Reduction Act of 2005.

Dated: September 20, 2011.

Daniel F. Kane,

Chief Grants Management Officer, Office of Acquisition and Grants Management, Centers for Medicare & Medicaid Services.

[FR Doc. 2011–24986 Filed 9–27–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: State Council on Developmental Disabilities Program Performance Report.

OMB No.: 0980–0172.

Description: A Developmental Disabilities Council Program Performance Report is required by federal statute. Each State Developmental Disabilities Council must submit an annual report for the preceding fiscal year of activities and accomplishments. Information provided in the Program Performance Report will be used (1) in the preparation of the biennial Report to the President, the Congress, and the National Council on Disabilities and (2) to provide a national perspective on program accomplishments and continuing challenges. This information will also be used to comply with requirements in the Government Performance and Results Act of 1993.

Respondents: State Governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Council on Developmental Disabilities Program Performance Report ..	55	1	138	7,590

Estimated Total Annual Burden Hours: 7,590.

In compliance with the requirements of Section 506(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 Planning, Research and Evaluation, 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 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. 2011–24967 Filed 9–27–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0362]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by October 28, 2011.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* FDA Desk Officer, *Fax:* 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0139. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals—21CFR Parts 210 and 211 (OMB Control No. 0910–0139)—Extension

Under Section 501(a)(2)(B) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 351(a)(2)(B)), a drug is adulterated if the methods used in, or the facilities or controls used for, its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with Current Good Manufacturing Practices (CGMPs) to ensure that such drug meets the requirements of the FD&C Act as to safety, and has the identity and strength, and meets the quality and purity characteristics, which it purports or is represented to possess.

The FDA has the authority under Section 701(a) of the FD&C Act (21 U.S.C. 371(a)) to issue regulations for the efficient enforcement of the FD&C Act regarding CGMP procedures for manufacturing, processing, and holding drugs and drug products. The CGMP regulations help ensure that drug products meet the statutory requirements for safety and have their purported or represented identity, strength, quality, and purity characteristics. The information collection requirements in the CGMP regulations provide FDA with the necessary information to perform its duty to protect public health and safety. CGMP requirements establish accountability in the manufacturing and processing of drug products, provide for meaningful FDA inspections, and enable manufacturers to improve the quality of drug products over time. The CGMP recordkeeping requirements also serve preventive and remedial purposes and provide crucial information if it is necessary to recall a drug product.

The general requirements for recordkeeping under part 211 (21 CFR part 211) are set forth in § 211.180. Any production, control, or distribution record associated with a batch and required to be maintained in compliance with part 211 must be retained for at least one year after the expiration date of the batch and, for certain OTC drugs, three years after distribution of the batch (§ 211.180(a)).

Records for all components, drug product containers, closures, and labeling are required to be maintained for at least one year after the expiration date and three years for certain OTC products (§ 211.180(b)).

All part 211 records must be readily available for authorized inspections during the retention period (§ 211.180(c)), and such records may be retained either as original records or as true copies (§ 211.180(d)). In addition, 21 CFR 11.2(a) provides that ''for records required to be maintained but not submitted to the Agency, persons may use electronic records in lieu of paper records or electronic signatures in lieu of traditional signatures, in whole or in part, provided that the requirements of this part are met.'' To the extent this electronic option is used, the burden of maintaining paper records should be substantially reduced, as should any review of such records.

In order to facilitate improvements and corrective actions, records must be maintained so that data can be used for evaluating, at least annually, the quality standards of each drug product to determine the need for changes in drug product specifications or manufacturing or control procedures (§ 211.180(e)). Written procedures for these evaluations are to be established and include provisions for a review of a representative number of batches and, where applicable, records associated with the batch; provisions for a review of complaints, recalls, returned or salvaged drug products; and investigations conducted under § 211.192 for each drug product.

The specific recordkeeping requirements provided in table 1 of this document are as follows:

Section 211.34—Consultants advising on the manufacture, processing, packing, or holding of drug products must have sufficient education, training, and experience to advise on the subject for which they are retained. Records must be maintained stating the name, address, and qualifications of any consultants and the type of service they provide.

Section 211.67(c)—Records must be kept of maintenance, cleaning, sanitizing, and inspection as specified in §§ 211.180 and 211.182.

Section 211.68—Appropriate controls must be exercised over computer or related systems to assure that changes in master production and control records or other records are instituted only by authorized personnel.

Section 211.68(a)—Records must be maintained of calibration checks, inspections, and computer or related system programs for automatic, mechanical, and electronic equipment.

Section 211.68(b)—All appropriate controls must be exercised over all computers or related systems and control data systems to assure that changes in master production and control records or other records are instituted only by authorized persons.

Section 211.72—Filters for liquid filtration used in the manufacture, processing, or packing of injectable drug products intended for human use must not release fibers into such products.

Section 211.80(d)—Each container or grouping of containers for components or drug product containers or closures must be identified with a distinctive code for each lot in each shipment received. This code must be used in recording the disposition of each lot. Each lot must be appropriately identified as to its status.

Section 211.100(b)—Written production and process control procedures must be followed in the execution of the various production and process control functions and must be documented at the time of performance. Any deviation from the written procedures must be recorded and justified.

Section 211.105(b)—Major equipment must be identified by a distinctive identification number or code that must be recorded in the batch production record to show the specific equipment used in the manufacture of each batch of a drug product. In cases where only one of a particular type of equipment exists in a manufacturing facility, the name of the equipment may be used in lieu of a distinctive identification number or code.

Section 211.122(c)—Records must be maintained for each shipment received of each different labeling and packaging material indicating receipt, examination, or testing.

Section 211.130(e)—Inspection of packaging and labeling facilities must be made immediately before use to assure that all drug products have been removed from previous operations. Inspection must also be made to assure that packaging and labeling materials not suitable for subsequent operations have been removed. Results of inspection must be documented in the batch production records.

Section 211.132(c)—Certain retail packages of OTC drug products must bear a statement that is prominently placed so consumers are alerted to the specific tamper-evident feature of the package. The labeling statement is required to be so placed that it will be unaffected if the tamper-resistant feature of the package is breached or missing. If the tamper-evident feature chosen is one that uses an identifying characteristic, that characteristic is required to be referred to in the labeling statement.

Section 211.132(d)—A request for an exemption from packaging and labeling requirements by a manufacturer or packer is required to be submitted in the form of a citizen petition under 21 CFR 10.30.

Section 211.137—Requirements regarding product expiration dating and compliance with 21 CFR 201.17 are set forth.

Section 211.160(a)—The establishment of any specifications, standards, sampling plans, test procedures, or other laboratory control mechanisms, including any change in such specifications, standards, sampling plans, test procedures, or other laboratory control mechanisms, must be drafted by the appropriate organizational unit and reviewed and approved by the quality control unit. These requirements must be followed and documented at the time of performance. Any deviation from the written specifications, standards, sampling plans, test procedures, or other laboratory control mechanisms must be recorded and justified.

Section 211.165(e)—The accuracy, sensitivity, specificity, and reproducibility of test methods employed by a firm must be established and documented. Such validation and documentation may be accomplished in accordance with § 211.194(a)(2).

Section 211.166(c)—Homeopathic drug product requirements are set forth.

Section 211.173—Animals used in testing components, in-process materials, or drug products for compliance with established specifications must be maintained and controlled in a manner that assures their suitability for their intended use. They must be identified, and adequate records must be maintained showing the history of their use.

Section 211.180(e)—Written records required by part 211 must be maintained so that data can be used for evaluating, at least annually, the quality standards of each drug product to determine the need for changes in drug product specifications or manufacturing or control procedures. Written procedures must be established and followed for such evaluations and must include provisions for a representative number of batches, whether approved or unapproved or rejected, and a review of complaints, recalls, returned or salvaged drug products, and investigations conducted under § 211.192 for each drug product.

Section 211.180(f)—Procedures must be established to assure that the responsible officials of the firm, if they are not personally involved in or immediately aware of such actions, are notified in writing of any investigations, conducted under § 211.198, 211.204, or 211.208, any recalls, reports of inspectional observations issued, or any regulatory actions relating to good manufacturing practices brought by FDA.

Section 211.182—Specifies requirements for equipment cleaning records and the use log.

Section 211.184—Specifies requirements for component, drug product container, closure, and labeling records.

Section 211.186—Specifies master production and control records requirements.

Section 211.188—Specifies batch production and control records requirement.

Section 211.192—Specifies the information that must be maintained on the investigation of discrepancies found in the review of all drug product production and control records by the quality control staff.

Section 211.194—Explains and describes laboratory records that must be retained.

Section 211.196—Specifies the information that must be included in records on the distribution of the drug.

Section 211.198—Specifies and describes the handling of all complaint files received by the applicant.

Section 211.204—Specifies that records be maintained of returned and salvaged drug products and describes the procedures involved.

Written procedures, referred to here as standard operating procedures (SOPs), are required for many Part 211 records. The current SOP requirements were initially provided in a final rule published in the **Federal Register** of September 29, 1978 (43 FR 45014), and are now an integral and familiar part of the drug manufacturing process. The major information collection impact of SOPs results from their creation. Thereafter, SOPs need to be periodically updated. A combined estimate for routine maintenance of SOPs is provided in table 1 of this document. The 25 SOP provisions under Part 211 in the combined maintenance estimate include:

Section 211.22(d)—Responsibilities and procedures of the quality control unit;

Section 211.56(b)—Sanitation procedures;

Section 211.56(c)—Use of suitable rodenticides, insecticides, fungicides, fumigating agents, and cleaning and sanitizing agents;

Section 211.67(b)—Cleaning and maintenance of equipment;

Section 211.68(a)—Proper performance of automatic, mechanical, and electronic equipment;

Section 211.80(a)—Receipt, identification, storage, handling, sampling, testing, and approval or rejection of components and drug product containers or closures;

Section 211.94(d)—Standards or specifications, methods of testing, and methods of cleaning, sterilizing, and processing to remove pyrogenic properties for drug product containers and closures;

Section 211.100(a)—Production and process control;

Section 211.110(a)—Sampling and testing of in-process materials and drug products;

Section 211.113(a)—Prevention of objectionable microorganisms in drug products not required to be sterile;

Section 211.113(b)—Prevention of microbiological contamination of drug products purporting to be sterile, including validation of any sterilization process;

Section 211.115(a)—System for reprocessing batches that do not conform to standards or specifications, to insure that reprocessed batches conform with all established standards, specifications, and characteristics;

Section 211.122(a)—Receipt, identification, storage, handling, sampling, examination and/or testing of labeling and packaging materials;

Section 211.125(f)—Control procedures for the issuance of labeling;

Section 211.130—Packaging and label operations, prevention of mixup and cross contamination, identification and handling of filed drug product containers that are set aside and held in unlabeled condition, and identification of the drug product with a lot or control number that permits determination of the history of the manufacture and control of the batch;

Section 211.142—Warehousing;

Section 211.150—Distribution of drug products;

Section 211.160—Laboratory controls;

Section 211.165(c)—Testing and release for distribution;

Section 211.166(a)—Stability testing;

Section 211.167—Special testing requirements;

Section 211.180(f)—Notification of responsible officials of investigations, recalls, reports of inspectional observations, and any regulatory actions relating to good manufacturing practice;

Section 211.198(a)—Written and oral complaint procedures, including quality control unit review of any complaint involving specifications failures, and serious and unexpected adverse drug experiences;

Section 211.204—Holding, testing, and reprocessing of returned drug products; and

Section 211.208—Drug product salvaging.

In addition, the following regulations in parts 610 and 680 (21 CFR Parts 610 and 680) reference certain CGMP regulations in part 211: §§ 610.12(h), 610.13(a)(2), 610.18(d), 680.2(f), and 680.3(f). In table 1 of this document, the burden associated with the information collection requirements in these regulations is included in the burden estimates under §§ 211.165, 211.167, 211.188, and 211.194, as appropriate.

Although most of the CGMP provisions covered in this document were created many years ago, there will be some existing firms expanding into new manufacturing areas and startup firms that will need to create SOPs. As provided in table 1 of this document, FDA is assuming that approximately 100 firms will have to create up to 25 SOPs for a total of 2,500 records, and the Agency estimates that it will take 20 hours per recordkeeper to create 25 new SOPs for a total of 50,000 hours.

In the **Federal Register** of May 31, 2011 (76 FR 31342), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one comment that pertained to the information collection.

The comment, from a plasma protein therapies association, stated that data from their association members may be higher than FDA's estimates and provided some examples of differences between their numbers and FDA's estimates. The comment stated that table 1 in the notice provides averages, but does not give data range. The comment requested that FDA provide data ranges so they could better assess if their members' high data are factored into the Agency's averages.

The burden estimates in the 60-day notice were compiled by FDA personnel (including field personnel who visit sites and review records) familiar with the records and the time it takes to assemble and maintain these records. The estimates are not expressed in ranges of data. The burden estimates are published every 3 years in the **Federal Register** to give the public an opportunity to comment on the accuracy of the estimates. We appreciate that the comment informed us that their actual data differed from our estimates. However, for us to consider revising our estimates, we request that the comment

provide to the docket specific proposals on what the burden estimates should be for their members for the CFR sections and headings in table 1 of this notice.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours) [2]	Total hours
SOP maintenance (See list of 25 SOPs in the **SUPPLEMENTARY INFORMATION** section of this document)	4,184	1	4,184	25	104,600
New startup SOPs	100	25	2500	20	50,000
211.34	4,184	.25	1,046	30/60	523
211.67(c)	4,184	50	209,200	15/60	52,300
211.68	4,184	2	8,368	1	8,368
211.68(a)	4,184	10	41,840	30/60	20,920
211.68(b)	4,184	5	20,920	15/60	5,230
211.72	4,184	.25	1,046	1	1,046
211.80(d)	4,184	.25	1,046	6/60	105
211.100(b)	4, 184	3	12,552	2	25,104
211.105(b)	4,184	.25	1,046	15/60	262
211.122(c)	4,184	50	209,200	15/60	52,300
211.130(e)	4,184	50	209,200	15/60	52,300
211.132(c)	1,698	20	33,960	30/60	16,980
211.132(d)	1,698	.2	340	30/60	170
211.137	4,184	5	20,920	30/60	10,460
211.160(a)	4,184	2	8,368	1	8,368
211.165(e)	4,184	1	4,184	1	4,184
211.166(c)	4,184	2	8,368	30/60	4,184
211.173	1.077	1	1,077	15/60	269
211.180(e)	4,184	.2	837	15/60	209
211.180(f)	4,184	.2	837	1	837
211.182	4,184	2	8,368	15/60	2,092
211.184	4,184	3	12,552	30/60	6,276
211.186	4,184	10	41,840	2	83,680
211.188	4,184	25	104,600	2	209,200
211.192	4,184	2	8,368	1	8,368
211.194	4,184	25	104,600	30/60	52,300
211.196	4,184	25	104,600	15/60	26,150
211.198	4,184	5	20,920	1	20,920
211.204	4,184	10	41,840	30/60	20,920
Total	.....	.....	.....	.....	848,625

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format ''[number of minutes per response]/60''.

Dated: September 22, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–24991 Filed 9–27–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0212]

Draft Guidance for Industry: Applications for Premarket Review of New Tobacco Products; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Applications for Premarket Review of New Tobacco Products.'' The draft guidance is intended to assist persons submitting applications for new tobacco products under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). The draft guidance explains, among other things, for new tobacco product applications, who submits, when and how to submit, what information the FD&C Act requires applicants to submit, and what information FDA recommends that applicants submit.

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 written or electronic comments on the draft guidance by December 27, 2011.

ADDRESSES: Submit electronic comments on the draft guidance, including comments on the proposed collection of information, to *http://www.regulations.gov.*

Submit written comments on the draft guidance, including comments regarding the proposed collection of information, to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance document entitled ''Applications for Premarket Review of New Tobacco Products'' to the Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229. Send one self-addressed adhesive

label to assist that office in processing your request or include a fax number to which the draft guidance may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance:

James Flahive or Carol Drew, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229, 1–877–287–1373, *CTPRegulations@fda.hhs.gov.*

With regard to the proposed collection of information:

Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., P150–400B, Rockville, MD 20850, 301–796–5156, *daniel.gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance entitled ''Applications for Premarket Review of New Tobacco Products.'' This guidance, when finalized, will provide industry with information on how to submit an application for premarket review of a new tobacco product as required by section 910 of the FD&C Act (21 U.S.C. 387j). On June 22, 2009, the President signed the Tobacco Control Act (Pub. L. 111–31) into law. The Tobacco Control Act amends the FD&C Act and grants FDA authority to regulate the manufacture, marketing and distribution of tobacco products to protect public health generally and to reduce tobacco use by minors. Section 910 of the FD&C Act requires that FDA issue a market authorization order before a tobacco product may be introduced into interstate commerce when the tobacco product is new or modified in any way. Where a new tobacco product is not substantially equivalent to a tobacco product commercially marketed in the United States as of February 15, 2007, or exempt from the requirement to obtain a substantial equivalence determination under regulation, applicants must submit a premarket tobacco product application (PMTA) under section 910(b) of the FD&C Act and receive a marketing authorization order under section 910(c)(1)(A)(i) of the FD&C Act prior to marketing the product.

The draft guidance is intended to assist persons seeking a marketing authorization order under section 910 in submitting a PMTA. The guidance discusses, among other things, the statutory requirement to submit a PMTA, definitions, who submits a PMTA, when a PMTA should be submitted, how a PMTA should be submitted, how FDA will review a PMTA, contents of a PMTA, information to support a public health finding, exemptions for investigational use of new tobacco products, and confidentiality issues.

II. Significance of Guidance

FDA is issuing this draft guidance document consistent with FDA's good guidance practices regulations (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on ''Applications for Premarket Review of New Tobacco Products.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act (the PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Applications for Premarket Review of New Tobacco Products (OMB Control Number 0910–NEW).

FDA is announcing the availability of the draft guidance entitled ''Applications for Premarket Review of New Tobacco Products.'' This guidance, when finalized, will provide industry with information on how to submit an application for premarket review of new tobacco products as required by section 910 of the FD&C Act.

On June 22, 2009, the President signed the Tobacco Control Act into law. The Tobacco Control Act grants FDA authority to regulate the manufacture, marketing, and distribution of tobacco products to protect public health generally and to reduce tobacco use by minors. Section 910(a)(1) of the FD&C Act requires persons who either create a new tobacco product that was not commercially marketed in the United States as of February 15, 2007, or modify a tobacco product in any way after February 15, 2007, ''including a change in design, any component, any part, or any constituent, including a smoke constituent, or in the content, delivery, or form of nicotine, or any other additive or ingredient,'' to submit a premarket tobacco product application and obtain an order from FDA authorizing the marketing of the product before the product may be introduced or delivered for introduction into interstate commerce, unless the product has been shown to be substantially equivalent to a tobacco product commercially marketed in the United States as of February 15, 2007, or exempt from a substantial equivalence determination under regulation.

The draft guidance entitled ''Applications for Premarket Review of New Tobacco Products'' explains the requirements and provides recommendations for the contents of an application for premarket review of a new tobacco product including a cover letter, an executive summary, full reports of all investigations of health risks, a full statement of all components, ingredients, additives, and properties, and of the principle or principles of operation of such tobacco product, a full description of methods of manufacturing and processing, a listing of all manufacturing, packaging, and control sites for the product, an explanation of how the product complies with applicable tobacco product standards, samples and components; and proposed labeling. As part of the application, if an applicant does not submit information on any of

the previously mentioned items, they should include a statement indicating which information is not being submitted and an explanation of why the information is not being submitted.

FDA also encourages persons who would like to study their new tobacco product to meet with the Office of Science at the Center for Tobacco Products (CTP) to discuss their investigational plan prior to distributing the product for investigational purposes. The request for a meeting should be sent in writing to the Director of CTP's Office of Science and should include adequate information for FDA to assess the potential utility of the meeting and to identify FDA staff necessary to discuss proposed agenda items.

FDA is required to deny a PMTA and issue an order that the product may not be introduced or delivered for introduction into interstate commerce under section 910(c)(1)(A)(ii) of the FD&C Act if FDA finds that the manufacturer has not shown that the product is appropriate for the protection of the public health, the manufacturing methods, facilities, or controls do not conform to manufacturing regulations issued under section 906(e) (21 U.S.C. 387f(e)) of the FD&C Act, the proposed labeling is false or misleading, or the manufacturer has not shown that the product complies with any tobacco product standard in effect under section 907 of the FD&C Act (21 U.S.C. 387g).

Under section 902(6)(A) (21 U.S.C. 387b(6)(A)), a tobacco product is deemed adulterated if it is a new tobacco product and does not have an order in effect under section 910(c)(1)(A)(i) of the FD&C Act, as necessary under section 910(a) of the FD&C Act. Under section 301(a) of the FD&C Act (21 U.S.C. 331(a)), the introduction or delivery for introduction into interstate commerce of any adulterated tobacco product is a prohibited act. Violations of section 910 are subject to regulatory and enforcement action by FDA, including, but not limited to, seizure and injunction.

Description of respondents: The respondents to this collection of information are applicants who are responsible for creating and submitting new tobacco product premarket applications and who wish to obtain an FDA order to allow them to market their product.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Information collected and FD&C act section	Number of respondents	Number of responses per respondent	Total annual responses	Hours per response	Total burden hours
Obtaining an FDA order authorizing marketing of tobacco product (the application) Section 910(a)(1)(B)	20	1	20	5,000	100,000
Request for Meeting with CTP's Office of Science to discuss Investigational Plan	18	1	18	4	72
21 CFR 25.40 Preparation of an Environmental Assessment	20	1	20	12	240
Total Reporting Burden Hours					100,312

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA estimates that each respondent will take approximately 5,000 hours to complete the information required in table 1 of this document to obtain an order from FDA allowing the marketing of a new tobacco product. FDA's estimate includes anticipated burden for the writing of an application, including intracompany edits and approvals, of approximately 200 hours. In addition, FDA expects that conducting the necessary scientific investigations for a new tobacco product will require, on average, 4,800 hours. FDA also estimates the number of PMTA applications that FDA expects to receive annually will be 20.

FDA anticipates that 18 potential respondents to this collection of information may need to meet with CTP's Office of Science to discuss their investigational plans. To request this meeting, applicants must compile and submit information to FDA for meeting approval. FDA estimates that it will take approximately 4 hours to compile this information, for a total of 72 hours additional burden (18 respondents × 4 burden hours).

FDA also estimates that 20 potential respondents will take approximately 12 hours to prepare and submit an environmental assessment under part 25 (21 CFR part 25) in accordance with the requirements of § 25.40, as referenced in 21 CFR 1107.1(b)(9).

The total burden for this collection of information is estimated to be 100,312 hours ((20 respondents multiplied by 5,000 per response) plus (18 respondents multiplied by 4 hours per response) plus (20 respondents multiplied by 12 hours per response)). These burden estimates were computed using FDA staff expertise and by reviewing comments received from recent FDA information collections for other tobacco-related initiatives.

IV. 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.

V. Electronic Access

Persons with access to the Internet may obtain an electronic version of this guidance document at *http://www.regulations.gov* or *http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/default.htm.*

Dated: September 21, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–24989 Filed 9–27–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Cognitive Function in Chronic Disease Ancillary Studies.

Date: October 26, 2011.

Time: 1:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *ls38z@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 21, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–24826 Filed 9–27–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Vascular and Hematology Integrated Review Group, Molecular and Cellular Hematology.

Date: October 13–14, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Katherine M Malinda, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4140, MSC 7814, Bethesda, MD 20892, 301–435–0912, *Katherine_Malinda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Cell Biology.

Date: October 19–20, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David Balasundaram, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301–435–1022, *balasundaramd@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Motor Function, Speech and Rehabilitation Study Section.

Date: October 28, 2011.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The Mandarin Oriental, 1330 Maryland Avenue, SW., Washington, DC 20024.

Contact Person: Biao Tian, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7848, Bethesda, MD 20892, 301–402–4411, *tianbi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, RFA Panel: Understanding and Promoting Health Literacy.

Date: October 28, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Rebecca Henry, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3222, MSC 7808, Bethesda, MD 20892, 301–435–1717, *henryrr@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cancer Etiology Overflow.

Date: October 28, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Chicago Hotel, 505 North Michigan Avenue, Chicago, IL 60611.

Contact Person: Elaine Sierra-Rivera, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Review of Immunology AREA Grant Applications.

Date: October 28, 2011.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaylord National Resort, 201 Waterfront Street, National Harbor, MD 20745.

Contact Person: Calbert A Laing, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4210, MSC 7812, Bethesda, MD 20892, 301–435–1221, *laingc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, RFA–OD–11–004: Strengthening Behavioral and Social Science in Medical School Education (R25).

Date: October 28, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 22, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–24940 Filed 9–27–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Member SEP.

Date: October 6, 2011.

Time: 3:15 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: DoubleTree by Hilton Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ramesh Vemuri, PhD, Chief, Scientific Review Branch, National Institute On Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C–212, Bethesda, MD 20892, 301–402–7700, *rv23r@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel, Reproductive Hormones and the Brain II.

Date: November 9, 2011.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Bita Nakhai, PhD, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 22, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–24942 Filed 9–27–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Research Centers in Wound Healing.

Date: October 19, 2011.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN18K, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Brian R. Pike, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: September 22, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–24948 Filed 9–27–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Tumor Microenvironment Study Section, October 13, 2011, 8 a.m. to October 14, 2011, 5 p.m., Doubletree Hotel Washington, 1515 Rhode Island Ave, NW., Washington, DC 20005 which was published in the **Federal Register** on September 7, 2011, 76 FR 55400–55402.

The meeting will be held at the Hilton Alexandria Mark Center, 5000 Seminary Road, Alexandria, VA 22311. The meeting date and time remain the same. The meeting is closed to the public.

Dated: September 22, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–24943 Filed 9–27–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Listing of Members of the National Institutes of Health's Senior Executive Service 2011 Performance Review Board (PRB)

The National Institutes of Health (NIH) announces the persons who will serve on the NIH Senior Executive Service 2011 Performance Review Board. This action is being taken in accordance with Title 5, U.S.C., Section 4314(c)(4), which requires that members of performance review boards be appointed in a manner to ensure consistency, stability, and objectivity in performance appraisals and requires that notice of the appointment of an individual to serve as a member be published in the **Federal Register**.

The following persons will serve on the NIH Performance Review Board, which oversees the evaluation of performance appraisals of NIH Senior Executive Service (SES) members:

Mary Affeldt.
Colleen Barros, Chair.
Courtney Billet.
Michael Gottesman.
Sally Rockey.
Lawrence Tabak.
Samir Zakhari.

For further information about the NIH Performance Review Board, contact the Office of Human Resources, Workforce Relations Division, NIH, Building 31, Room B3C07, Bethesda, Maryland 20892, telephone 301–402–9203 (not a toll-free number).

Dated: September 21, 2011.

Francis S. Collins,

Director, National Institutes of Health.

[FR Doc. 2011–24944 Filed 9–27–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0087]

Privacy Act of 1974; Department of Homeland Security/U.S. Citizenship and Immigration Services—016 Electronic Immigration System-3 Automated Background Functions System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of

Homeland Security proposes to establish a new Department of Homeland Security system of records titled, ''Department of Homeland Security/U.S. Citizenship and Immigration Services—016 Electronic Immigration System-3 Automated Background Functions System of Records.'' This system of records will allow the Department of Homeland Security/U.S. Citizenship and Immigration Services to collect and maintain certain biographic information about individuals in the U.S. Citizenship and Immigration Services Electronic Immigration System and its legacy systems in order to detect duplicate and related accounts and identify potential national security concerns, criminality, and fraud to ensure that serious or complex cases receive additional scrutiny. Additionally, the Department of Homeland Security is issuing a Notice of Proposed Rulemaking elsewhere in the **Federal Register**, to exempt this system of records from certain provisions of the Privacy Act. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before October 28, 2011. This new system will be effective October 28, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0087 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: Donald K. Hawkins (202–272–8030), Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue NW., Washington, DC 20529. 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)/U.S. Citizenship and Immigration Services (USCIS) proposes to establish a new DHS system of records titled, ''DHS/USCIS–016 Electronic Immigration System-3 Automated Background Functions System of Records.''

DHS/USCIS is creating a new electronic environment known as the Electronic Immigration System (USCIS ELIS). USCIS ELIS allows individuals requesting a USCIS benefit to register online and submit certain benefit requests through the online system. This system will improve customer service; increase efficiency for processing benefits; better identify potential national security concerns, criminality, and fraud; and create improved access controls and better auditing capabilities.

DHS and USCIS are promulgating the regulation ''Immigration Benefits Business Transformation, Increment I'' (August 29, 2011, 76 FR 53764) to allow for USCIS to transition to an electronic environment. This regulation will assist USCIS in the transformation of its electronics operations by removing references and processes that inhibit the use of electronic systems or constrain USCIS's ability to respond to changing workloads, priorities, and statutory requirements.

Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependents, or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to the Applicant (Co-Applicants); and their attorneys and representatives accredited by the Board of Immigration Appeals (Representatives) may create individualized online accounts. These online accounts help Applicants and their Representatives file for benefits, track the status of open benefit requests, schedule appointments, change their addresses and contact information, and receive notices and notifications regarding their particular cases. Through USCIS ELIS, individuals may submit evidence electronically. Once an individual provides biographic information for one benefit request, USCIS ELIS uses that information to pre-populate any future benefit requests by the same individual. This eases the burden on an individual so he or she does not have to repeatedly type in the same information and also reduces the number of possible errors.

USCIS is publishing three System of Records Notices (SORNs) to cover the following three distinct processes of this new electronic environment and the privacy and security protections incorporated into USCIS ELIS:

1. *Temporary Accounts and Draft Benefit Requests:* The Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests SORN (DHS/USCIS–014) addresses temporary data provided by Applicants or Representatives. This temporary data includes temporary accounts for first-time Applicants and draft benefit request data from first-time Applicants, Applicants with permanent accounts, and Representatives. Applicants first interact with USCIS ELIS by creating a temporary account, setting notification preferences, and drafting the first benefit request. If a first-time Applicant does not formally submit a benefit request within 30 days of opening the temporary account, USCIS ELIS automatically deletes the temporary account and all draft benefit request data. If a first-time Applicant submits the benefit request within 30 days, USCIS ELIS automatically changes the status of the account from temporary to permanent. Applicants with permanent USCIS ELIS accounts or Representatives may also draft benefit requests. USCIS ELIS deletes all draft benefit requests if they are not submitted within 30 days of initiation.

2. *Account and Case Management:* The Electronic Immigration System-2 Account and Case Management SORN (DHS/USCIS–015) addresses the activities undertaken by USCIS after Applicants or Representatives submit a benefit request. USCIS ELIS uses information provided on initial and subsequent benefit requests and subsequent collections through the Account and Case Management process to create or update USCIS ELIS accounts; collect any missing information; manage workflow; assist USCIS adjudicators as they make a benefit determination; and provide a repository of data to assist with future benefit requests. In addition, USCIS ELIS processes and tracks all actions related to the case, including scheduling appointments and issuing decision notices and/or a proofs of benefit.

3. *Automated Background Functions:* The Electronic Immigration System-3 Automated Background Functions SORN (DHS/USCIS–016) addresses the actions USCIS ELIS takes to detect duplicate and related accounts and identify potential national security concerns, criminality, and fraud to

ensure that serious or complex cases receive additional scrutiny.

Electronic Immigration System-3 Automated Background Functions (USCIS ELIS Automated Background Functions) uses biographic information stored in Electronic Immigration System-2 Account and Case Management (USCIS ELIS Account and Case Management) to run a series of automated rules on that information, generating results, and assigning confidence and severity levels to the results to assist USCIS personnel reviewing the results. The results of all USCIS ELIS Automated Background Functions are returned to the account or case and are used and shared according to the Electronic Immigration System-2 Account and Case Management SORN. USCIS ELIS Automated Background Functions use this information to detect duplicates and related records, and to identify national security concerns, criminality, and fraud to ensure that serious or complex cases receive additional scrutiny.

Detect Duplicates and Related Records

In order to identify duplicate USCIS ELIS accounts, other USCIS records pertaining to the individual, and relationships among individuals with USCIS records, USCIS ELIS Automated Background Functions maintain a copy of biographical information from USCIS ELIS accounts and cases (described in the Electronic Immigration System-2 Account and Case Management SORN), as well as the following legacy USCIS systems: Alien File/Central Index System; Benefits Processing of Applicants other than Petitions for Naturalization, Refugee Status, and Asylum (CLAIMS 3); Computer Linked Application Information Management System (CLAIMS 4); Refugees, Asylum, and Parole System (RAPS); and Fraud Detection and National Security Data System (FDNS–DS).

Background, National Security, and Criminality Checks

USCIS ELIS Automated Background Functions automatically perform background checks when new information is received by querying several DHS, Federal Bureau of Investigation (FBI), and other agencies'' law enforcement and/or immigration systems, as appropriate, to identify national security and/or law enforcement concerns.

Identification of Possible Fraud

Results from the de-duplication and relationship analysis and background checks are run against a set of USCIS analyst-derived rules to assign confidence levels indicating how strongly the information in one record matches another record, as well as a severity level indicating possible criminal, national security, or fraudulent activity. Each result will have a summary which will include the rule used to produce the result and any alerts or flags to control subsequent processing. Once the rules have returned results and confidence and severity levels are assigned, USCIS ELIS Automated Background Functions will route the case to the appropriate USCIS personnel based on the nature of the results.

Information is shared outside of DHS to perform system queries as part of USCIS ELIS Automated Background Functions. USCIS shares biographic information with the Department of State (DOS) and receives visa information in return. USCIS provides biometric and biographic information to, and receives criminal history information from, the FBI. USCIS provides biographic information to, and receives biographic and immigration court data from, the Department of Justice (DOJ) Executive Office of Immigration Review (EOIR).

The proposed routine uses are compatible with the purpose of the original collection. The routine uses have been tailored to ensure that the information within the system is shared through USCIS Automated Background Functions when an individual requests a benefit. Generally, all other sharing will occur out of the Electronic Immigration System-2 Account and Case Management SORN. However, pursuant to (b)(1) of the Privacy Act, this information may be shared with other parts of DHS if the individual has a need to know the information pursuant to his mission within the Department.

USCIS collects, uses, and maintains benefit request eligibility results pursuant to 8 U.S.C. 1103 and 8 U.S.C. 1225.

Consistent with DHS's information sharing mission, information stored in USCIS ELIS Automated Background Functions may be shared with other DHS components, as well as appropriate federal, state, local, tribal, territorial, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need-to-know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

DHS is issuing a Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2), elsewhere in the **Federal Register**. Additionally, many of the functions in this system require retrieving records from law enforcement systems. Where a record received from a law enforcement system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule. This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of DHS/USCIS–016 Electronic Immigration System-3 Automated Background Functions 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/USCIS–016

SYSTEM NAME:

DHS/USCIS–016 Electronic Immigration System-3 Automated Background Functions.

SECURITY CLASSIFICATION:

Unclassified, sensitive, for official use only, law enforcement sensitive.

SYSTEM LOCATION:

Records are maintained at the United States Citizenship and Immigration

Services Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

USCIS ELIS Automated Background Functions stores and/or uses information about individuals who previously received or petitioned for benefits in USCIS ELIS, or have information in USCIS legacy systems described under ''records source,'' under the Immigration and Nationality Act (INA), as amended. These individuals include: Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependants or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to the Applicant (Co-Applicants); attorneys and representatives accredited by the Board of Immigration Appeals (Representatives); and individuals that assist in the preparation of the benefit request.

CATEGORIES OF RECORDS IN THE SYSTEM:

- ELIS Account Number.
- Name.
- Date of Birth.
- Place of Birth.
- Country of Citizenship.
- Gender.
- Social Security Number, if applicable.
- Alien Number.
- Marital Status.
- Family Relationships.
- Current and Past Address Information.
- Current and Past Telephone Information.
- Case ID Number (specific to the benefit application).
- Application Type.
- Passport Information.
- Drivers License Number.
- E-mail Address.
- Eye Color.
- Hair Color.
- Height.
- Attorney or Accredited Representative Information.
- Employment Information.
- FBI Number, if available.
- Entry/Exit Data.
- Rules used to generate results, assign confidence and severity levels, assign system flags, and route cases.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

8 U.S.C. 1103 and 8 U.S.C. § 1225.

PURPOSE(S):

The purpose of USCIS ELIS Automated Background Functions is to assist USCIS personnel in detecting duplicate and related accounts; identifying potential national security concerns, criminality, and fraud; as well as ensuring that serious or complex cases receive additional scrutiny.

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 DOJ, including U.S. Attorney Offices, or other federal agencies 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 the Department of Justice (DOJ) Executive Office of Immigration Review (EOIR) in the processing of petitions or applications for benefits under INA, and all other immigration and nationality laws including treaties and reciprocal agreements.

H. To DOS in the processing of petitions or applications for benefits under INA, and all other immigration and nationality laws including treaties and reciprocal agreements.

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 data elements listed above or combination thereof.

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:

USCIS is currently in negotiations with NARA for approval of the USCIS ELIS data retention and archiving plan. USCIS proposes retaining the copy of biographic data stored in USCIS ELIS Automated Background Functions as long as the records exist in the source system. However, USCIS is reviewing its needs for the information as it transitions to a fully electronic environment and may amend its retention, as needed.

USCIS proposes that, in compliance with NARA General Records Schedule 24, section 6, ''User Identification, Profiles, Authorizations, and Password Files,'' internal user accounts will be destroyed or deleted six years after the user account is terminated, or when no longer needed for investigative or security purposes, whichever is later.

SYSTEM MANAGER AND ADDRESS:

The DHS system manager is the Chief, Records Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it may maintain law enforcement information. However, DHS/USCIS will consider individual requests to determine whether or not information may be released. Thus, 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 National Records Center, FOIA/PA Office, P.O. Box 648010, Lee's Summit, MO 64064–8010. Specific FOIA contact information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are retrieved through, but not stored in, the USCIS ELIS Automated Background Functions from the following USCIS, DHS, and other federal agency systems of records:

- DHS/USCIS–015—Electronic Immigration System-2—Account and Case Management System of Records;
- DHS/USCIS–001—Alien File, Index, and National File Tracking System of Records;
- DHS/USCIS–007—Benefits Information System (BIS);
- DHS/USCIS–010—Asylum Information and Pre-Screening;
- DHS/USCIS–006—Fraud Detection and National Security Data System (FDNS–DS);
- DHS/CBP–011—U.S. Customs and Border Protection TECS;
- DHS/ICE–001—Student and Exchange Visitor Information System (SEVIS);
- DHS/ICE–011—Immigration Enforcement Operational Records System (ENFORCE);
- DHS/USVISIT–001—Arrival and Departure Information System (ADIS);
- DHS/USVISIT–0012—DHS Automated Biometric Identification System (IDENT);
- Department of State Consular Consolidated Database (CCD);
- JUSTICE/EOIR–001—Records and Management Information System;
- JUSTICE/FBI–002—FBI Central Records System; and
- JUSTICE/FBI–009—Fingerprint Identification Records System (FIRS).

In order to resolve identity and relationships, records stored in USCIS ELIS Automated Background Functions are obtained from the following USCIS systems of records: Electronic Immigration System-2 Account and Case Management; Alien File, Index, and National File Tracking; Fraud Detection and National Security Data System; Benefits Information System; and Asylum Information and Pre-Screening.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Additionally, many of the functions in this system require retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule.

Dated: September 15, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–24933 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0084]

Privacy Act of 1974; Department of Homeland Security/U.S. Citizenship and Immigration Services–014 Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new Department of Homeland Security system of records titled, ''Department of Homeland Security/U.S. Citizenship and Immigration Services–014 Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests System of Records.'' This system of records allows the Department of Homeland Security/U.S. Citizenship and Immigration Services to collect and maintain records on an individual as he or she creates a temporary electronic account and/or drafts a benefit request for submission through U.S. Citizenship and Immigration Services Electronic Immigration System. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before October 27, 2011. This new system will be effective October 27, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0084 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: Donald K. Hawkins (202–272–8000), Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529. 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) U.S. Citizenship and Immigration Services (USCIS) proposes to establish a new DHS system of records titled, ''DHS/USCIS–014 Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests System of Records.''

DHS/USCIS is creating a new electronic environment known as the Electronic Immigration System (USCIS ELIS). USCIS ELIS allows individuals requesting a USCIS benefit to register online and submit certain benefit requests through the online system. This system will improve customer service; increase efficiency for processing benefits; better identify potential national security concerns, criminality, and fraud; and create improved access controls and better auditing capabilities.

DHS and USCIS are promulgating the regulation ''Immigration Benefits Business Transformation, Increment I'' (August 29, 2011, 76 FR 53764) to allow USCIS to transition to an electronic environment. This regulation will assist USCIS in the transformation of its operations by removing references and processes that inhibit the use of electronic systems or constrain USCIS's ability to respond to new requirements.

Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependents, or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to an Applicant (Co-Applicants); and their attorneys and representatives accredited by the Board of Immigration Appeals (Representatives) may create individualized online accounts. These online accounts help Applicants and their Representatives file for benefits, track the status of open benefit requests, schedule appointments, change their addresses and contact information, and receive notices and notifications regarding their cases. Through USCIS ELIS, individuals may submit evidence electronically. Once an individual provides biographic information in one benefit request, USCIS ELIS uses that information to pre-populate any future benefit requests. This eases the burden on an individual so he or she does not have to repeatedly type in the same information. USCIS is publishing three SORNs to cover the three distinct phases of the benefit request process of this new electronic environment and the privacy and security protections incorporated into USCIS ELIS. The SORNs address the new electronic environment in the following different processes:

1. Temporary Accounts and Draft Benefit Requests: The Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests SORN (DHS/USCIS–014) addresses temporary data provided by Applicants or Representatives. This temporary data includes temporary accounts for first-time Applicants and draft benefit request data from first-time Applicants, Applicants with permanent accounts, and Representatives. Applicants first interact with USCIS ELIS by creating a temporary account, setting notification preferences, and drafting the first benefit request. If a first-time Applicant does not formally submit a benefit request within 30 days of opening the temporary account, USCIS ELIS deletes the temporary account and all draft benefit request data. If a first-time Applicant submits the benefit request within 30 days, USCIS ELIS changes the status of the account from temporary to permanent. Applicants with permanent USCIS ELIS accounts or Representatives may also draft benefit requests. USCIS ELIS deletes all draft benefit requests if they are not submitted within 30 days of initiation.

2. Account and Case Management: The Electronic Immigration System-2 Account and Case Management SORN (DHS/USCIS–015) addresses the activities undertaken by USCIS after Applicants or Representatives submit a benefit request. USCIS ELIS uses information provided on initial and subsequent benefit requests and subsequent collections through the Account and Case Management process to create or update USCIS ELIS accounts; collect any missing information; manage workflow; assist USCIS adjudicators as they make a benefit determination; and provide a repository of data to assist with future benefit requests. In addition, USCIS ELIS processes and tracks all actions related to the case, including scheduling appointments and issuing decision notices and/or proofs of benefit.

3. Automated Background Functions: The Electronic Immigration System-3 Automated Background Functions SORN (DHS/USCIS–016) addresses the actions USCIS ELIS takes to detect duplicate and related accounts and identify potential national security concerns, criminality, and fraud to ensure that serious or complex cases receive additional scrutiny.

This SORN addresses the USCIS ELIS temporary account process for first-time Applicants in USCIS ELIS and the draft benefit request process for all Applicants and Representatives. Because USCIS ELIS collects this information before a benefit request is submitted, USCIS does not have an official need-to-know the information in the drafted benefit request. USCIS is segregating temporary account and draft

benefit request information from permanent information in USCIS ELIS and preventing USCIS personnel (aside from USCIS ELIS System Administrators as part of their system maintenance duties) from viewing this temporary data until the Applicant or Representative submits the benefit request. USCIS will purge this information from USCIS ELIS if the Applicant or Representative does not submit the benefit request within 30 days of initiation. If the Applicant submits the benefit request, USCIS will convert the temporary account to a permanent account and process the benefit request information according to the guidelines set forth in the Electronic Immigration System-2 Account and Case Management SORN and Electronic Immigration System-3 Automated Background Functions SORN.

Temporary Accounts

USCIS ELIS creates temporary accounts for Applicants that have not previously submitted a benefit request through USCIS ELIS. These temporary accounts permit the first-time Applicant to log in to USCIS ELIS, set notification preferences, and draft a benefit request. If no benefit request is submitted within 30 days of initiation, USCIS ELIS deletes the temporary account. This minimizes the time USCIS ELIS retains personally identifiable information (PII) about individuals that have no pending benefit requests with USCIS, while still giving Applicants time to draft and submit a benefit request. If the Applicant submits a benefit request within the time allotted, USCIS ELIS will convert the temporary account to a permanent account and treat it according to the Electronic Immigration System-2 Account and Case Management SORN and Electronic Immigration System-3 Automated Background Functions SORN.

Draft Benefit Requests

USCIS ELIS retains benefit requests drafted by Applicants or Representatives for 30 days from initiation to further minimize the PII retained by USCIS ELIS. This information is not accessible by USCIS personnel (aside from system administrators for system maintenance) and will only be shared internally for system maintenance purposes and externally to reduce the harm to individuals in the event the system is compromised. However, once a benefit request has been formally submitted to USCIS, the information will be retained and used according to the Electronic Immigration System-2 Account and Case Management SORN and Electronic Immigration System-3 Automated Background Functions SORN in order to maintain USCIS ELIS accounts and determine eligibility for requested benefits.

USCIS ELIS collects information previously collected on different forms. In the first release of USCIS ELIS, USCIS collects information from the following forms:

- I–90—Application to Replace Permanent Residence Card (1615–0082), 08/31/12;
- I–129—Petition for a Nonimmigrant Worker (1615–0009), 10/31/13;
- I–131—Application for Travel Document (1615–0013), 03/31/12;
- I–140—Immigrant Petition for Alien Worker (1615–0015), 01/31/13;
- I–539—Application to Extend/Change Nonimmigrant Status (1615–0003), 02/29/12;
- I–539—Application to Extend/Change Nonimmigrant Status (On-Line Application) (Pending);
- I–765—Application for Employment Authorization (1615–0040), 09/30/11;
- I–821—Application for Temporary Protected Status (1615–0043), 10/31/13;
- I–907—Request for Premium Processing Service (1615–0048), 08/31/11;
- AR–11—Alien Change of Address Card System (1615–0007), 09/30/11; and
- G–28 Notice of Entry of Appearance as Attorney or Accredited Representative (1615–0105), 04/30/12.

Additional forms from which information will be collected will be posted to the USCIS ELIS website as the system develops.

USCIS collects, uses, and maintains temporary account and draft benefit request information pursuant to the Immigration and Nationality Act of 1952, Public Law No. 82–414, sections 101 and 103, as amended.

This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/USCIS–014 Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests 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/USCIS–014

SYSTEM NAME:

DHS/USCIS–014 Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests System of Records.

SECURITY CLASSIFICATION:

Unclassified .

SYSTEM LOCATION:

Records are maintained at the USCIS Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests (USCIS ELIS Temporary Accounts and Draft Benefit Requests) stores and/or uses information about individuals who receive or petition for benefits under the Immigration and Nationality Act, as amended. These individuals include: Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependents, or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to an Applicant (Co-Applicants); attorneys and Board of Immigration Appeals accredited representatives (Representatives); and individuals that assist in the preparation of the benefit request.

CATEGORIES OF RECORDS IN THE SYSTEM:

Temporary USCIS ELIS account information includes the following from all of the categories of individuals above. If an Applicant or Representative formally submits a benefit request within the 30-day window, USCIS proposes converting the temporary account to a permanent USCIS ELIS

account and retaining the information according to the Electronic Immigration System-2 Account and Case Management SORN and Electronic Immigration System-3 Automated Background Functions SORN. An Applicant's temporary USCIS ELIS account registration information includes the following:

- Valid e-mail address
- Password
- Challenge questions and answers
- Telephone Number (optional)

All benefit requests about the Applicant or Co-Applicant includes the following information:

- Alien Registration Number(s).
- Full name and any alias(es) used.
- Physical and mailing address(es).
- Immigration status.
- Date of birth.
- Place of birth (city, state, and country).
- Country of citizenship.
- Gender.
- Contact information (Phone number(s), E-mail address).
- Military status.
- Government-issued identification (*e.g.* passport, driver's license):
  - document type.
  - issuing organization.
  - document number.
  - expiration date.
- Benefit requested.
- IP Address.
- Browser information.
- USCIS ELIS account number (for returning Applicants).

The following information may be requested for benefit-specific eligibility:

- Arrival/Departure Information.
- Family Relationships (*e.g.,* Parent, Spouse, Sibling, Child, Other Dependents, etc., as well as polygamy, custody, guardianship, and other relationship issues).
- USCIS Receipt/Case Number.
- Personal Background Information (e.g., involvement with national security threats, Communist party, torture, genocide, killing, injuring, forced sexual contact, limiting or denying others religious beliefs; service in military or other armed groups; work in penal or detention systems, weapons distribution, combat training, etc.).
- Health Information (e.g., communicable disease, physical or mental disorder, prostitution, drug abuse, etc.).
- Education History.
- Work History.
- Financial Information (income, expenses, scholarships, savings, assets, property, financial support, supporter information, life insurance, debts, encumbrances, etc.).
- Social Security Number, if applicable.
- Supporting documentation as necessary (i.e. Birth Certificate).
- Criminal Records.

Preparer information includes:

- Name.
- Organization.
- Physical and Mailing Addresses.
- Phone and Fax Numbers.
- Paid/Not Paid.
- Relationship to Applicant.

Representative information includes:

- Name.
- Law Firm/Recognized Organization.
- Physical and Mailing Addresses.
- Phone and Fax Numbers.
- E-mail Address.
- Attorney Bar Card Number or Equivalent.
- BAR Membership.
- Accreditation Date.
- BIA Representative Accreditation Expiration Date.
- Law Practice Restriction Explanation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Immigration and Nationality Act of 1952, Public Law 82–414, sections 101 and 103, as amended.

PURPOSE(S):

The purpose of the system collecting this information is to provide an Applicant with a temporary account so that he or she may submit a benefit request through USCIS ELIS for the first time. All draft benefit request information is collected to assist the Applicant or Representative in providing all of the information necessary to request a benefit. If a first-time Applicant does not formally submit a benefit request within 30 days of opening the temporary account, the information will be deleted. If an Applicant or Representative formally submits a benefit request within the 30-day window, USCIS proposes converting the temporary account to a permanent USCIS ELIS account and retaining the information according to the USCIS ELIS Account and Case Management SORN and USCIS ELIS Automated Background Functions SORN.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

A. 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, 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 relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and/or 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.

B. 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.

If a benefit request has been submitted to USCIS within 30 days of initiation, the information will become permanent and shared according to the routine uses listed in the Electronic Immigration System-2 Account and Case Management SORN and Electronic Immigration System-3 Automated Background Functions SORN in order to maintain USCIS ELIS accounts and determine eligibility for requested benefits.

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 and/or tape to maintain a real-time copy of the data for disaster recovery purposes. Real-time copies of data are deleted at the same time as the original data.

RETRIEVABILITY:

Records may be retrieved by any of the data elements listed above or combination thereof.

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:

USCIS has submitted to the National Archives and Records Administration (NARA) a retention schedule for these records. USCIS proposes that information collected for an Applicant's temporary account and all draft benefit requests will be retained for 30 days after initiation. If a first-time Applicant does not formally submit a benefit request within 30 days of opening the temporary account, the information will be deleted. If an Applicant or Representative formally submits a benefit request within the 30-day window, USCIS proposes converting the temporary account to a permanent USCIS ELIS account and retaining the information according to the Electronic Immigration System-1 Account and Case Management SORN and Electronic Immigration System-2 Automated Background Functions SORN.

SYSTEM MANAGER AND ADDRESS:

The DHS system manager is the Chief, Records Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may log in to USCIS ELIS to amend their information within the 30-day window. If they submit a benefit request, the information will still be available by logging in to their USCIS ELIS account and may be amended through the processes described in the USCIS ELIS Account and Case Management SORN and USCIS ELIS Automated Background Functions SORN.

Because of the temporary nature of this data, records will not likely be available for FOIA requests. However, individuals are free to request records pertaining to them by submitting a request in writing to the National Records Center, FOIA/PA Office, P.O. Box 648010, Lee's Summit, MO 64064–8010. Specific FOIA contact information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from the Applicant or his or her Representative.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: September 15, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–24936 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0090]

Privacy Act of 1974; Department of Homeland Security Federal Emergency Management Agency—012 Suspicious Activity Reporting System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new system of records titled, ''Department of Homeland Security/Federal Emergency Management Agency—012 Suspicious Activity Reporting System of Records.'' This system of records allows the Department of Homeland Security/Federal Emergency Management Agency to collect, maintain, and retrieve records on individuals who report suspicious activities, individuals reported as being involved in suspicious activities, and individuals charged with the analysis and appropriate handling of suspicious activity reports. Additionally, the Department of Homeland Security/Federal Emergency Management Agency is issuing a Notice of Proposed Rulemaking elsewhere in the **Federal Register** to exempt this system of records from certain provisions of the Privacy Act. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before October 27, 2011. This new system will be effective October 27, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0090 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, (202–646–3323), Acting Privacy Officer, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC 20478. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) proposes to establish a new DHS/FEMA system of records titled, ''DHS/FEMA—012 Suspicious Activity Reporting System of Records.''

FEMA's mission is to ''support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.'' FEMA will collect, maintain, and retrieve records on individuals who report suspicious activities, individuals reported as being involved in suspicious activities, and individuals charged with the analysis and appropriate handling of suspicious activity reports. FEMA's Office of the Chief Security Officer (OCSO), Fraud and Investigations Unit, manages this process. To reduce any risk of unauthorized access, FEMA SARs are secured in a room monitored by FEMA OCSO special agents and analysts.

FEMA SARs may shared with federal, state, local, and tribal jurisdictions that hold the responsibility of investigating suspicious activities within their jurisdictions. FEMA SARs that do not have a nexus to terrorism or hazards to homeland security, as determined by FEMA OCSO special agents or analysts, are forwarded to the appropriate jurisdiction, such as sheriff offices, county/city police, and state police. FEMA SARs that have a nexus to terrorism or hazards to homeland security, as determined by FEMA OCSO special agents or analysts, are shared with the Federal Bureau of Investigations (FBI) Joint Terrorism Task Force (JTTF), Federal Protective Service, and/or other federal agencies required to investigate and respond to terrorist threats or hazards to homeland security.

FEMA's SAR process is authorized and governed by 44 CFR Chapter 2 ''Delegation of Authority;'' 42 U.S.C. 5196(d); Executive Orders 12333 and 13388; 40 U.S.C. 1315(b)(2)(F); 6 U.S.C. 314; The Homeland Security Act of 2002, as amended; the Intelligence Reform and Terrorism Prevention Act of 2004, as amended; the National Security Act of 1947, as amended; and FEMA Manual 1010–1 ''Federal Emergency Management Agency Missions and Functions.''

Consistent with DHS's information sharing mission, information stored in the DHS/FEMA—012 Suspicious Activity Reporting System of Records may be shared with other DHS components, as well as appropriate federal, state, local, tribal, territorial, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) elsewhere in the **Federal Register** to exempt this system of records from certain provisions of the Privacy Act. This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals'' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/FEMA—12 Suspicious Activity Reporting 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

Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA)—012

SYSTEM NAME:

DHS FEMA—012 Suspicious Activity Reporting.

SECURITY CLASSIFICATION:

For official use only (FOUO) and law enforcement sensitive (LES).

SYSTEM LOCATION:

Records are maintained at FEMA Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who report suspicious activities, individuals reported as being involved in suspicious activities, and individuals charged with the analysis and appropriate handling of suspicious activity reports.

CATEGORIES OF RECORDS IN THE SYSTEM:

- Case/incident number;
- Name (first, middle, and last);
- Address (number, street, apartment, city, and state);
- Age;
- Sex;
- Race;
- Signature (investigator, analyst, or LEO);
- Jurisdiction;
- Injury code if applicable;
- Telephone numbers (home, business, or cell);
- Other contact information (*e.g.,* email address);
- Property information (name, quantity, serial number, brand name, model, value, year, make, color, identifying characteristics, and/or registration information).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

44 CFR Chapter 2 ''Delegation of Authority;'' 42 U.S.C. 5196(d); Executive Orders 12333 and 13388; 40 U.S.C. 1315(b)(2)(F); 6 U.S.C. 314; The Homeland Security Act of 2002, as amended; the Intelligence Reform and Terrorism Prevention Act of 2004, as amended; the National Security Act of 1947, as amended; and FEMA Manual 1010–1 ''Federal Emergency Management Agency Missions and Functions.''

PURPOSE(S):

The purpose of this system is to collect, investigate, analyze, and report

suspicious activities to the Federal Bureau of Investigations (FBI) Joint Terrorism Task Force (JTTF), Federal Protective Service, and/or other federal, state, or local agencies required to investigate and respond to terrorist threats or hazards to homeland security.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including U.S. Attorney Offices, or other federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or other federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To an appropriate federal, state, tribal, local, international counterterrorism agencies where DHS becomes aware of an indication of a threat or potential threat to security, and where such use is to assist in counterterrorism efforts.

I. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life, property or other vital interests of a data subject and disclosure is proper and consistent with the official duties of the person making the disclosure.

J. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD-ROM.

RETRIEVABILITY:

Records may be retrieved by case/incident number, name, address, and/or date.

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:

Pursuant to National Archives and Records Administration (NARA) Schedule Number N1–311–99–6, Items 1, 2, and 3, files containing information or allegations which are of an investigative nature but do not relate to a specific investigation are destroyed when five years old. Investigative case files that involve allegations made against senior agency officials, attract significant attention in the media, attract congressional attention, result in substantive changes in agency policies and procedures, or are cited in the OIG's periodic reports to Congress are cut off when the case is closed, retired to the Federal Records Center (FRC) 5 years after cutoff, and then transferred to NARA 20 years after cutoff. All other investigative case files except those that are unusually significant for documenting major violations of criminal law or ethical standards by agency officials or others are placed in inactive files when case is closed, cut

off at the end of fiscal year, and destroyed 10 years after cutoff.

SYSTEM MANAGER AND ADDRESS:

Office of the Chief Security Officer, Fraud and Investigation Unit, 1201 Maryland Avenue, SW., Washington, DC 20024.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, DHS/FEMA will consider individual requests to determine whether or not information may be released. Thus, 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 Chief of the FEMA Disclosure Branch whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from individuals who report suspicious activities, individuals reported as being involved in suspicious activities, and individuals charged with the analysis and appropriate handling of suspicious activity reports, commercially available systems, and also from other federal, state, and local law enforcement agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a (k)(2).

Dated: September 9, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–24934 Filed 9–27–11; 8:45 am]

BILLING CODE 9110–17–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0085]

Privacy Act of 1974; Department of Homeland Security/U.S. Citizenship and Immigration Services 015 Electronic Immigration System-2 Account and Case Management System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new Department of Homeland Security system of records titled, ''Department of Homeland Security/U.S. Citizenship and Immigration Services 015 Electronic Immigration System-2 Account and Case Management System of Records.'' This system of records will allow the Department of Homeland Security/U.S. Citizenship and Immigration Services to collect and maintain records on an individual after he or she submits a benefit request and/or updates account information to create or update U.S. Citizenship and Immigration Services Electronic Immigration System accounts; gather any missing information; manage workflow; assist U.S. Citizenship and Immigration Services in making a benefit determination; and provide a repository of data to assist with the efficient processing of future benefit requests. U.S. Citizenship and Immigration Services Electronic Immigration System-2 Account and Case Management process will also be used to process and track all actions related to a particular case, including scheduling appointments and issuing decision notices and/or proofs of benefit. Additionally, the Department of Homeland Security is issuing a Notice of Proposed Rulemaking elsewhere in the **Federal Register** , to exempt this system of records from certain provisions of the Privacy Act. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before October 27, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011-0085 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: Donald K. Hawkins (202–272–8000), Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529.

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) U.S. Citizenship and Immigration Services (USCIS) proposes to establish a new DHS system of records titled, ''DHS/USCIS–015 Electronic Immigration System-2 Account and Case Management System of Records.''

DHS and USCIS are promulgating the regulation ''Immigration Benefits Business Transformation, Increment I'' (August 29, 2011, 76 FR 53764) to allow for USCIS to transition to an electronic environment. This regulation will assist USCIS in the transformation of its operations by removing references and processes that inhibit the use of electronic systems or constrain USCIS's ability to respond to changing workloads, priorities, or statutory requirements.

DHS/USCIS is creating a new electronic environment known as the Electronic Immigration System (USCIS ELIS). USCIS ELIS allows individuals requesting a USCIS benefit to register online and submit certain benefit requests through the online system. This system will improve customer service; increase efficiency for processing benefits; better identify potential national security concerns, criminality, and fraud; and create improved access controls and better auditing capabilities.

Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependents, or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to an Applicant (Co-Applicants); and their attorneys and representatives accredited by the Board of Immigration Appeals (Representatives) may create individualized online accounts. These online accounts help Applicants and their Representatives file for benefits, track the status of open benefit requests, schedule appointments, change their addresses and contact information, and receive notices and notifications regarding their particular cases. Through USCIS ELIS, individuals may submit evidence electronically. Once an individual provides biographic information for one benefit request, USCIS ELIS uses that information to pre-populate any future benefit requests by the same individual. This eases the burden on an individual so he or she does not have to repeatedly type in the same information and also reduces the number of possible errors. USCIS is publishing three SORNs to cover the three distinct phases of the benefit request process of this new electronic environment and the privacy and security protections incorporated into USCIS ELIS. The SORNs address the new electronic environment in the following different processes:

1. *Temporary Accounts and Draft Benefit Requests:* The Electronic Immigration System-1Temporary Accounts and Draft Benefit Requests SORN (DHS/USCIS–014) addresses temporary data provided by Applicants or Representatives. This temporary data includes temporary accounts for first-time Applicants and draft benefit request data from first-time Applicants, Applicants with permanent accounts, and Representatives. Applicants first interact with USCIS ELIS by creating a temporary account, setting notification preferences, and drafting the first benefit request. If a first-time Applicant does not formally submit a benefit request within 30 days of opening the temporary account, USCIS ELIS automatically deletes the temporary account and all draft benefit request data. If a first-time Applicant submits the benefit request within 30 days, USCIS ELIS automatically changes the status of the account from temporary to permanent. Applicants with permanent USCIS ELIS accounts or Representatives may also draft benefit requests. USCIS ELIS deletes all draft benefit requests if they are not submitted within 30 days of initiation.

2. *Account and Case Management:* The Electronic Immigration System-2 Account and Case Management SORN (DHS/USCIS–015) addresses the activities undertaken by USCIS after Applicants or Representatives submit a benefit request. USCIS ELIS uses information provided on initial and subsequent benefit requests and subsequent collections through the Account and Case Management process to create or update USCIS ELIS accounts; collect any missing information; manage workflow; assist USCIS adjudicators as they make a benefit determination; and provide a repository of data to assist with future benefit requests. In addition, USCIS ELIS processes and tracks all actions related to the case, including scheduling appointments and issuing decision notices and/or proofs of benefit.

3. *Automated Background Functions:* The Electronic Immigration System-3 Automated Background Functions SORN (DHS/USCIS–016) addresses the actions USCIS ELIS takes to detect duplicate and related accounts and identify potential national security concerns, criminality, and fraud to ensure that serious or complex cases receive additional scrutiny.

This SORN addresses the USCIS ELIS account and case management process for applicants. Information for Electronic Immigration System-2 Account and Case Management (USCIS ELIS Account and Case Management) is derived from multiple sources. The main source of information is the benefit request formally submitted by the Applicant or Representative (see Electronic Immigration System-1 Temporary Accounts and Draft Benefits Requests SORN). Upon the formal submission of a benefit request to USCIS, this information will no longer be considered temporary and is subject to the retention schedules provided for in this SORN.

USCIS ELIS collects information previously collected on different forms. In the first release of USCIS ELIS, USCIS collects information from the following legacy forms:

- I–90—Application to Replace Permanent Residence Card (1615–0082), 08/31/12;
- I–129—Petition for a Nonimmigrant Worker (1615–0009), 10/31/13;
- I–131—Application for Travel Document (1615–0013), 03/31/12;
- I–140—Immigrant Petition for Alien Worker (1615–0015), 01/31/13;
- I–539—Application to Extend/Change Nonimmigrant Status (1615–0003), 02/29/12;
- I–539—Application to Extend/Change Nonimmigrant Status (On-Line Application) (Pending);
- I–765—Application for Employment Authorization (1615–0040), 09/30/11;
- I–821—Application for Temporary Protected Status (1615–0043), 10/31/13;
- I–907—Request for Premium Processing Service (1615–0048), 08/31/11;
- AR–11—Alien Change of Address Card System (1615–0007), 09/30/11; and
- G–28—Notice of Entry of Appearance as Attorney or Accredited Representative (1615–0105), 04/30/12.

Additional forms from which information will be collected will be posted to the USCIS ELIS website as the system develops.

The information collected throughout the USCIS ELIS Account and Case Management process is necessary to conduct an accurate and thorough adjudication of a request for immigration benefits. USCIS ELIS will use information provided in an Applicant's benefit request, account

updates, responses to a request for evidence, obtained during an interview, or during a biometrics collection at an Application Support Center. The information provided by the Applicant or his or her Representative will be used to create or update USCIS ELIS accounts; gather any missing information; manage workflow; generate reports; assist USCIS in making a benefit determination; and provide a repository of data to assist with future benefit requests. Pursuant to 8 CFR 103.2(a)(3), Co-Applicants may not access, modify, or participate in benefit requests submitted by the Applicant. However, Co-Applicants may create their own USCIS ELIS accounts as Applicants and submit their own benefit requests. USCIS personnel may input information as they process a case, including information from commercial sources, like LexisNexis or Dun and Bradstreet, to verify information provided by an Applicant or Co-Applicant in support of a request for a benefit. The USCIS ELIS Account and Case Management process will be used to process and track all actions related to the case, including scheduling appointments and issuing decision notices and/or proofs of benefit. USCIS ELIS will generate notices and notifications that will be available to individuals online, via e-mail, text message, or postal mail. These notices will also be stored in the Applicant's USCIS ELIS account.

Results from Electronic Immigration System-3 Automated Background Functions (USCIS ELIS Automated Background Functions) will also be stored in the individual's USCIS ELIS account and/or case. This includes information from other USCIS, DHS, and federal government systems to confirm identity, determine eligibility, and perform background checks. USCIS ELIS Account and Case Management may store information from DHS systems including: DHS/USCIS–001—Alien File, Index, and National File Tracking System of Records; DHS/USCIS–007—Benefits Information System (BIS); DHS/USCIS/010—Asylum Information and Pre-Screening; DHS/USCIS–006—Fraud Detection and National Security Data System (FDNS–DS); DHS/CBP–011—U.S. Customs and Border Protection TECS; DHS/ICE–001—Student and Exchange Visitor Information System (SEVIS); DHS/ICE–011—Immigration Enforcement Operational Records System (ENFORCE); DHS/USVISIT–001—Arrival and Departure Information System (ADIS); and DHS/USVISIT–0012—DHS Automated Biometric Identification System (IDENT). Furthermore, USCIS ELIS Account and Case Management may store information from systems outside of DHS, including: Department of State Consular Consolidated Database (CCD); JUSTICE/EOIR–001–Records and Management Information System; JUSTICE/FBI–002–FBI Central Records System; JUSTICE/FBI–009–Fingerprint Identification Records System (FIRS); and TREASURY/FMS–017–Collections Records—Treasury/Financial Management Service.

To protect Applicant, Co-Applicant, and Representative information, USCIS ELIS will employ role-based access controls to ensure internal users of the system do not have access to information beyond the functions of their employment. USCIS ELIS will also maintain audit logs of account access information by recording user identification and the date and time of access. Case and account histories are kept in order to track who created, deleted, or edited a record and when the change was made.

USCIS collects, uses, and maintains account and case management information pursuant to Sections 103 and 290 of the Immigration and Nationality Act (INA), as amended (8 U.S.C. 1103 and 1360), and the regulations issued pursuant thereto; and Section 451 of the Homeland Security Act of 2002 (Pub. L. 107–296).

Consistent with DHS's information sharing mission, information stored in the Electronic Immigration Services-2 Account and Case Management SORN may be shared with other DHS components, as well as appropriate federal, state, local, tribal, territorial, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need-to-know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice. USCIS provides information related to the immigration status of persons to employers participating in the USCIS E-Verify program (*see* DHS/USCIS–011 E-Verify Program SORN). In addition, USCIS provides the immigration status of persons applying for benefits from a government agency through the USCIS Systematic Alien Verification for Entitlements (SAVE) program (*see* DHS/USCIS–004 Systematic Alien Verification for Entitlements Program SORN).

DHS is issuing a Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2), elsewhere in the **Federal Register**. Additionally, many of the functions in this system require retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. § 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule. This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/USCIS–015 Electronic Immigration System-2 Account and Case Management 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.

DHS/USCIS–015

SYSTEM OF RECORDS:

SYSTEM NAME:

DHS/USCIS–015 Electronic Immigration System-2 Account and Case Management System of Records.

SECURITY CLASSIFICATION:

Unclassified, sensitive, for official use only, law enforcement sensitive.

SYSTEM LOCATION:

Records are maintained at the USCIS Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

USCIS ELIS Account and Case Management stores and/or uses information about individuals who receive or petition for benefits under the Immigration and Nationality Act, as amended. These individuals include: Applicants and petitioners (Applicants); co-applicants, beneficiaries, derivatives, dependents, or other persons on whose behalf a benefit request is made or whose immigration status may be derived because of a relationship to an Applicant (Co-Applicants); attorneys and representatives accredited by the Board of Immigration Appeals (Representatives); and individuals that assist in the preparation of the benefit request.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information about Applicants and Co-Applicants may include:

- USCIS ELIS account number.
- Alien Registration Number(s).
- Family Name.
- Given Name.
- Middle Name.
- Alias(es).
- Physical and mailing address(es):
  - Address.
  - Unit Number.
  - City.
  - State.
  - ZIP Code.
  - Postal Code.
  - Province.
  - Country.
- Date of Birth.
- Deceased Date.
- Nationality.
- Country of Citizenship.
- City of Birth.
- State of Birth.
- Province of Birth.
- Country of Birth.
- Gender.
- Marital Status.
- Military Status.
- Preferred Contact Method.
- Phone Number.
- Phone Extension.
- E-mail Address.
- Password.
- Challenge questions and answers.
- Immigration status.
- Government-issued identification (*e.g.,* passport, driver's license):
  - Document type.
  - Issuing organization.
  - Document number.
  - Expiration date.
- Benefit requested.
- Preparer Information (name, address, organization, e-mail, phone number, relation, paid/unpaid).
- Signature (electronic or scanned physical signature).
- Pay.gov payment tracking number.
- IP Address and browser information.
- USCIS ELIS case submission confirmation number.

Benefit-specific eligibility information (if applicable) may include:

- Arrival/Departure Information.
- Family Relationships (*e.g.*, Parent, Spouse, Sibling, Child, Other Dependents, etc., as well as polygamy, custody, guardianship, and other relationship practices).
- USCIS Receipt/Case Number.
- Personal Background Information (*e.g.*, involvement with national security threats, Communist party, torture, genocide, killing, injuring, forced sexual contact, limiting or denying others religious beliefs; service in military or other armed groups; work in penal or detention systems, weapons distribution, combat training, etc.).
- Health Information (*e.g.*, communicable disease, physical or mental disorder, prostitution, drug abuse, etc.).
- Education History.
- Work History.
- Financial Information (income, expenses, scholarships, savings, assets, property, financial support, supporter information, life insurance, debts, encumbrances, etc.).
- Social Security Number (SSN), if applicable.
- Supporting documentation as necessary (*i.e.* Birth Certificate).
- Physical Description.
- Fingerprint(s).
- Photographs.
- FBI Identification Number.
- Fingerprint Identification Number.
- Criminal Records.
- Criminal and National Security background check information.

Preparer information includes:

- Name.
- Organization.
- Physical and Mailing Addresses.
- Phone and Fax Numbers.
- Paid/Not Paid.
- Relationship to Applicant.

Representative information includes:

- Name.
- Law Firm/Recognized Organization.
- Physical and Mailing Addresses.
- Phone and Fax Numbers.
- E-mail Address.
- Attorney Bar Card Number or Equivalent.
- BAR Membership.
- Accreditation Date.
- BIA Representative Accreditation Expiration Date.
- Law Practice Restriction Explanation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintaining this system is in Sections 103 and 290 of the INA, as amended (8 U.S.C. 1103 and 1360), and the regulations issued pursuant thereto; and Section 451 of the Homeland Security Act of 2002 (Pub. L. 107–296).

PURPOSE(S):

The purpose of this system is to manage USCIS ELIS accounts; gather information related to a benefit request; manage workflow; generate reports; assist USCIS in making a benefit determination; and provide a repository of data to assist with future benefit requests. In addition, the USCIS ELIS Account and Case Management process will be used to process and track all actions related to the case, including scheduling appointments and issuing decision notices and/or proofs of benefit.

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 agencies 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. If 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, 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 relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To clerks and judges of courts exercising naturalization jurisdiction for the purpose of filing petitions for naturalization and to enable such courts to determine eligibility for naturalization or grounds for revocation of naturalization.

I. To courts, magistrates, administrative tribunals, opposing counsel, parties, and witnesses, in the course of immigration, civil, or criminal proceedings before a court or adjudicative body when:

1. DHS or any component thereof; or

2. Any employee of DHS in his or her official capacity; or

3. Any employee of DHS in his or her individual capacity where the agency has agreed to represent the employee; or

4. The United States, where DHS determines that litigation is likely to affect DHS or any of its components;

Is a party to litigation or has an interest in such litigation, and DHS determines that use of such records is relevant and necessary to the litigation, and that in each case, DHS determines that disclosure of the information to the recipient is a use of the information that is compatible with the purpose for which it was collected.

J. To an attorney or representative (as defined in 8 CFR 1.1(j)) who is acting on behalf of an individual covered by this system of records in connection with any proceeding before USCIS, ICE, or CBP or the DOJ Executive Office for Immigration Review (EOIR).

K. To DOJ (including United States Attorneys' Offices) or other federal agencies conducting litigation or in proceedings before any court, adjudicative or administrative body, where necessary to assist in the development of such agency's legal and/or policy position.

L. To the Department of State (DOS) in the processing of petitions or applications for benefits under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements; or when DOS requires information to consider and/or provide an informed response to a request for information from a foreign, international, or intergovernmental agency, authority, or organization about an alien or an enforcement operation with transnational implications.

M. To appropriate federal, state, local, tribal, territorial, or foreign governments, as well as to other individuals and organizations during the course of an investigation by DHS or the processing of a matter under DHS's jurisdiction, or during a proceeding within the purview of the immigration and nationality laws, when DHS deems that such disclosure is necessary to carry out its functions and statutory mandates to elicit information required by DHS to carry out its functions and statutory mandates.

N. To an appropriate federal, state, tribal, territorial, local, or foreign government agency or organization, or international organization, lawfully engaged in collecting law enforcement intelligence, whether civil or criminal, or charged with investigating, prosecuting, enforcing or implementing civil or criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities, including the collection of law enforcement intelligence and the disclosure is appropriate to the proper performance of the official duties of the person receiving the information.

O. To an appropriate federal, state, local, tribal, territorial, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit.

P. To an individual's current employer to the extent necessary to determine employment eligibility or to a prospective employer or government agency to verify an individual is eligible for a government-issued credential that is a condition of employment.

Q. To a former employee of DHS, in accordance with applicable regulations, for purposes of: responding to an official inquiry by a federal, state, or local government entity or professional licensing authority; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

R. To the Office of Management and Budget (OMB) in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in the Circular.

S. To the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary when necessary to inform members of Congress about an alien who is being considered for private immigration relief.

T. To a federal, state, tribal, or local government agency and/or to domestic courts to assist such agencies in collecting the repayment of loans, or fraudulently or erroneously secured benefits, grants, or other debts owed to them or to the U.S. Government, or to obtain information that may assist DHS in collecting debts owed to the U.S. Government;

U. To an individual or entity seeking to post or arrange, or who has already posted or arranged, an immigration bond for an alien to aid the individual or entity in (1) Identifying the location of the alien, or (2) posting the bond, obtaining payments related to the bond, or conducting other administrative or financial management activities related to the bond.

V. To a coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

W. Consistent with the requirements of the INA, to the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or to any state or local health authorities, to:

1. Provide proper medical oversight of DHS-designated civil surgeons who perform medical examinations of both arriving aliens and of those requesting status as a lawful permanent resident; and

2. Ensure that all health issues potentially affecting public health and safety in the United States are being or have been adequately addressed.

X. To a federal, state, local, tribal, or territorial government agency seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.

Y. To the Social Security Administration (SSA) for the purpose of issuing a SSN and Social Security card to an alien who has made a request for a SSN as part of the immigration process and in accordance with any related agreements in effect between the SSA, DHS, and DOS entered into pursuant to 20 CFR 422.103(b)(3); 422.103(c); and 422.106(a), or other relevant laws and regulations.

Z. To federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to conduct national intelligence and security investigations or assist in anti-terrorism efforts.

AA. To third parties to facilitate placement or release of an individual (*e.g.*, at a group home, homeless shelter, etc.) who has been or is about to be released from DHS custody but only such information that is relevant and necessary to arrange housing or continuing medical care for the individual.

BB. To foreign governments for the purpose of coordinating and conducting the removal of individuals to other nations under the INA; and to international, foreign, and intergovernmental agencies, authorities, and organizations in accordance with law and formal or informal international arrangements.

CC. To a federal, state, local, territorial, tribal, international, or foreign criminal, civil, or regulatory law enforcement authority when the information is necessary for collaboration, coordination, and de-confliction of investigative matters, prosecutions, and/or other law enforcement actions to avoid duplicative or disruptive efforts and to ensure the safety of law enforcement officers who may be working on related law enforcement matters.

DD. To the DOJ Federal Bureau of Prisons and other federal, state, local, territorial, tribal, and foreign law enforcement or custodial agencies for the purpose of placing an immigration detainer on an individual in that agency's custody, or to facilitate the transfer of custody of an individual from DHS to the other agency. This will include the transfer of information about unaccompanied minor children to HHS to facilitate the custodial transfer of such children from DHS to HHS.

EE. To federal, state, local, tribal, territorial, or foreign governmental or quasi-governmental agencies or courts to confirm the location, custodial status, removal, or voluntary departure of an alien from the United States, in order to facilitate the recipients' exercise of responsibilities pertaining to the custody, care, or legal rights (including issuance of a U.S. passport) of the removed individual's minor children, or the adjudication or collection of child support payments or other debts owed by the removed individual.

FF. To a federal, state, tribal, territorial, local, international, or foreign government agency or entity for the purpose of consulting with that agency or entity: (1) To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program; (2) for the purpose of verifying the identity of an individual seeking redress in connection with the operations of a DHS component or program; or (3) for the purpose of verifying the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

GG. To the Department of Treasury to process and resolve payment issues.

HH. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records may be retrieved by any of the data elements listed above or combination thereof.

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:

USCIS is currently in negotiations with NARA for approval of the USCIS ELIS data retention and archiving plan. USCIS proposes retaining information for the retention periods of the underlying forms. Account information will be stored for 15 years from last action. However, USCIS is reviewing its needs for the information as it transitions to a fully electronic environment and may amend its retention, as needed.

USCIS proposes that, in compliance with NARA General Records Schedule 24, section 6, ''User Identification, Profiles, Authorizations, and Password Files,'' internal USCIS personnel accounts will be destroyed or deleted six years after the account is terminated, or when no longer needed for

investigative or security purposes, whichever is later.

SYSTEM MANAGER AND ADDRESS:

The DHS system manager is the Chief, Records Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

Applicants may access and amend this information by logging in to their USCIS ELIS account. Pursuant to 8 CFR 103.2 (a)(3), Co-Applicants may access their information by logging in to USCIS ELIS after the benefit request has been approved or denied. Further, 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 National Records Center, FOIA/PA Office, P.O. Box 648010, Lee's Summit, MO 64064–8010. Specific FOIA contact information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from the Applicant or his or her Representative. USCIS personnel may input information as they process a case, including information from commercial sources, like LexisNexis or Dunn and Bradstreet, to verify whether an Applicant or Co-Applicant is eligible for the benefit requested. USCIS ELIS Account and Case Management will also store and use information from the following USCIS, DHS, and other federal agency systems of records:

- DHS/USCIS–001—Alien File, Index, and National File Tracking System of Records;
- DHS/USCIS–007—Benefits Information System (BIS);
- DHS/USCIS–010—Asylum Information and Pre-Screening;
- DHS/USCIS–006—Fraud Detection and National Security Data System (FDNS–DS);
- DHS/USCIS–014—Electronic Immigration System-1 Temporary Accounts and Draft Benefit Requests System of Records;
- DHS/USCIS–016—Electronic Immigration System-3 Automated Background Functions System of Records;
- DHS/CBP–011—U.S. Customs and Border Protection TECS;
- DHS/ICE–001—Student and Exchange Visitor Information System (SEVIS);
- DHS/ICE–011—Immigration Enforcement Operational Records System (ENFORCE);
- DHS/USVISIT–001—Arrival and Departure Information System (ADIS);
- DHS/USVISIT–0012—DHS Automated Biometric Identification System (IDENT);
- Department of State Consular Consolidated Database (CCD);
- JUSTICE/EOIR–001—Records and Management Information System;
- JUSTICE/FBI–002—FBI Central Records System;
- JUSTICE/FBI–009—Fingerprint Identification Records System (FIRS); and
- TREASURY/FMS–017—Collections Records Treasury/Financial Management Service.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Additionally, many of the functions in this system require retrieving records from law enforcement systems. Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions in accordance with this rule.

Dated: September 15, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–24929 Filed 9–27–11; 8:45 am]

BILLING CODE 9911–97–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–0512]

Lower Mississippi River Waterway Safety Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications; reopening of application period.

SUMMARY: The Coast Guard is reopening the period for accepting applications for membership to the Lower Mississippi River Waterway Safety Advisory Committee. This Committee provides advice and recommendations to the Department of Homeland Security on matters relating to communications, surveillance, traffic management, anchorages, development and operation of the New Orleans Vessel Traffic Service (VTS), and other related topics dealing with navigation safety on the Lower Mississippi River as required by the U.S. Coast Guard.

DATES: Applicants should submit a cover letter and resume in time to reach the Designated Federal Officer (DFO) on or before November 15, 2011.

ADDRESSES: Applicants should send their cover letter and resume to Captain P.W. Gautier, DFO, Lower Mississippi River Waterway Safety Advisory Committee, 200 Hendee Street, New Orleans, LA 70114; or by calling (504) 365–2281; or by faxing (504) 365–2287; or by e-mailing to *Marcie.L.Kohn@uscg.mil.*

This notice is available in our online docket, USCG–2011–0512, at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LCDR Marcie Kohn, Alternate Designated Federal Officer (ADFO) of the Lower Mississippi River Waterway Safety Advisory Committee; telephone (504) 365–2281 or fax (504) 365–2287; or e-mail at *Marcie.L.Kohn@uscg.mil.*

SUPPLEMENTARY INFORMATION: On March 11, 2011, the Coast Guard published a request in the **Federal Register** volume 76, number 48, page 13422, for applications for membership in the Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC). The deadline for applications announced in that notice expired on May 1, 2011. Through this notice, the application period is being re-opened until November 15, 2011. Applicants who responded to the initial notice do not need to reapply.

The Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC) is a Federal advisory committee under 5 U.S.C. App. (Pub. L. 92–463). It was established under the authority provided for in section 19 of the Coast Guard Authorization Act of 1991, (Pub. L. 102–241) as amended by section 621 of the Coast Guard Authorization Act of 2010, (Pub. L. 111–281).

The Committee is expected to meet twice per year. It may also meet for extraordinary purposes with the approval of the DFO. The location of meetings is the U.S. Coast Guard Sector New Orleans building, 200 Hendee Street, New Orleans, LA 70114.

We will consider applications for 25 positions that expired or became vacant March 30, 2011. Applicants should have expertise, knowledge, and experience regarding the transportation, equipment, and techniques that are used to ship cargo and to navigate vessels on the Lower Mississippi River and its connecting navigable waterways, including the Gulf of Mexico.

1. Five members representing River Port Authorities between Baton Rouge, Louisiana, and the head of passes of the Lower Mississippi River, of which one member shall be from the Port of St. Bernard and one member from the Port of Plaquemines.

2. Two members representing vessel owners or ship owners domiciled in the State of Louisiana.

3. Two members representing organizations which operate harbor tugs or barge fleets in the geographical area covered by the Committee.

4. Two members representing companies which transport cargo or passengers on the navigable waterways in the geographical area covered by the Committee.

5. Three members representing State Commissioned Pilot organizations, with one member each representing New Orleans-Baton Rouge Steamship Pilots Association, the Crescent River Port Pilots Association, and the Associated Branch Pilots Association.

6. Two at-large members who utilize water transportation facilities located in the geographic area covered by the Committee.

7. Three members who utilize vessels that transit and use the navigable waterways covered by the committee. These three members should comprise of one consumer member, one shipper member, and one importer/exporter member.

8. Two members representing those licensed merchant mariners, other than pilots, who perform shipboard duties on those vessels which utilize navigable waterways covered by the Committee.

9. One member representing an organization that serves in a consulting or advisory capacity to the maritime industry.

10. One member representing an environmental organization.

11. One member drawn from the general public.

12. One member representing the Associated Federal Pilots and Docking Masters of Louisiana.

Registered lobbyists are not eligible to serve on Federal advisory committees. Registered lobbyists are lobbyists required to comply with provisions contained in the Lobbyist Disclosure Act of 1995 (Pub. L. 110–81, as amended).

Each LMRWSAC Committee member serves a term of office for 2 years and may serve consecutive terms. All members serve at their own expense and receive no salary reimbursement of travel expenses, or other compensation from the Federal Government.

In support of the policy of the Coast Guard on gender and ethnic nondiscrimination, we encourage qualified men and women and members of all racial and ethnic groups to apply. The Coast Guard values diversity and recognizes that different characteristics and attributes enhance the Coast Guard mission.

If you are selected as a non-representative member, or as a member who is drawn from the general public, you will be appointed and serve as a Special Government Employee (SGE) as defined in section 202(a) of Title 18, United States Code. As a candidate for appointment as a SGE, applicants are required to complete a Confidential Financial Disclosure Report (OGE Form 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Only the Designated Agency Ethics Official (DAEO) or the DAEO's Designee may release a Confidential Financial Disclosure Report.

Interested applicants should send a cover letter and resume to Captain P. W. Gautier, DFO, Lower Mississippi River Waterway Safety Advisory Committee, 200 Hendee Street, New Orleans, LA 70114. The deadline for applications is November 15, 2011.

To visit our online docket, go to *http://www.regulations.gov,* enter the docket number for this notice (USCG–2011–0512) in the Search box, and click ''Go.'' Please do not post your resume on this site.

Dated: August 31, 2011.

R.A. Nash,

Rear Admiral, U.S. Coast Guard, Commander, 8th Coast Guard District.

[FR Doc. 2011–24892 Filed 9–27–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3335–EM; Docket ID FEMA–2011–0001]

Maryland; Amendment No. 3 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for State of Maryland (FEMA–3335–EM), dated August 27, 2011, and related determinations.

DATES: *Effective Date:* August 30, 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: The Federal Emergency Management Agency

(FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Regis Leo Phelan, of FEMA is appointed to act as the Federal Coordinating Officer for this emergency.

This action terminates the appointment of Thomas J. McCool as Federal Coordinating Officer for this emergency.

(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. 2011–24910 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3334–EM; Docket ID FEMA–2011–0001]

Rhode Island; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for State of Rhode Island (FEMA–3334–EM), dated August 27, 2011, and related determinations.

DATES: *Effective Date:* September 20, 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: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this emergency.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this emergency.

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. 2011–24908 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4027–DR; Docket ID FEMA–2011–0001]

Rhode Island; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for State of Rhode Island (FEMA–4027–DR), dated September 3, 2011, and related determinations.

DATES: *Effective Date:* September 20, 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: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

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. 2011–24927 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4031–DR; Docket ID FEMA–2011–0001]

New York; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New York (FEMA–4031–DR), dated September 13, 2011, and related determinations.

DATES: *Effective Date:* September 19, 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: The notice of a major disaster declaration for the State of New York is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 31, 2011.

Chemung County for Individual Assistance.

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. 2011–24914 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4029–DR; Docket ID FEMA–2011–0001]

Texas; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–4029–DR), dated September 9, 2011, and related determinations.

DATES: *Effective Date:* September 19, 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: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 9, 2011.

Cass and Marion Counties for Individual Assistance.

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. 2011–24912 Filed 9–27–11; 8:45 am]

BILLING CODE 9111–32–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0911–8428; 2280–665]

Landmarks Committee of the National Park System Advisory Board Meeting

AGENCY: National Park Service.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act [5 U.S.C. Appendix (1988)], that a meeting of the Landmarks Committee of the National Park System Advisory Board will be held beginning at 1 p.m. on November 8, 2011, at the following location. The meeting will continue beginning at 9 a.m. on November 9 and 10, 2011.

DATES: November 8, 2011, at 1 p.m.; November 9–10, 2011, at 9 a.m.

Location: The Finn Forum, 2nd Floor, Ray Group International, 900 15th Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Patricia Henry, National Historic Landmarks Program, National Park Service; 1849 C Street, NW., (2280); Washington, DC 20240; Telephone (202) 354–2216; *E-mail: Patty_Henry@nps.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting of the Landmarks Committee of the National Park System Advisory Board is to evaluate nominations of historic properties in order to advise the National Park System Advisory Board of the qualifications of each property being proposed for National Historic Landmark (NHL) designation, and to make recommendations regarding the possible designation of those properties as National Historic Landmarks to the National Park System Advisory Board at a subsequent meeting at a place and time to be determined. The Committee also makes recommendations to the National Park System Advisory Board regarding amendments to existing designations and proposals for withdrawal of designation. The members of the Landmarks Committee are:

Mr. Ronald James, Chair, Dr. James M. Allan, Dr. Cary Carson, Dr. Darlene Clark Hine, Mr. Luis Hoyos, AIA, Dr. Barbara J. Mills, Dr. William J. Murtagh, Dr. Franklin Odo, Dr. William D. Seale, Dr. Michael E. Stevens.

The meeting will be open to the public. Pursuant to 36 CFR part 65, any member of the public may file, for consideration by the Landmarks Committee of the National Park System Advisory Board, written comments concerning the National Historic Landmarks nominations, amendments to existing designations, or proposals for withdrawal of designation.

Comments should be submitted to J. Paul Loether, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service; 1849 C Street, NW., (2280); Washington, DC 20240; *E-mail: Paul_Loether@nps.gov.*

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.

In addition to the properties listed in the **Federal Register** notice published on September 8, 2011, the National Park System Advisory Board and its Landmarks Committee may also consider the following nominations:

Nominations

New York

- Admiral David G. Farragut Grave Site, Bronx, NY.

Puerto Rico

- Bacardi Distillery, Cataño, Puerto Rico.

September 13, 2011.

J. Paul Loether,

Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service, Washington, DC.

[FR Doc. 2011–24895 Filed 9–27–11; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

Cedar Creek and Belle Grove National Historical Park Advisory Commission; Notice of Public Meetings

AGENCY: Cedar Creek and Belle Grove National Historical Park Advisory Commission, National Park Service, Department of the Interior.

ACTION: Notice of Meetings

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act that meetings of the Cedar Creek and Belle Grove National Historical Park Advisory Commission will be held to discuss the implementation of the Park's general management plan.

Date: December 15, 2011.

Location: Warren County Government Center, 220 North Commerce Avenue, Front Royal, VA.

Date: March 15, 2012.

Location: Strasburg Town Hall Council Chambers, 174 East King Street, Strasburg, VA.

Date: June 21, 2012.

Location: Middletown Town Council Chambers, 7875 Church Street, Middletown, VA. All meetings will convene at 8:30 a.m. and are open to the public.

FOR FURTHER INFORMATION CONTACT: Diann Jacox, Superintendent, Cedar Creek and Belle Grove National Historical Park, (540) 868–9176.

SUPPLEMENTARY INFORMATION: Topics to be discussed at the meetings include: visitor services and interpretation, land protection planning, historic preservation, and natural resource protection.

The Park Advisory Commission was designated by Congress to advise on the preparation and implementation of the park's general management plan. Individuals who are interested in the Park, the implementation of the plan, or the business of the Advisory Commission are encouraged to attend the meetings.

Dated: September 19, 2011.

Diann Jacox,

Superintendent, Cedar Creek and Belle Grove National Historical Park.

[FR Doc. 2011–24915 Filed 9–27–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0911–8394; 2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before September 3, 2011. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 13, 2011. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

COLORADO

San Juan County

Gold Prince Mine, Mill and Aerial Tramway, (Mining Industry in Colorado, MPS) Address Restricted, Silverton, 11000734

FLORIDA

Miami-Dade County

Parrot Jungle Historic District, 11000 SW. 57th Ave., Pinecrest, 11000735

LOUISIANA

St. Tammany Parish

Pottery Hill, Address Restricted, Mandeville, 11000736

MISSOURI

St. Louis Independent city

Lafayette Garage and Repair Company Building, (Auto-Related Resources of St. Louis, Missouri MPS) 2710–2716 Lafayette, St. Louis (Independent City), 11000737

NEW YORK

Erie County

Buffalo Smelting Works, (Black Rock Planning Neighborhood MPS) 23 Austin St., Buffalo, 11000738

Dayton House, (Black Rock Planning Neighborhood MPS) 243 Dearborn St., Buffalo, 11000739

Eberz House, (Black Rock Planning Neighborhood MPS) 285 Dearborn St., Buffalo, 11000740

House at 218 Dearborn Street, (Black Rock Planning Neighborhood MPS) 218 Dearborn St., Buffalo, 11000741

Market Street Historic District, (Black Rock Planning Neighborhood MPS) Amherst St. between Niagara & Tonawanda Sts. & portions of Dearborn & East Sts., Buffalo, 11000743

NORTH DAKOTA

Cass County

Fargo Oak Grove Residential Historic District, N. & S. Terrace Aves., E. of Elm St., N., Fargo, 11000744

Grand Forks County

B'nai Israel Synagogue and Montefiore Cemetery, 601 Cottonwood St. & 1450 N. Columbia Rd., Grand Forks, 11000745

SOUTH DAKOTA

Lawrence County

Hardy Guard Station, 22107 US 85, Lead, 11000746

WISCONSIN

Brown County

Gretzinger, Otto and Hilda, House, 922 N. Broadway, De Pere, 11000747

WYOMING

Carbon County

Headquarters Park Historic District, Approx. 1 mi. N. of WY 130 on USFS road 103, Centennial, 11000748

[FR Doc. 2011–24894 Filed 9–27–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Computer Devices with Associated Instruction Sets,* DN 2844; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the

Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of VIA Technologies Inc., IP-First, LLC and Centaur Technology on September 22, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain computer devices with associated instruction sets. The complaint names as respondent Apple Inc. of CA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number (''Docket No. 2844'') in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: September 23, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–24955 Filed 9–27–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Electronic Devices with Graphics Data Processing Systems, Components Thereof, and Associated Software,* DN 2845; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of S3 Graphics Co., Ltd. and S3 Graphics Inc. on September 23, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices with graphics data processing systems, components thereof, and associated software. The complaint names as respondent Apple Inc. of CA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether

issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number (''Docket No. 2845'') in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: September 23, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–24954 Filed 9–27–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–784]

In the Matter of Certain Light-Emitting Diodes and Products Containing Same; Notice of Commission Determination Not To Review an Initial Determination Granting Complainant's Motion To Amend the Complaint and Notice of Investigation To Reflect a Corporate Name Change

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 4) issued by the presiding administrative law judge (''ALJ'') granting complainant's motion to amend the complaint and notice of investigation to reflect a corporate name change in the above-referenced investigation.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–4737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 11, 2011, based on a complaint filed by OSRAM GmbH of Munich, Germany. 76 FR 40745 (Jul. 11, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-emitting diodes and products containing the same by reason of infringement of various claims of United States Patent Nos. 6,812,500; 7,078,732; 7,126,162; 7,345,317; 7,629,621; 6,459,130; 6,927,469; 7,199,454; and 7,427,806. The respondents named in the Commission's notice of investigation are LG Electronics, Inc. and LG Innotek Co., Ltd., both of Seoul, South Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, New Jersey; and LG Innotek U.S.A., Inc. of San Diego, California.

On August 31, 2011, complainant moved to amend the complaint and notice of investigation to reflect a recent change of its corporate name from OSRAM GmbH to OSRAM AG. According to complainant, good cause exists to permit the amendment and no party will be prejudiced. No responses to the motion were filed. On September 2, 2011, the ALJ issued the subject ID (Order No. 4). The ALJ explained that Commission Rule 210.14(b)(1) (19 CFR 210.14(b)(1)) provides for amendment of the complaint only by leave of the Commission for good cause, when and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation. The ALJ found that good cause exists for the requested amendment and that it is unlikely that the amendment would prejudice the other parties or the public. None of the parties petitioned for review of the ID.

The Commission has determined not to review the subject ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: September 22, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–24862 Filed 9–27–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–847 and 849 (Second Review)]

Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Japan and Romania

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty orders on carbon and alloy seamless standard, line, and pressure pipe from Japan and Romania would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2]

Background

The Commission instituted these reviews on April 1, 2011 (76 FR 18251) and determined on July 5, 2011 that it would conduct expedited reviews (76 FR 44608, July 26, 2011).

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on September 22, 2011. The views of the Commission are contained in USITC Publication 4262 (September 2011), entitled *Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Japan and Romania: Investigation Nos. 731–TA–847 and 849 (Second Review).*

By order of the Commission.

Issued: September 22, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–24953 Filed 9–27–11; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Chairman Deanna Tanner Okun and Commissioner Daniel R. Pearson dissent with respect to the determination regarding small-diameter carbon and alloy seamless standard, line, and pressure pipe from Romania.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements—Supply and Service

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Federal Contract Compliance Programs (OFCCP) sponsored revised information collection request (ICR) titled, ''Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements—Supply and Service,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*).

DATES: Submit comments on or before October 28, 2011.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, *Attn:* OMB Desk Officer for the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–6929/*Fax:* 202–395–6881 (these are not toll-free numbers), *e-mail: OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This is a request for a revision to the Supply and Service ICR, including revisions to the Scheduling Letter. The OFCCP Scheduling Letter is used to schedule Federal contractors and subcontractors for Compliance Evaluations in accordance with Executive Order 11246, as amended; section 503 of the Rehabilitation Act of 1973, as amended); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212. These mandates prohibit Federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, disability, or veterans' status. The OFCCP is revising the Scheduling Letter to reduce contractor burden and make Compliance Evaluations more efficient.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1250–0003. The current OMB approval is scheduled to expire on September 30, 2011; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New or revised information collection requirements would only take effect after OMB approval. For additional information, see the related notice published in the **Federal Register** on May 12, 2011 (76 FR 27670).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1250–0003. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Office of Federal Contract Compliance Programs.

Title of Collection: Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements—Supply and Service.

OMB Control Number: 1250–0003.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 171,275.

Total Estimated Number of Responses: 171,275.

Total Estimated Annual Burden Hours: 11,949,346.

Total Estimated Annual Other Costs Burden: $129,633,262.

Dated: September 22, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–24859 Filed 9–27–11; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF LABOR

Employment and Training Administration

Extension Request for Collection of Baseline Information for Green Jobs and Health Care Impact Evaluation of ARRA-Funded Grants

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department or DOL), 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 (PRA) [44 U.S.C. 3505(c)(2)(A)]. The 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 the collection requirements on respondents can be properly assessed.

Currently the Employment and Training Administration (ETA) is soliciting comments concerning the continued collection of baseline data to support the evaluation of the impact of the Green Jobs and Health Care American Recovery and Reinvestment Act of 2009 (ARRA or Recovery Act)-funded training grants. The present OMB approval expires January 31, 2011. This information collection follows an emergency review that was conducted in accordance with the Paperwork Reduction Act of 1995 and 5 CFR 1320.13. The submission for OMB emergency review was approved on July 18, 2011. A copy of this ICR can be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain.*

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before November 28, 2011.

ADDRESSES: Submit written comments to the Department of Labor, Employment and Training Administration, *Attn:* Savi Swick, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210. Written comments may be transmitted by facsimile to 202–693–2766 (this is not a toll-free number) or e-mailed to *swick.savi@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This baseline information collection supports an evaluation of the impacts of the Green Jobs and Health Care (GJHC) training grants. This evaluation is sponsored by ETA for worker training and placement in high growth and emerging industries through training grants funded by the 2009 Recovery Act, which was enacted in an effort to preserve and create jobs, promote economic growth, and assist those impacted by the recession. The Recovery Act included funding for four Solicitations for Grant Applications (SGAs) with the goal of training workers in the skills required to be employed in specific high-growth and emerging industries including health care, energy efficiency, and renewable energy. Two of these four SGAs that are the focus of this study, for which baseline data must be collected, are:

- Pathways Out of Poverty (POP) ($150 million for 38 projects).
- Health Care and Other High Growth Emerging Industries (HHG) ($225 million for 55 projects).

The overall aim of this evaluation is to determine the extent to which enrollees achieve increases in employment, earnings, and career advancement because of their participation in the training provided by POP and HHG grantees and to identify promising best practices and strategies for replication. Individuals enrolling in the GJHC training programs have a 50/50 chance of receiving these services. Those individuals not receiving the training services receive the existing services offered by the grantee. Education, employment, and other outcomes of the two groups will be compared over time to evaluate the GJHC training grant impact. The evaluation will estimate the success in providing educational and occupational skills training that fosters entry into job fields that are innovative and/or experiencing high growth, as in health care industry.

II. Review Focus

The Department 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 submission of responses.

III. Current Actions

Agency: Employment and Training Administration.

Type of Review: Regular Extension of Approved Information Collection.

Title of Collection: Baseline Information for Green Jobs and Health Care Impact Evaluation of ARRA-Funded Grants.

OMB Control Number: 1205–0481.

Affected Public: Individuals or households; State, Local, and Tribal Governments.

Estimated Number of Respondents: 6,024.

Frequency: Once.

Total Estimated Annual Responses: 6,024.

Estimated Total Annual Burden Hours: 2,600.

Total Annualized Capital and Startup Costs: $0.

Total Annualized Operation and Maintenance Costs: $0.

Total Estimated Annual Cost Burden: $24,388.

Comments submitted in response to this notice will be summarized and may be included in the request for Office of Management and Budget approval of the final information collection request. The comments will become a matter of public record.

Dated: September 15, 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–24963 Filed 9–27–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0065]

National Advisory Committee on Occupational Safety and Health (NACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for nominations to serve on NACOSH.

SUMMARY: The Assistant Secretary of Labor for Occupational Safety and Health requests nominations for membership on NACOSH.

DATES: Nominations for NACOSH must be submitted (postmarked, sent or received) by November 28, 2011.

ADDRESSES: You may submit nominations for NACOSH, identified by OSHA Docket No., OSHA–2011–0065, by any of the following methods:

Electronically: You may submit nominations, including attachments, electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions on-line for submitting nominations.

Facsimile: If your nomination, including attachments, does not exceed 10 pages, you may fax it to the OSHA Docket Office at (202) 693–1648.

Mail, express delivery, hand delivery, messenger or courier service: You may submit your nomination to the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.—4:45 p.m., E.T.

Instructions: All nominations for NACOSH must include the Agency name and docket number for this **Federal Register** notice (Docket No. OSHA–2011–0065). Submissions in response to this **Federal Register** notice, including personal information provided, will be posted without change at *http://*www.regulations.gov. Because of security-related procedures, submitting nominations by regular mail may result in a significant delay in their receipt. Please contact the OSHA Docket Office, at the address above, for information about security procedures for submitting nominations by hand delivery, express delivery, and messenger or courier service. For additional information on submitting nominations, see the **SUPPLEMENTARY INFORMATION** section below.

Docket: To read or download submissions, go to *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through *http://www.regulations.gov.* All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT: Deborah Crawford, OSHA, Directorate of Evaluation and Analysis, Room N–3641, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210; telephone (202) 693–1932; e-mail address *crawford.deborah@dol.gov.*

SUPPLEMENTARY INFORMATION: The Assistant Secretary of Labor for Occupational Safety and Health invites interested individuals to submit nominations for membership on NACOSH. The terms of seven NACOSH members will expire on March 31, 2012.

The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 656) authorizes NACOSH to advise the Secretary of Labor (Secretary) and the Secretary of Health and Human Services (HHS) on matters relating to the administration of the OSH Act. NACOSH is a continuing advisory body and operates in compliance with the OSH Act, the Federal Advisory Committee Act (5 U.S.C. App. 2), and regulations implementing those laws (29 CFR 1912a, 41 CFR part 101–6 and 102–3).

NACOSH is comprised of 12 members, all of whom the Secretary appoints (29 CFR 1912a.2). The composition of the Committee and categories of new members to be appointed are as follows:

- Four public representatives—two will be appointed;
- Two management representatives—one will be appointed;
- Two labor representatives—two will be appointed;
- Two occupational safety professional representatives—one will be appointed; and,
- Two occupational health professional representatives—one will be appointed.

Pursuant to 29 CFR 1912a.2, HHS will designate one public and one occupational health professional for appointment by the Secretary. OSHA will provide to HHS all nominations and supporting materials for those membership categories.

NACOSH members serve for staggered of two-year terms, unless the member becomes unable to serve, resigns, ceases to be qualified to serve, or is removed by the Secretary of Labor. If a vacancy occurs before a term expires, the Secretary may appoint a new member who represents the same interest as the predecessor to serve for the remainder of the unexpired term. The committee meets at least two times a year (29 CFR 1912a.4).

Any individual or organization may nominate one or more qualified persons for membership. Nominations must include the nominee's name, occupation or current position, and contact information. The nomination also must identify the category that the candidate is qualified to represent, and include a resume of the nominee's background, experience, and qualifications. In addition, the nomination must state that the nominee is aware of the nomination and is willing to serve on NACOSH for a two-year term.

NACOSH members will be selected upon the basis of their knowledge, experience and competence in the field of occupational safety and health (29 CFR 1912a.2). The information received through this nomination process, in addition to other relevant sources of information, will assist the Secretary in appointing members to serve on NACOSH. In selecting NACOSH members, the Secretary will consider individuals nominated in response to this **Federal Register** notice, as well as other qualified individuals.

Before candidates are appointed, the U.S. Department of Labor (Department) conducts a basic background check using publicly available, Internet-based sources.

The Department is committed to bringing greater diversity of thought, perspective and experience to its advisory committees. In addition, the Department encourages nominees of all races, gender, age, disabilities and sexual orientation to apply.

Public Participation—Submission of Nominations and Access to Docket

You may submit nominations (1) Electronically at *http://www.regulations.gov*, the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments and other material must identify the Agency name and docket number for this **Federal Register** notice (OSHA Docket No. OSHA–2011–0065). You may supplement electronic nominations by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit three copies to the OSHA Docket Office (see **ADDRESSES** section). The additional materials must clearly identify your electronic nomination by name, date, and docket number so OSHA can attach them to your nomination. Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of nominations. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office (see **ADDRESSES** section).

Submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions individuals about submitting personal information such as Social Security numbers and birthdates. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through *http://www.regulations.gov*. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Website to submit comments and access the docket is available at the Website. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the internet to locate docket submissions.

Electronic copies of this **Federal Register** document are available at *http://www.regulations.gov*. This document, as well as news releases and other relevant information, also are available at OSHA's Webpage at *http://www.osha.gov.*

Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by section 7 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656), 29 CFR 1912a, and Secretary of Labor's Order No. 4–2010 (75 FR 55355, 9/10/2010).

Signed at Washington, DC on September 22, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2011–24878 Filed 9–27–11; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Wage and Hour Division

Proposed Extension of the Approval of Information Collection Requirements

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance 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 a 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 Wage and Hour Division is soliciting comments concerning its proposal to extend Office of Management and Budget (OMB) approval of the Information Collection: The Family and Medical Leave Act Optional Forms. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before November 28, 2011.

ADDRESSES: You may submit comments identified by Control Number 1235–0003, by either one of the following methods: *E-mail: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via e-mail or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–0406 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information to request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. *Background:* The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601, *et seq.,* requires private sector employers who employ 50 or more employees, all public and private elementary schools, and all public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons (*i.e.,* for birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; because of a serious health condition that makes the employee unable to perform the functions of the employee's job; and to address qualifying exigencies arising out of the deployment of the employee's spouse, son, daughter, or parent to covered active duty in the military), and up to 26 weeks of unpaid, job protected leave during a single 12-month period to care for a covered servicemember with a serious injury or illness who is the spouse, son, daughter, parent, or next of kin to the employee. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654.

WHD Publication 1420 allows employers to satisfy the general notice requirement. See § 825.300(a).

A. *Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), –.301(b), –.302, –.303].* An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member or planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable under the facts and circumstances of the particular case. When an employee seeks leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide sufficient information that indicates that leave is potentially FMLA-qualifying and the timing and anticipated duration of the absence. Such information may include that a condition renders the employee unable to perform the functions of the job, or if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities or, that the family member is a covered servicemember with a serious injury or illness, and whether the employee or the employee's family member is under the continuing care of a health care provider. Sufficient information for leave due to a qualifying family member's call (or impending call) to active duty status may include that the military member is on or has been called to covered active duty and that the requested leave is for one of the categories of qualify exigency leave. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

B. *Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice [29 CFR 825.219–.300(b)].* When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee—within five business days, absent extenuating circumstances—of the employee's eligibility to take FMLA leave and any additional requirements for taking such leave. The eligibility notice must provide information regarding the employee's eligibility for FMLA leave and, if the employee is determined not to meet the eligibility criteria, provide at least one reason why the employee is not eligible. The rights and responsibilities notice must detail the specific rights and responsibilities of the employee and explain any consequences of a failure to meet these responsibilities. If an employee provides notices of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, the employer does not have to provide an additional eligibility notice if the employee's eligibility status has not changed. If the employee's eligibility status has changed, then the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided to the employee. Form WH–381 allows an employer to satisfy the regulatory requirement to provide employees with specific information concerning eligibility status and with written notice detailing specific rights as well as expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* § 825.300(b) and (c).

C. *Medical Certification and Recertification [29 U.S.C. 2613, 2614(c)(3); 29 CFR 825.100(d), –.305–.308].* An employer may require that an employee's leave due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position or to care for the employee's spouse, son, daughter, or parent with a serious health condition, be supported by a certification issued by the health care provider of the eligible employee or of the employee's family member. In addition, an employer may request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification and any subsequent recertification unless the employee is not able to do so despite his or her diligent good faith efforts. An employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient and must provide the employee seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any identified deficiency. The employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any identified deficiencies. An employer, at its own expense and subject to certain limitations, also may require an employee to obtain a second and third medical opinion. Form WH–380–E allows an employee requesting FMLA-leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. See § 825.305(a). Form WH–380–F allows an employee requesting FMLA-leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. See § 825.305(a).

D. *Certification for Leave for a Qualifying Exigency.* [29 CFR 825.309] An employer may require an employee who requests FMLA-leave due to a qualifying exigency to certify the need for leave. In addition, the first time an employee requests leave for a qualifying exigency related to a qualifying family member's active duty status, an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military that indicates the military member is on covered active duty. Optional Form WH–384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency.

E. *Certification for Leave to Care for Covered Servicemember.* [29 CFR 825.310] An employee who requests FMLA-leave to care for a covered servicemember may be required by his or her employer to certify the need for leave. Optional Form WH–385 currently allows an employee requesting FMLA leave based on an active duty covered servicemember's serious injury or illness to satisfy the statutory requirement to furnish, upon the employer's request, a medical

certification from an authorized health care provider. An employer must accept as sufficient certification of leave to care for a covered servicemember an invitational travel order or invitational travel authorization (ITO or ITA) issued to the employee or to another family member in lieu of optional Form WH–385 or the employer's own form.

F. *Notice to Employees of FMLA Designation [29 CFR §§ 825.300(c) –.301(a)].* When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided upon request by the employee but not more often than once every 30 days if leave is taken during the 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation. In addition, if the employer will require the employee to submit a fitness-for-duty certification, the employer must provide notice of the requirement with the designation notice. Form WH–382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. *See* § 825.300(d).

G. *Fitness-for-Duty Medical Certification [29 U.S.C. 2614(a)(4); 29 CFR 825.312].* As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. An employer may require that the fitness-for-duty certification specifically address the employee's essential functions if the employer has provided the employee with a list of those essential functions and notified the employee of the need for a fitness-for-duty certification in the designation notice. Certain managers for an employer, but not the employee's immediate supervisor, may contact a health care provider for purposes of clarifying and authenticating a fitness-for-duty certification. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule; however, an employee may be required to furnish a fitness-for-duty certificate no more often than once every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

H. *Notice to Employees of Change of 12–Month Period for Determining FMLA Entitlement [29 CFR 825.200(d)(1)].* An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period for FMLA leave reasons other than care of a covered servicemember with a serious injury or illness (which is subject to a set ''single 12-month period''). An employer wishing to change to another alternative is required to give at least 60 days notice to all employees.

I. *Key Employee Notification [29 U.S.C. 2614(b)(1)(B); 29 CFR 825.217 – .219 and 825.300(c)(1)(v)].* An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination, including that the employer cannot deny FMLA leave and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

J. *Periodic Employee Status Reports [29 CFR 825.300(b)(4)].* An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.

K. *Notice to Employee of Pending Cancellation of Health Benefits [29 CFR 825.212(a)].* Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease and advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.

L. *Documenting Family Relationship [29 CFR 825.122(j)].* An employer may require an employee giving notice of the need for FMLA leave to provide reasonable documentation or statement of family relationship. This

documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

M. *Recordkeeping [29 U.S.C. 2616; 29 CFR 825.500].* The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the DOL has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint.

Covered employers who have eligible employees must maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; total compensation paid; and dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave and leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data already discussed. Covered employers that jointly employ workers with other employers must keep all the records required by the regulations with respect to any primary employees, and must keep the basic payroll and identifying employee data with respect to any secondary employees.

If FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.,* not covered by, or exempt from, FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that: eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record.

Employers must maintain records and documents relating to any medical certification, recertification or medical history of an employee or employee's family member created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable Americans with Disabilities Act (ADA) confidentiality requirements; except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request.

The FLSA recordkeeping requirements, contained in Regulations 29 CFR part 516, are currently approved under OMB control number 1215–0018; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

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;
- Enhance the quality, utility, and clarity of the information to be collected;
- 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;
- 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 technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. *Current Actions:* The DOL seeks approval for the extension of these information collection requirements that allow covered employers and eligible employees seeking FMLA-qualifying leave to provide third-party disclosures in accordance with the statutory and regulatory requirements discussed herein.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: The Family and Medical Leave Third Party Disclosures.

OMB Control Number: 1235–0003.

Affected Public: Business or other for-profit; Not-for-profits institutions; Farms; State, Local, and Tribal Government.

Total Respondents: 91.1 million employees.

Total Annual Responses: 51,405,741.

Estimated Total Burden Hours: 19,030,424.

Estimated Time per Response

Employee Notice of Need for FMLA Leave: 2 minutes.

Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice: 10 minutes.

Medical Certification and Recertification: 20 minutes.

Certification for Leave for a Qualifying Exigency: 20 minutes.

Certification for Leave to Care for Covered Servicemember: 30 minutes.

Notice to Employees of FMLA Designation: 10 minutes.

Fitness-for-Duty Medical Certification: 10 minutes.

Notice to Employees of Change of 12–Month Period for Determining FMLA Entitlement: 1.79336117 seconds.

Key Employee Notification: 5 minutes.

Periodic Employee Status: 2 minutes.

Notice to Employee of Pending Cancellation of Health Benefits: 5 minutes.

Documenting Family Relationship: 5 minutes.

Recordkeeping: 1.25 minutes.

Frequency: As needed.

Total Burden Cost (capital/startup): $0.

Total Burden Costs (operation/maintenance): $175,684,518.

Dated: September 22, 2011.

Mary Ziegler,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2011–24873 Filed 9–27–11; 8:45 am]

BILLING CODE 4510–27–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–085)]

Performance Review Board, Senior Executive Service (SES)

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of membership of SES Performance Review Board.

SUMMARY: The Civil Service Reform Act of 1978, Public Law 95–454 (Section 405) requires that appointments of individual members to the Performance Review Board (PRB) be published in the **Federal Register**.

The performance review function for the SES in NASA is being performed by the NASA PRB and the NASA Senior Executive Committee. The latter performs this function for senior executives who report directly to the Administrator or the Deputy Administrator and members of the PRB. The following individuals are serving on the Board and the Committee:

Performance Review Board

Chairperson, Chief of Staff, NASA Headquarters.
Executive Secretary, Director, Workforce Management and Development Division, NASA Headquarters.
Associate Administrator, NASA Headquarters.
Associate Deputy Administrator, NASA Headquarters.
Associate Administrator for Human Exploration and Operations Directorate, NASA Headquarters.
Associate Administrator for Science Mission Directorate, NASA Headquarters.
Associate Administrator for Aeronautics Research Mission Directorate, NASA Headquarters.
Associate Administrator for Mission Support Directorate, NASA Headquarters.
Associate Administrator for Communications, NASA Headquarters.
Associate Administrator for Diversity and Equal Opportunity, NASA Headquarters.
Associate Administrator for Education, NASA Headquarters.
Associate Administrator for International and Interagency Relations, NASA Headquarters.
Associate Administrator for Legislative and Intergovernmental Affairs, NASA Headquarters.
Assistant Administrator for Human Capital Management, NASA Headquarters.
Chief Financial Officer, NASA Headquarters.
Chief Information Officer, NASA Headquarters.
Chief Engineer, NASA Headquarters.
Chief, Safety and Mission Assurance, NASA Headquarters.
Chief Technologist, NASA Headquarters.
Chief Scientist, NASA Headquarters.
General Counsel, NASA Headquarters.
Director, Ames Research Center.
Director, Dryden Flight Research Center.
Director, Glenn Research Center.
Director, Goddard Space Flight Center.
Director, Johnson Space Center.
Director, Kennedy Space Center.
Director, Langley Research Center.
Director, Marshall Space Flight Center.
Director, Stennis Space Center.

Senior Executive Committee

Chairperson, Deputy Administrator, NASA Headquarters.
Chair, Executive Resources Board, NASA Headquarters.
Chair, NASA Performance Review Board, NASA Headquarters.
Associate Administrator, NASA Headquarters.
Associate Deputy Administrator, NASA Headquarters.
Chief Information Officer, NASA Headquarters.

Charles F. Bolden, Jr.,

Administrator.

[FR Doc. 2011–24941 Filed 9–27–11; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On August 22, 2011, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on September 23, 2011 to: Jeff Bowman, Permit No. 2012–006.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2011–24949 Filed 9–27–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0124]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on July 5, 2011 (76 FR 39132).

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* 48 CFR 20, U.S. Nuclear Regulatory Commission Acquisition Regulation (NRCAR).

3. *Current OMB approval number:* 3150–0169.

4. *The form number if applicable:* None.

5. *How often the collection is required:* On occasion; one time.

6. *Who will be required or asked to report:* NRC contractors and potential contractors.

7. *An estimate of the number of annual responses:* 5,425 responses.

8. *The estimated number of annual respondents:* 2,803 respondents.

9. *An estimate of the total number of hours needed annually to complete the*

requirement or request: 21,579.5 (20,484 reporting plus 1,095.5 recordkeeping).

10. *Abstract:* The mandatory requirements of the NRCAR implement and supplement the government-wide Federal Acquisition Regulation (FAR), and ensure that the regulations governing the procurement of goods and services within the NRC satisfy the particular needs of the agency. Because of differing statutory authorities among Federal agencies, the FAR permits agencies to issue regulations to implement FAR policies and procedures internally to satisfy the specific need of the agency.

The public may examine and copy for a fee, publicly available documents, including the final supporting statement, at the NRC's Public Document Room, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by October 28, 2011. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–0169), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *CWhiteman@omb.eop.gov* or submitted by telephone at 202–395–4718.

The NRC Clearance Officer is Tremaine Donnell, 301–415–6258.

Dated at Rockville, Maryland this 22nd day of September 2011.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2011–24843 Filed 9–27–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–407; NRC–2011–0153]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for the University of Utah Nuclear Reactor Facility; Facility Operating License No. R–126

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Geoffrey Wertz, Project Manager, Research and Test Reactor Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, *telephone:* 301–415–0893; *e-mail: Geoffrey.Wertz@nrc.gov.*

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

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

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application for license renewal, dated March 25, 2005, as supplemented by letter dated June 8, 2011, is available electronically under ADAMS Accession Nos. ML092090027 and ML111720666. Also see the license's annual reports for years 2003–2004 (ADAMS Accession No. ML042240097), 2004–2005 (ADAMS Accession No. ML052150028), 2005–2006 (ADAMS Accession No. ML061980026), 2006–2007 (ADAMS Accession No. ML071910231), 2007–2008 (ADAMS Accession No. ML082050236), 2008–2009 (ADAMS Accession No. ML091950580), and 2009–2010 (ADAMS Accession No. ML102150226).

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–2011–0153.

SUPPLEMENTARY INFORMATION: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of a renewed Facility Operating License No. R–126, to be held by University of Utah (the licensee), which would authorize continued operation of the University of Utah TRIGA Reactor (UUTR), located in Salt Lake City, Salt Lake County, Utah. Therefore, as required by Title 10 of the *Code of Federal Regulations* (10 CFR) Section 51.21, the NRC is issuing this Environmental Assessment and Finding of No Significant Impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would renew Facility Operating License No. R–126 for a period of 20 years from the date of issuance of the renewed license. The proposed action is in accordance with the licensee's application dated March 25, 2005, as supplemented by the letter dated June 8, 2011. In accordance with 10 CFR 2.109, the existing license remains in effect until the NRC takes final action on the renewal application.

Need for the Proposed Action

The proposed action is needed to allow the continued operation of the UUTR to routinely provide teaching, research, and services to numerous institutions for a period of 20 years.

Environmental Impacts of the Proposed Action

The NRC has completed its safety evaluation of the proposed action to issue a renewed Facility Operating License No. R–126 to allow continued operation of the UUTR for a period of 20 years and concludes there is reasonable assurance that the UUTR will continue to operate safely for the additional period of time. The details of the NRC staff's safety evaluation will be provided with the renewed license that will be issued as part of the letter to the licensee approving its license renewal application. This document contains the environmental assessment of the proposed action.

The UUTR is located on the main campus of University of Utah and is housed in the Merrill Engineering Building. The Merrill Engineering Building is a multipurpose building designed to conform to the zone 3 requirements of the Uniform Building Code. The UUTR reactor tank, concrete pad, footing, and structures also comply with zone 3 requirements of the Uniform Building Code. Adjacent to the site is a parking lot to the north; fields,

parking lots and a roadway to the east and west; and academic and research buildings to the south. The nearest permanent residences are located approximately 137 meters (150 yards) west of the building. Student dormitories on the campus are more than 914 meters (1000 yards) from the reactor site.

The UUTR is a pool-type, light water moderated and cooled research reactor licensed to operate at a steady-state power level of 100 kilowatt thermal power (kW(T)) in non-pulse mode. The fuel is located at the bottom of the inner aluminum tank with a water volume of approximately 31,000 liters (8000 gallons) and a depth of 7.3 meters (24 feet). The reactor is fueled with standard TRIGA (Training, Research, Isotope production, General Atomics) low enriched uranium fuel. A detailed description of the reactor can be found in the UUTR Safety Analysis Report (SAR). There have been no major modifications to the Facility Operating License since renewal of the license on April 17, 1985.

The licensee has not requested changes to the facility design or operating conditions as part of the license renewal. No changes are being made in the types or quantities of effluents that may be released offsite. The licensee has systems in place for controlling the release of radiological effluents and implements a radiation protection program to monitor personnel exposures and to calculate releases of radioactive effluents. As discussed in the NRC staff's safety evaluation, the systems and radiation protection program are appropriate for the types and quantities of effluents expected to be generated by continued operation of the reactor. Accordingly, there would be no increase in routine occupational or public radiation exposure as a result of license renewal. As discussed in the NRC staff's safety evaluation, the proposed action will not significantly increase the probability or consequences of accidents. Therefore, license renewal would not change the environmental impact of facility operations. The NRC staff evaluated information contained in the licensee's application, as supplemented, and data reported to the NRC by the licensee for the last six years of operation to determine the projected radiological impact of the facility on the environment during the period of the renewed license. The NRC staff found that releases of radioactive material and personnel exposures were all well within applicable regulatory limits. Based on this evaluation, the NRC staff concluded that continued operation of the reactor would not have a significant environmental impact.

I. Radiological Impact

Environmental Effects of Reactor Operations

Gaseous radioactive effluents are discharged by the ventilation exhaust system located on the roof of the building at a volumetric flow rate of approximately 0.61 cubic meters per second (22 cubic feet per second). The remainder of the facility is maintained at negative pressure which minimizes other release pathways. The only significant nuclide found in the gaseous effluent stream is argon-41. Licensee calculations indicate that annual argon-41 releases will result in a maximum concentration in the ventilation exhaust of 9.33E–10 microCuries per milliliter (μCi/ml). The previous seven years of operational experience shows that the maximum average annual concentration was 7.9E–11 μCi/ml, which is below the limit of 1.0E–8 μCi/ml specified in 10 CFR 20 Appendix B for air effluent releases. The NRC staff performed an independent calculation and found the licensee's calculation to be reasonable. The licensee also performed calculations to estimate the potential release of nitrogen-16 resulting from activation of reactor pool water into the reactor facility. The NRC staff performed independent calculations and found the licensee's calculations to be reasonable. Total gaseous radioactive releases reported to the NRC in the licensees' annual reports were approximately 1 percent or less of the air effluent concentration limits set by 10 CFR 20, Appendix B. The potential radiation dose to a member of the general public resulting from this concentration is approximately 0.5 millirems (mrem) (0.005 milliSieverts (mSv)) and this demonstrates compliance with the dose limit of 100 mrem (1 mSv) set by 10 CFR 20.1301. Additionally, this potential radiation dose demonstrates compliance with the air emissions dose constraint of 10 mrem (0.1 mSv) specified in 10 CFR 20.1101(d).

The licensee disposes of liquid radioactive wastes by transfer to the University's Radiological Health Department for proper disposal under the University's broad scope byproduct material license. During the past six years, the licensee reported no routine releases of liquid radioactive waste by any method.

The University's Radiological Health Department oversees the handling of solid low-level radioactive waste generated at the UUTR. The bulk of the waste consists of ion exchange resin, irradiated samples, lab-ware, and anti-contamination clothing. Upon removal from the facility by the Radiological Health Department, the waste is controlled under the University's broad scope byproduct material license. The Radiological Health Department disposes of the waste by decay in storage or shipment to a low-level waste broker in accordance with all applicable regulations for transportation of radioactive materials. To comply with the Nuclear Waste Policy Act of 1982, the University of Utah has entered into a contract with the U.S. Department of Energy (DOE) that provides that DOE retains title to the fuel utilized at the UUTR and that DOE is obligated to take the fuel from the site for final disposition.

As described in Chapter 11 of the UUTR Safety Analysis Report (SAR), personnel exposures are well within the limits set by 10 CFR 20.1201, and as low as is reasonably achievable (ALARA). The Radiological Health Department tracks personnel exposures, which are usually less than 10 mrem (0.1 mSv) per year. Operating experience which documented radiation exposures to personnel working in the UUTR from both direct and airborne radiation during normal operation have been reviewed and assessed. The licensee conducts an environmental monitoring program to record and track the radiological impact of UUTR operation on the surrounding unrestricted area. The program consists of quarterly exposure measurements at six locations. Three locations are on the roof of the Merrill Engineering Building and three are on adjacent buildings. The University's Radiological Health Department administers the program and maintains the appropriate records. Over the past six years, the survey program indicated that radiation exposures at the monitoring locations did not significantly change. No correlation exists between total annual reactor operations and annual exposures measured at the monitoring locations. Based on the NRC staff's review of the past six years of data, the NRC staff concludes that operation of the UUTR does not have any significant radiological impact on the surrounding environment. No changes in reactor operation that would affect off-site radiation levels are expected as a result of the proposed action.

Environmental Effects of Accidents

Accident scenarios are discussed in Chapter 13 of the UUTR SAR. The maximum hypothetical accident (MHA) is the cladding failure of a single irradiated fuel element in air with no

radioactive decay of the contained fission products taking place prior to the release. The licensee conservatively calculated doses to facility personnel and the maximum potential dose to a member of the public. NRC staff performed independent calculations to verify that the doses represent conservative estimates for the MHA. Occupational doses resulting from this accident would be well below 10 CFR Part 20 limit of 50 mSv (5000 mrem). Maximum doses for members of the public resulting from this accident would be well below 10 CFR Part 20 limit of 1 mSv (100 mrem). The proposed action will not increase the probability or consequences of accidents.

II. Non-Radiological Impacts

The UUTR core is cooled by a light water primary system consisting of the reactor pool, a heat removal system, and a processing system. Cooling occurs by natural convection, with the heated coolant rising out of the core and into the bulk pool water. The large heat sink provided by the volume of primary coolant allows a few hours of full-power operation without any secondary cooling. The heat removal system transfers heat to the secondary system via a 25 kilowatt (kW) heat exchanger. The secondary system is cooled using an R134a-based refrigeration system. The refrigeration system releases heat to a potable water system which is released to the sanitary sewer. During operation, the secondary system is maintained at a higher pressure than the primary system to minimize the likelihood of primary system contamination entering the secondary system, and ultimately the environment. Release of thermal effluents from the UUTR will not have a significant effect on the environment. Given that the proposed action does not involve any change in the operation of the reactor and the heat load dissipated to the environment, the NRC staff concludes that the proposed action will not have a significant impact on the local water supply.

National Environmental Policy Act (NEPA) Considerations

NRC has responsibilities that are derived from NEPA and from other environmental laws. These include the Endangered Species Act (ESA), Coastal Zone Management Act (CZMA), National Historic Preservation Act (NHPA), Fish and Wildlife Coordination Act (FWCA), and Executive Order 12898 Environmental Justice. The following presents a brief discussion of impacts associated with these laws and other requirements.

I. Endangered Species Act

No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act would be expected.

II. Coastal Zone Management Act

The UUTR is not located within any managed coastal zones, nor would the UUTR effluents and emissions impact any managed coastal zones.

III. National Historic Preservation Act

The NHPA requires Federal agencies to consider the effects of their undertakings on historic properties. National Register of Historic Places (NRHP) lists the closest historical site as the Isaac C. and Dorothy S. Clark House approximately 250 meters (0.16 Miles) west of the UUTR. Given the distance between the facility and the Isaac C. and Dorothy S. Clark House, continued operation of the UUTR will not impact any historical sites. Based on this information, the NRC finds that the potential impacts of license renewal would have no adverse effect on historic and archaeological resources at UUTR.

IV. Fish and Wildlife Coordination Act

The licensee is not planning any water resource development projects, including any of the modifications relating to impounding a body of water, damming, diverting a stream or river, deepening a channel, irrigation, or altering a body of water for navigation or drainage.

V. Executive Order 12898—Environmental Justice

The environmental justice impact analysis evaluates the potential for disproportionately high and adverse human health and environmental effects on minority and low-income populations that could result from the relicensing and the continued operation of the University of Utah TRIGA reactor. Such effects may include human health, biological, cultural, economic, or social impacts. Minority and low-income populations are subsets of the general public residing around the UUTR and all are exposed to the same health and environmental effects generated from activities at the UUTR.

Minority Populations in the Vicinity of the UUTR—According to 2000 census data, 15.6 percent of the population (approximately 1,765,000 individuals) residing within a 50-mile radius of the UUTR identified themselves as minority individuals. The largest minority group was Hispanic or Latino (approximately 175,000 persons or 9.9 percent), followed by ''Some other race'' (approximately 98,000 persons or about 5.6 percent). According to the U.S. Census Bureau, about 19.1 percent of the Salt Lake County population identified themselves as minorities, with persons of Hispanic or Latino origin comprising the largest minority group (11.9 percent). According to census data 3-year average estimates for 2006–2008, the minority population of Salt Lake County, as a percent of total population, had increased to 23.8 percent.

Low-Income Populations in the Vicinity of the UUTR—According to 2000 census data, approximately 24,300 families and 147,000 individuals (approximately 5.7 and 8.3 percent, respectively) residing within a 50-mile radius of the UUTR were identified as living below the Federal poverty threshold in 1999. The 1999 Federal poverty threshold was $17,029 for a family of four.

According to census data in the 2006–2008 American Community Survey 3-Year Estimates, the median household income for Utah was $56,484, while 10.0 percent of the state population and 6.9 percent of families were determined to be living below the Federal poverty threshold. Salt Lake County had a higher median household income average ($58,000) and slightly lower percentages (9.3 percent) of individuals and families (6.6 percent) living below the poverty level.

In response to a comment from the State of Utah Division of Radiation Control, an evaluation for a 10-mile radius was performed. Minority Populations in the Vicinity of the UUTR—According to 2000 census data, 21.5 percent of the population (approximately 517,000 individuals) residing within a 10-mile radius of the UUTR identified themselves as minority individuals. The largest minority group was Hispanic or Latino (approximately 68,000 persons or 13.1 percent), followed by ''Some other race'' (approximately 38,000 persons or about 7.3 percent). According to the U.S. Census Bureau, about 19.1 percent of the Salt Lake County population identified themselves as minorities, with persons of Hispanic or Latino origin comprising the largest minority group (11.9 percent). According to 2010 census data, the minority population of Salt Lake County, as a percent of total population, had increased to 26.0 percent.

Low-Income Populations in the Vicinity of the UUTR—According to 2000 census data, approximately 9,000

families and 52,000 individuals (approximately 7.2 and 10.0 percent, respectively) residing within a 10-mile radius of the University of Utah TRIGA reactor was identified as living below the Federal poverty threshold in 1999. According to 2009 American Community Survey 1-Year Estimates, the median household income for Utah was $55,117, while 11.5 percent of the state population and 7.8 percent of families were determined to be living below the Federal poverty threshold. The 1999 Federal poverty threshold was $17,029 for a family of four. Salt Lake County had a higher median household income average ($57,006) and slightly lower percentages (10.3 percent) of individuals and families (6.9 percent) living below the poverty level.

Impact Analysis—Potential impacts to minority and low-income populations would mostly consist of radiological effects, however radiation doses from continued operations associated with the license renewal are expected to continue at current levels, and would be well below regulatory limits.

Based on this information and the analysis of human health and environmental impacts presented in this environmental assessment, the proposed relicensing would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the vicinity of the UUTR.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to license renewal, the NRC staff considered denial of the proposed action. If the NRC denied the request for license renewal, reactor operations would end and decommissioning would be required. The NRC staff notes that, even with a renewed license, the UUTR will eventually require decommissioning, at which time the environmental effects of decommissioning will occur. Decommissioning will be conducted in accordance with an NRC-approved decommissioning plan which will require a separate environmental review under 10 CFR 51.21. Cessation of facility operations would reduce or eliminate radioactive effluents and emissions. However, as previously discussed in this environmental assessment, radioactive effluents resulting from facility operations constitute only a small fraction of the applicable regulatory limits. Therefore, the environmental impacts of license renewal and denial of the application for license renewal are similar. In addition, denial of the request for license renewal would cease the benefits of teaching, research, and services provided by UUTR.

Alternative Use of Resources

The proposed action does not involve the use of any different resources or significant quantities of resources beyond those previously considered in the issuance of Amendment No. 8 to Facility Operating License No. R–126 for the University of Utah's Nuclear Reactor dated April 4, 2005, which increased the possession limit for special nuclear materials.

Agencies and Persons Consulted

The NRC staff provided a draft of this environmental assessment to the State of Utah Division of Radiation Control for review on July 5, 2011. The Utah Division of Radiation Control responded with three comments on August 18, 2011. The first comment identified a typographical error, which was easily corrected by the NRC staff. The second comment questioned the periodicity of the personnel dose tracking, and the third comment questioned the use of a 50-mile radius, rather than a 10-mile radius, for the area evaluated in the environmental justice review. The NRC staff responded to the second comment with an explanation that the personnel dose was tracked on a monthly, not annual basis. As previously discussed, the NRC staff responded to the third comment by providing an additional analysis for the environmental justice review using a 10-mile radius. The State of Utah Division of Radiation Control acknowledged the NRC staff response with an electronic mail message dated August 22, 2011 (ADAMS Accession ML112350572). The comments were accepted by the NRC staff and incorporated into the environmental assessment.

In a letter to the Utah State Historic Preservation Office dated March 15, 2010 (ADAMS Accession No. ML100740648), the NRC staff described the proposed activity and requested concurrence with the NRC staff's conclusion that no historic properties would be affected. On March 23, 2010, the Utah State Historic Preservation Office responded by letter (ADAMS Accession No. ML100900420) and concurred with the NRC staff's conclusion that no historical properties would be affected by the proposed action.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

Dated at Rockville, Maryland, this 21st day of September, 2011.

For the Nuclear Regulatory Commission.

Patricia A. Silva,

Acting Chief, Research and Test Reactors Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–24939 Filed 9–27–11; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29820; File No. 812–13943]

DFA Investment Dimensions Group Inc., et al.; Notice of Application

September 22, 2011.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from rule 12d1–2(a) under the Act.

SUMMARY: *Summary of Application*: Applicants request an order to permit open-end management investment companies relying on rule 12d1–2 under the Act to invest in certain financial instruments.

Applicants: DFA Investment Dimensions Group Inc. (''DFAIDG''), Dimensional Emerging Markets Value Fund (''DEM''), Dimensional Investment Group Inc. (''DIG''), The DFA Investment Trust Company (''DFAITC,'' and together with DFAIDG, DEM, and DIG, the ''Funds'' and each a ''Fund''), Dimensional Fund Advisors LP (''Dimensional''), and DFA Securities LLC (''DFA Securities'').

DATES: *Filing Dates*: The application was filed on August 19, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 17, 2011, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be

notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, 6300 Bee Cave Road, Building One, Austin, TX 78746.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 551–6879, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. Each of DFAIDG and DIG is organized as a Maryland corporation, and each of DFAITC and DEM is organized as a Delaware statutory trust. The Funds are registered under the Act as open-end management investment companies. Dimensional, a Delaware limited partnership, is an investment adviser registered under the Investment Advisers Act of 1940, as amended (the ''Advisers Act'') and currently serves as investment adviser to each existing Applicant Series (as defined below). DFA Securities, a Delaware corporation, is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended (the ''Exchange Act''), and serves as the distributor for the Applicant Series that are series of the Funds.

2. Applicants request the exemption to the extent necessary to permit any existing or future series of the Funds and any other existing or future registered open-end investment company or series thereof that (i) is advised by Dimensional or any person now or in the future controlling, controlled by or under common control with Dimensional (any such adviser or Dimensional, an ''Adviser'') [1]; (ii) invests in other registered open-end investment companies (''Underlying Funds'') in reliance on section 12(d)(1)(G) of the Act; and (iii) is also eligible to invest in securities (as defined in section 2(a)(36) of the Act) in reliance on rule 12d1–2 under the Act (each an ''Applicant Series''), to also invest, to the extent consistent with its investment objectives, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').[2] Applicants also request that the order exempt any entity controlling, controlled by or under common control with DFA Securities that now or in the future acts as principal underwriter with respect to the transactions described in the application.

3. Consistent with its fiduciary obligations under the Act, each Applicant Series' board of directors/trustees will review the advisory fees charged by the Applicant Series' Adviser to ensure that the fees are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Applicant Series may invest.

Applicants' Legal Analysis:

1. Section 12(d)(1)(A) of the Act provides that no registered investment company (''acquiring company'') may acquire securities of another investment company (''acquired company'') if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies and companies controlled by them.

2. Section 12(d)(1)(G) of the Act provides, in part, that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquired company and acquiring company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

3. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (i) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (ii) securities (other than securities issued by an investment company); and (iii) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as defined in section 2(a)(36) of the Act.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of the Act, or from any rule under the Act, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

5. Applicants state that the Applicant Series will comply with rule 12d1–2 under the Act, but for the fact that the Applicant Series may invest a portion of their assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Applicant Series to invest in Other Investments while investing in Underlying Funds. Applicants assert that permitting the Applicant Series to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) were designed to address.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

[1] Any other Adviser will also be registered under the Advisers Act.

[2] Every existing entity that currently intends to rely on the requested order is named as an applicant. Any existing or future entity that relies on the requested order will do so only in accordance with the terms and condition in the application.

Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2) to the extent that it restricts any Applicant Series from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, under delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24920 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29819; File No. 812–13893]

Fifth Third Funds, et al.; Notice of Application

September 22, 2011.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A) and (B) of the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act, and under section 6(c) of the Act for an exemption from rule 12d1–2(a) under the Act.

SUMMARY: *Summary of the Application:* The requested order would (a) permit certain registered open-end management investment companies that operate as ''funds of funds'' to acquire shares of certain registered open-end management investment companies and unit investment trusts (''UITs'') that are within and outside the same group of investment companies as the acquiring investment companies, and (b) permit funds of funds relying on rule 12d1–2 under the Act to invest in certain financial instruments.

APPLICANTS: Fifth Third Funds (''Trust'') and Fifth Third Asset Management, Inc. (''Adviser'').

DATES: *Filing Dates:* The application was filed on April 15, 2011 and amended on August 11, 2011.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 17, 2011, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: 38 Fountain Square Plaza, MD 1090D2, Cincinnati, OH 45202.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is an open-end management investment company registered under the Act and organized as a Massachusetts business trust. The Trust currently offers shares of 24 series (''Funds''), which each pursue different investment objectives and principal investment strategies.[1] Five of the Funds currently pursue their investment objectives by investing in other Funds in reliance on section 12(d)(1)(G) of the Act.

2. The Adviser, an Ohio corporation, is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and serves as investment adviser to each of the Funds. The Adviser is an indirect wholly-owned subsidiary of Fifth Third Bancorp. The Adviser employs Fort Washington Investment Advisers, Inc. (''Fort Washington'') as subadviser (a ''Subadviser'') to manage the Fifth Third High Yield Bond Fund. Fort Washington is registered as an investment adviser under the Advisers Act.

3. Applicants request an order to permit (a) a Fund that operates as a ''fund of funds'' (each a ''Fund of Funds'') to acquire shares of (i) registered open-end management investment companies that are not part of the same ''group of investment companies,'' within the meaning of section 12(d)(1)(G)(ii) of the Act, as the Fund of Funds (''Unaffiliated Investment Companies'') and UITs that are not part of the same group of investment companies as the Fund of Funds (''Unaffiliated Trusts,'' together with the Unaffiliated Investment Companies, ''Unaffiliated Funds''),[2] or (ii) registered open-end management companies or UITs that are part of the same group of investment companies as the Fund of Funds (collectively, ''Affiliated Funds,'' together with the Unaffiliated Funds, ''Underlying Funds'') and (b) each Underlying Fund, any principal underwriter for the Underlying Fund, and any broker or dealer (''Broker'') registered under the Securities Exchange Act of 1934 (''Exchange Act'') to sell shares of the Underlying Fund to the Fund of Funds.[3] Applicants also request an order under sections 6(c) and 17(b) of the Act to exempt applicants from section 17(a) to the extent necessary to permit Underlying Funds to sell their shares to Funds of Funds and redeem their shares from Funds of Funds.

4. Applicants also request an exemption under section 6(c) from rule 12d1–2 under the Act to permit any existing or future Fund of Funds that relies on section 12(d)(1)(G) of the Act (''Same Group Fund of Funds'') and that otherwise complies with rule 12d1–2 to also invest, to the extent consistent with its investment objective, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').

5. Consistent with its fiduciary obligations under the Act, the board of directors or trustees (''Board'') of each Same Group Fund of Funds will review the advisory fees charged by the Same Group Fund of Fund's investment adviser to ensure that they are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory

[1] Applicants request that the relief apply to each existing and future Fund and to each existing and future registered open-end management investment company or series thereof that is advised by the Adviser or any entity controlling, controlled by or under common control with the Adviser and which is part of the same group of investment companies (as defined in section 12(d)(1)(G)(ii)) as the Trust (included in the term ''Funds'').

[2] Certain of the Unaffiliated Funds may be registered under the Act as either UITs or open-end management investment companies and have received exemptive relief to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs'').

[3] All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

agreement of any investment company in which the Same Group Fund of Funds may invest.

Applicants' Legal Analysis

Investments in Underlying Funds

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act, in relevant part, prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, and any broker or dealer from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) of the Act to permit a Funds of Funds to acquire shares of the Underlying Funds in excess of the limits in section 12(d)(1)(A), and an Underlying Fund, any principal underwriter for an Underlying Fund, and any Broker to sell shares of an Underlying Fund to a Fund of Funds in excess of the limits in section 12(d)(1)(B) of the Act.

3. Applicants state that the terms and conditions of the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants submit that the proposed arrangement will not result in the exercise of undue influence by a Fund of Funds or a Fund of Funds Affiliate (as defined below) over the Unaffiliated Funds.[4] To limit the control that a Fund of Funds may have over an Unaffiliated Fund, applicants propose a condition prohibiting the Adviser, any person controlling, controlled by, or under common control with the Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Adviser or any person controlling, controlled by, or under common control with the Adviser (the ''Advisory Group'') from controlling (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Subadviser within the meaning of section 2(a)(20)(B) of the Act to a Fund of Funds, any person controlling, controlled by or under common control with the Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by or under common control with the Subadviser (the ''Subadvisory Group''). Applicants propose other conditions to limit the potential for undue influence over the Unaffiliated Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, investment adviser, Subadviser, or employee of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, investment adviser, Subadviser, or employee is an affiliated person. An Underwriting Affiliate does not include any person whose relationship to an Unaffiliated Fund is covered by section 10(f) of the Act.

5. To further assure that an Unaffiliated Investment Company understands the implications of an investment by a Fund of Funds under the requested order, prior to a Fund of Funds' investment in the shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute an agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''Participation Agreement''). Applicants note that an Unaffiliated Investment Company (other than an ETF whose shares are purchased by a Fund of Funds in the secondary market) will retain its right at all times to reject any investment by a Fund of Funds.[5]

6. Applicants state that they do not believe that the proposed arrangement will involve excessive layering of fees. The Board of each Fund of Funds, including a majority of the trustees who are not ''interested persons'' (within the meaning of section 2(a)(19) of the Act) (''Independent Trustees''), will find that the advisory fees charged under any investment advisory or management contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. In addition, the Adviser will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any sales charges and/or service fees, as defined in Rule 2830 of the Conduct Rules of the NASD (''NASD Conduct Rule 2830''),[6] charged with respect to shares of a Fund of Funds will not

[4] A ''Fund of Funds Affiliate'' is the Adviser, any subadviser, promoter or principal underwriter of a Fund of Funds, as well as any person controlling, controlled by, or under common control with any of those entities. An ''Unaffiliated Fund Affiliate'' is an investment adviser, sponsor, promoter, or principal underwriter of an Unaffiliated Fund, as well as any person controlling, controlled by, or under common control with any of those entities.

[5] An Unaffiliated Investment Company, including an ETF, would retain its right to reject any initial investment by a Fund of Funds in excess of the limit in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds.

[6] Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

7. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Underlying Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except in certain circumstances identified in condition 11 below.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that a Fund of Funds and the Affiliated Funds might be deemed to be under common control of the Adviser and therefore affiliated persons of one another. Applicants also state that a Fund of Funds and the Unaffiliated Funds might be deemed to be affiliated persons of one another if the Fund of Funds acquires 5% or more of an Unaffiliated Fund's outstanding voting securities. In light of these and other possible affiliations, section 17(a) could prevent an Underlying Fund from selling shares to and redeeming shares from a Fund of Funds.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act.[7] Applicants state that the terms of the transactions are reasonable and fair and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of the Underlying Fund.[8] Applicants state that the proposed transactions will be consistent with the policies of each Fund of Funds and each Underlying Fund and with the general purposes of the Act.

Other Investments by Same Group Funds of Funds

1. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and acquired company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

2. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (1) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (2) securities (other than securities issued by an investment company); and (3) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as defined in section 2(a)(36) of the Act.

3. Applicants state that the proposed arrangement would comply with the provisions of rule 12d1–2 under the Act, but for the fact that a Same Group Fund of Funds may invest a portion of its assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Same Group Funds of Funds to invest in Other Investments. Applicants assert that permitting Same Group Funds of Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) were designed to address.

Applicants' Conditions

Investments by Funds of Funds in Underlying Funds

Applicants agree that the relief to permit Funds of Funds to invest in Underlying Funds shall be subject to the following conditions:

1. The members of an Advisory Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Subadvisory Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Unaffiliated Fund, the Advisory Group or a Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of the Unaffiliated Fund, then the Advisory Group or the Subadvisory Group will vote its shares

[7] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by a Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e)(1) of the Act. The Participation Agreement also will include this acknowledgement.

[8] Applicants note that a Fund of Funds generally would purchase and sell shares of an Unaffiliated Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Unaffiliated Fund. To the extent that a Fund of Funds purchases or redeems shares from an ETF that is an affiliated person of the Fund of Funds in exchange for a basket of specified securities as described in the application for the exemptive order upon which the ETF relies, applicants also request relief from section 17(a) of the Act for those in-kind transactions. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds, because an investment adviser to the ETF is also an investment adviser to the Fund of Funds.

of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Subadvisory Group with respect to an Unaffiliated Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or as the sponsor (in the case of an Unaffiliated Trust).

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in shares of an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of each Fund of Funds, including a majority of the Independent Trustees, will adopt procedures reasonably designed to assure that its Adviser and any Subadviser(s) to the Fund of Funds are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or Fund of Funds Affiliate from an Unaffiliated Fund or an Unaffiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s) or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things, (a) whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of the Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth the: (a) Party from whom the securities were acquired, (b) identity of the underwriting syndicate's members, (c) terms of the purchase, and (d) information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the Independent Trustees, shall find that the advisory fees charged under such advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding and the basis upon which the finding was made will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser, or

an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Subadviser, or an affiliated person of the Subadviser, from an Unaffiliated Fund, other than any advisory fees paid to the Subadviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) Receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to (i) acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

12. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to fund of funds set forth in NASD Conduct Rule 2830.

Other Investments by Same Group Funds of Funds

Applicants agree that the relief to permit Same Group Funds of Funds to invest in Other Investments shall be subject to the following condition:

13. Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2), to the extent that it restricts any Same Group Fund of Funds from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24919 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29817; 812–13944]

The Singapore Fund, Inc.; Notice of Application

September 22, 2011.

AGENCY: Securities and Exchange Commission (''Commission'').

APPLICANT: The Singapore Fund, Inc. (the ''Fund'').

ACTION: Notice of application for an order under section 17(b) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 17(a) of the Act.

SUMMARY: *Summary of Application:* Applicant seeks an order that would permit in-kind repurchases of shares of the Fund held by certain affiliated shareholders of the Fund.

DATES: *Filing Dates:* The application was filed on August 22, 2011, and amended on September 21, 2011.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 17, 2011, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, c/o Daiwa Securities Trust Company, One Evertrust Plaza, 9th Floor, Jersey City, NJ 07302–3051.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876, or Dalia Osman Blass, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicant's Representations

1. The Fund, a Maryland corporation, is registered under the Act as a closed-end management investment company. Applicant's investment objective is to seek long-term capital appreciation through investment primarily in Singapore equity securities. Applicant states that under normal circumstances it invests at least 80% of its net assets in Singapore equity securities.[1] Shares of the Fund are listed and trade on the New York Stock Exchange. Aberdeen Asset Management Asia Limited (the ''Adviser''), an investment adviser registered under the Investment Advisers Act of 1940, serves as the investment adviser to the Fund.

2. The Fund proposes to conduct a tender offer for up to 25% of its outstanding shares at a price equal to 99% of net asset value per share (''NAV'') as of the business day immediately after the day such tender offer expires (the ''In-Kind Repurchase Offer''). Payment for any shares repurchased during the In-Kind Repurchase Offer would be made in-kind through a *pro rata* distribution of the Fund's portfolio securities (with exceptions generally for odd lots, fractional shares, and cash items). The In-Kind Repurchase Offer will be made pursuant to section 23(c)(2) of the Act and conducted in accordance with rule 13e–4 under the Securities Exchange Act of 1934.

3. Applicant states that the In-Kind Repurchase Offer is designed to accommodate the needs of stockholders who wish to participate in the In-Kind Repurchase Offer and long-term stockholders who would prefer to remain invested in a closed-end investment vehicle. Under the In-Kind Repurchase Offer, only participating

[1] Applicant states that as of July 31, 2011, approximately 94.72% of applicant's net assets were invested in Singapore equity securities. The Singapore Stock Exchange is the primary trading market for the Singapore equity securities held by applicant. As of July 31, 2011, approximately 0.99% of applicant's net assets were invested in Malaysian equity securities, however applicant has subsequently disposed of its Malaysian holdings. The balance of applicant's net assets were in the form of time deposits and other cash equivalents. The Fund held no preferred securities, warrants or convertible debt securities of Singapore issuers as of that date.

stockholders will pay U.S. Federal taxes on the gain on appreciated securities distributed in the In-Kind Repurchase Offer. Non-participating stockholders would avoid the imposition of a significant Federal tax liability, which would occur if the Fund sold the appreciated securities to make payments in cash. Applicant further states that the In-Kind Repurchase Offer will minimize disruption to the investment management of applicant, while allowing the Fund to avoid a cascade of distributions that would reduce the size of the Fund drastically to a point where it could potentially be no longer viable.

4. Applicant requests relief to permit any common stockholders of the Fund who are ''affiliated persons'' of the Fund solely by reason of owning, controlling, or holding with the power to vote, 5% or more of the Fund's outstanding voting securities (each, an ''Affiliated Stockholder'') to participate in the proposed In-Kind Repurchase Offer.

Applicant's Legal Analysis

1. Section 17(a) of the Act prohibits an affiliated person of a registered investment company, or any affiliated person of the person, acting as principal, from knowingly purchasing or selling any security or other property from or to the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include any person who directly or indirectly owns, controls, or holds with power to vote 5% or more of the outstanding voting securities of the other person. Applicant states that to the extent that the In-Kind Repurchase Offer could be deemed the purchase or sale of securities by an Affiliated Stockholder, the transactions would be prohibited by section 17(a). Accordingly, applicant requests an exemption from section 17(a) of the Act to the extent necessary to permit the participation of Affiliated Stockholders in the In-Kind Repurchase Offer.

2. Section 17(b) of the Act authorizes the Commission to exempt any transaction from the provisions of section 17(a) if the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the transaction is consistent with the policy of each registered investment company and with the general purposes of the Act.

3. Applicant asserts that the terms of the In-Kind Repurchase Offer meet the requirements of sections 17(b) of the Act. Applicant asserts that neither the Fund nor an Affiliated Stockholder has any choice as to the portfolio securities to be received as proceeds from the In-Kind Repurchase Offer. Instead, stockholders will receive their *pro rata* portion of each of the Fund's portfolio securities, excluding (a) Securities which, if distributed, would have to be registered under the Securities Act of 1933 (''1933 Act''), (b) securities issued by entities in countries which restrict or prohibit the holding of securities by non-residents other than through qualified investment vehicles, or whose distribution would otherwise be contrary to applicable local laws, rules or regulations, and (c) certain portfolio assets that involve the assumption of contractual obligations, require special trading facilities, or may only be traded with the counterparty to the transaction. Moreover, applicant states that the portfolio securities to be distributed in the In-Kind Repurchase Offer will be valued in accordance with section 2(a)(41) of the Act, which will be an objective, verifiable standard that removes any discretion of an Affiliated Stockholder or the Adviser to conduct the In-Kind Repurchase Offer at a price that would be beneficial or detrimental to the interests of any particular stockholder. Applicant further states that the In-Kind Repurchase Offer is consistent with the investment policies of the Fund. Applicant represents that the In-Kind Repurchase Offer is consistent with the general purposes of the Act because the interests of all stockholders are equally protected and no Affiliated Stockholder would receive an advantage or special benefit not available to any other stockholder participating in the In-Kind Repurchase Offer.

Applicant's Conditions

Applicant agrees that any order granting the requested relief will be subject to the following conditions:

1. Applicant will distribute to stockholders participating in the In-Kind Repurchase Offer an in-kind pro rata distribution of portfolio securities of applicant. The pro rata distribution will not include: (a) Securities that, if distributed, would be required to be registered under the 1933 Act; (b) securities issued by entities in countries that restrict or prohibit the holdings of securities by non-residents other than through qualified investment vehicles, or whose distribution would otherwise be contrary to applicable local laws, rules or regulations; and (c) certain portfolio assets, such as derivative instruments or repurchase agreements, that involve the assumption of contractual obligations, require special trading facilities, or can only be traded with the counterparty to the transaction. Cash will be paid for that portion of applicant's assets represented by cash and cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements) and other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable). In addition, Applicant will distribute cash in lieu of fractional shares and accruals on such securities. Applicant may round down or up the proportionate distribution of each portfolio security to the nearest round lot amount to eliminate any odd lot prior to the distribution and will distribute the value of the remaining odd lot, if any, in cash. Applicant may also distribute a higher pro rata percentage of other portfolio securities to represent such fractional shares and odd lots.

2. The securities distributed to stockholders pursuant to the In-Kind Repurchase Offer will be limited to securities that are traded on a public securities market or for which quoted bid and asked prices are available.

3. The securities distributed to stockholders pursuant to the In-Kind Repurchase Offer will be valued in the same manner as they would be valued for purposes of computing Applicant's net asset value, consistent with the requirements of section 2(a)(41) of the 1940 Act.

4. Applicant will maintain and preserve for a period of not less than six years from the end of the fiscal year in which the In-Kind Repurchase Offer occurs, the first two years in an easily accessible place, a written record of the In-Kind Repurchase Offer, that includes the identity of each stockholder of record that participated in the In-Kind Repurchase Offer, whether that stockholder was an Affiliated Stockholder, a description of each security distributed, the terms of the distribution, and the information or materials upon which the valuation was made.

For the Commission, by the Division of Investment Management, under delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24869 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65380; File No. SR–C2–2011–017]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a Market-Maker Trade Prevention Order

September 22, 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 September 15, 2011, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a Market-Maker Trade Prevention Order. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt a Market-Maker Trade Prevention (''MMTP'') Order. The proposed MMTP Order is an immediate-or-cancel order containing a designation that prevents incoming orders for a Market-Maker from executing against resting quotes and orders for the same Market-Maker.

The MMTP Order type designation is intended to prevent a Market-Maker from trading on both sides of the same transaction. Orders would be marked with the MMTP designation on an order-by-order basis. An incoming MMTP Order cannot interact with interest resting on the book from the same Market-Maker. An MMTP Order that would trade against a resting quote or order for the same Market-Maker will be cancelled, as will the resting quote or order. The MMTP Order will trade against other tradable orders and quotes entered by or on behalf of another market participant (other than those entered by or on behalf of the same Market-Maker) in accordance with the execution process described in Exchange Rule 6.12 (Order Execution and Priority).

However, if the MMTP is received while an order for the same Market-Maker is subject to Rule 6.14, *SAL,* Rule 6.51, *Automated Improvement Mechanism (''AIM''),* and Rule 6.52, *Solicitation Auction Mechanism* (each an ''auction''), only the MMTP Order will be canceled. The order being represented in the auction will not be cancelled. This is because the order being represented in the auction will still be able to execute via the auction mechanism against orders originating from other market participants. As auctions are designed to achieve price improvement, the Exchange does not want to interfere with the auction process and cancel an order that is already up for auction, since it can achieve price improvement with an order from another market participant.

For example, assume the Exchange's best bid and offer is $1.00–$1.20, 100 contracts on each side. A Market-Maker marks an order to buy 100 contracts at $1.20 with the MMTP distinction, making it an MMTP Order. The MMTP Order is submitted to the Exchange and it would trade with a resting quote from the same Market-Maker for 100 contracts offered at $1.20, then both the order to buy and the resting offer quote would be canceled. However, if the resting offer quote from the same Market-Maker was for only 60 contracts, then 60 contracts from the order to buy would be canceled (as would the resting quote), but the other 40 contracts could trade with the resting offer interest of the other market participants.

As another example, assume a sell order entered on behalf of a Market-Maker is subject to a HAL auction. A Market-Maker marks an order to buy with the MMTP distinction, making it an MMTP Order. If this incoming MMTP Order is received while the auction is in progress and the MMTP Order would otherwise trade with the order that is subject to the HAL auction, then only the MMTP Order would be cancelled. The order being represented in the auction would not be canceled.

At this time, the Exchange intends to identify an incoming MMTP Order as being for the same Market-Maker if the MMTP Order and resting quote or order share any of the following: (1) User acronym, (2) login ID, or (3) sub-account code. Each Market-Maker is assigned its own acronym (sometimes multiple acronyms). However, a Market-Maker may have multiple different login IDs or sub-account codes. A login ID is the session through which a Market-Maker routes orders to the Exchange. A Market-Maker may elect to use different login IDs to route different types of communications to the Exchange. For example, a Market-Maker may choose to use login ID #1 for all orders it sends to the Exchange and login ID #2 for all quotes it sends to the Exchange. Or the Market-Maker may be much more specific, and use different login IDs for different types of orders and quotes. A sub-account code is simply a field on each order or quote that lists the account into which a trade clears at the Options Clearing Corporation (''OCC''). A Market-Maker may have different sub-account codes for each trader it employs, so that the Market-Maker may track each trader's activity. Finally, Market-Makers sometimes use different acronyms but clear into the same accounts (thereby using the same sub-accounts codes).

Allowing Market-Makers to designate orders as MMTP Orders is intended to allow firms to better manage order flow and prevent unwanted executions resulting from the interaction of executable buy and sell trading interest for the same Market-Maker, as well as prevent the potential for (or appearance of) ''wash sales'' that may occur as a result of the velocity of trading in today's high speed marketplace. When a Market-Maker is preparing to submit an order, the Market-Maker may not know whether or not his order is going to trade against his own resting quote.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

Further, many Market-Makers have multiple connections into the Exchange due to capacity- and speed-related demands. Orders routed by the same Market-Makers via different connections may, in certain circumstances, trade against each other. Finally, the Exchange notes that offering the MMTP modifiers will streamline certain regulatory functions by reducing false positive results that may occur on Exchange-generated wash trading surveillance reports when orders are executed by the same Market-Maker. For these reasons, the Exchange believes the MMTP Order provides Market-Makers enhanced order processing functionality to prevent potentially unwanted trades from occurring.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act [5] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change advances these objectives by making available to Market-Makers a type of order that will assist Market-Makers in preventing unwanted executions against themselves.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is filed for immediate effectiveness pursuant to Section 19(b)(3)(A) [8] of the Securities Exchange Act of 1934 and Rule 19b–4(f)(6) [9] thereunder because it effects a change that (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–C2–2011–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–C2–2011–017. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–C2–2011–017 and should be submitted on or before October 19, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24867 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78s(b)(1).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65381; File No. SR–NASDAQ–2011–128]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Customer Rebates To Add Liquidity

September 22, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 15, 2011, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify Exchange Rule 7050 governing pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

routing standardized equity and index options. Specifically, NOM proposes to increase pricing for the Penny Pilot [3] Options (''Penny Options'') with respect to the Customer Rebate to Add Liquidity.

While changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative for transactions on October 3, 2011.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to modify Exchange Rule 7050 governing the rebates and fees assessed for option orders entered into NOM. The Exchange is proposing to modify pricing for the Customer Rebate to Add Liquidity in Penny Options by amending Rebates to Add Liquidity and eliminating certain tiers.

The Exchange currently pays a Customer Rebate to Add Liquidity in Penny Options based on six volume tiers as follows:

	Monthly volume	Rebate to add liquidity
Tier 1	Participant adds Customer liquidity of up to 24,999 contracts per day in a month	$0.26.
Tier 2(a)	Participant adds Customer liquidity of 25,000–59,999 contracts per day in a month	$0.34.
Tier 2(b)	Participant (1) qualifies for Tier 2(a) above, and (2) adds Customer liquidity of 750,000 contracts during the period from September 6 through September 30, 2011.	$0.36 for Customer Liquidity added from September 6 through September 30, 2011.
Tier 3	Participant adds Customer liquidity of 60,000–124,999 contracts per day in a month.	$0.38.
Tier 4	Participant adds Customer liquidity of 125,000 or more contracts per day in a month.	$0.40.
Tier 5 [a]	Participant adds (1) Customer liquidity of 60,000 or more contracts per day in a month, and (2) NOM Market Maker liquidity of 60,000 or more contracts per day in a month.	$0.40.
Tier 6(a)	Participant adds Customer liquidity of 25,000 or more contracts per day in a month, and (2) the Participant simultaneously qualifies for credit under the Investor Support Program set forth in Rule 7014.	$0.35.
Tier 6(b)	Participant (1) Qualifies for Tier 6(a) above, and (2) adds Customer liquidity of 750,000 contracts during the period from September 6 through September 30, 2011.	$0.37 for Customer Liquidity added from September 6 through September 30, 2011.

The Exchange is proposing to: (i) Increase the Tier 2(a) Rebate to Add Liquidity from $0.34 per contract to $0.36 per contract and amend the title from ''Tier 2(a)'' to ''Tier 2''; (ii) increase the Tier 6 Rebate to Add Liquidity from $0.35 per contract to $0.37 per contract and amend the title from ''Tier 6(a)'' to ''Tier 6''; and (iii) eliminate Tier 2(b) and Tier 6(b) language, which as of October 3, 2011 will be outdated as those terms expired after September 30, 2011.

The Exchange adopted these monthly volume achievement tiers in September 2011.[4] The Exchange subsequently offered a monthly volume target for NOM Participants that qualified for Tiers 2 and 6.[5] Specifically, firms that qualified for Tier 2 by adding Customer Liquidity in Penny Options of 25,000 to 59,999 contracts per day for the month could receive a $0.02 per contract Rebate to Add Liquidity by contributing 750,000 contracts of Customer liquidity in Penny Options between September 6 and September 30, 2011. Also, firms that qualify for Tier 6 by adding Customer Liquidity in Penny Options of 25,000 or more contracts per day for the month and also qualifying for a credit under NASDAQ's Investor Support Program (set forth in Rule 7014),[6] could receive a $0.02 per contract Rebate to Add Liquidity by contributing 750,000 contracts of Customer liquidity in Penny Options between September 6 and September 30, 2011. These two incentives expired on close of business September 30, 2011 and will not be offered as of October 3, 2011. The Exchange is therefore proposing to delete the text associated with Tiers 2(b) and 6(b) as that text is outdated.

The Exchange believes the existing monthly volume thresholds have incentivized firms that route Customer orders to the Exchange to increase

[3] The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through December 31, 2011. *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR–NASDAQ–2009–097) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010) (SR–NASDAQ–2010–013) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); and 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR–NASDAQ–2010–053) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot). *See also* Exchange Rule Chapter VI, Section 5.

[4] *See* Securities Exchange Act Release No. 65317 (September 12, 2011) (SR–NASDAQ–2011–127).

[5] *See* Securities Exchange Act Release No. 65318 (September 12, 2011) (SR–NASDAQ–2011–124).

[6] For a detailed description of the Investor Support Program, *see* Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010) (NASDAQ–2010–141) (notice of filing and immediate effectiveness) (the ''ISP Filing''). *See also* Securities Exchange Act Release Nos. 63414 (December 2, 2010), 75 FR 76505 (December 8, 2010) (NASDAQ–2010–153) (notice of filing and immediate effectiveness); and 63628 (January 3, 2011), 76 FR 1201 (January 7, 2011) (NASDAQ–2010–154) (notice of filing and immediate effectiveness).

Customer order flow to the Exchange. The Exchange desires to continue to encourage firms that route Customer orders to increase Customer order flow to the Exchange by offering greater Customer rebates for greater liquidity added to the Exchange. The Exchange is proposing two amendments to the Rebate to Add Liquidity tiers in addition to the elimination of the aforementioned language in Tier 2(b) and Tier 6(b).

First, the Exchange is proposing to increase the rebate for newly named Tier 2 firms that add between 25,000 and 59,999 contracts per day in month [7] from a $0.34 per contract Rebate to Add Liquidity to a $0.36 per contract Rebate to Add Liquidity. The Exchange believes that the increased rebate will further incentivize firms to continue to contribute between 25,000 and 59,999 contracts per day.

Second, the Exchange is proposing to increase the rebate for newly named Tier 6 from a $0.35 per contract Rebate to Add Liquidity to a $0.37 per contract Rebate to Add Liquidity. Tier 6 firms are required to meet two criteria: (1) Provide 25,000 or more contracts per day in a month; [8] and (2) the Participant simultaneously qualifies for credit under the Investor Support Program as set forth in Rule 7014.[9] By meeting the two criteria, Participants will receive a $0.01 per contract rebate increase ($0.37 per contract for meeting both criteria as opposed to $0.36 per contract for meeting only the first of the two criteria and therefore only qualifying for a Tier 2 rebate). This proposal will continue to amount to a rebate of $0.01 per contract higher for any contracts between 25,000 and 59,999 per day for qualifying participants in both markets ($0.37 per contract as proposed in Tier 6) versus those that participate and qualify only on NOM ($0.36 per contract as proposed in Tier 2). The rebate in Tier 6 is proposed to continue to incentivize participants in the Exchange's equity markets to also participate in the Exchange's options market.

The Exchange is not proposing any amendments to Tiers 1, 3, 4, and 5.

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[10] in general, and with Section 6(b)(4) of the Act,[11] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls.

The Exchange believes that the proposed new pricing tiers are equitable, reasonable and not unfairly discriminatory because they continue an existing program to encourage broker-dealers acting as agent for Customer orders to select the Exchange as a venue to post Customer orders. The Exchange believes that its success at attracting Customer order flow benefits all market participants by improving the quality of order interaction and executions at the Exchange.

The Exchange believes that the proposed increased rebates for Tiers 2 and 6 are reasonable because as explained herein, the Exchange is seeking to further incentivize Participants to add liquidity to the Exchange. In addition, with respect to Tier 6, the Exchange believes the increased Rebates to Add Liquidity will incentivize participants in the Exchange's equity markets to also participate in the Exchange's options market.

The Exchange believes that the proposed increased rebates for Tiers 2 and 6 are equitable and not unfairly discriminatory because the proposed Rebates to Add Liquidity will apply to all Customer order flow in a uniform manner. All Customers will have the opportunity to earn even higher rebates by adding liquidity and obtaining higher tier rebates as compared to all other market participants.

The Exchange believes that its proposal to eliminate outdated language in Tier 2(b) and Tier 6(b) is reasonable and equitable because the elimination of outdated language will provide clarity to Exchange Rule 7050.

The Exchange operates in a highly competitive market comprised of nine U.S. options exchanges in which sophisticated and knowledgeable market participants can and do send order flow to competing exchanges if they deem fee levels at a particular exchange to be excessive or rebate opportunities to be inadequate. The Exchange believes that the proposed rebate scheme is competitive and similar to other rebates and tiers opportunities in place on other exchanges. The Exchange believes that this competitive marketplace materially impacts the rebates present on the Exchange today and substantially influenced the proposal set forth above.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [12] and paragraph (f)(2) of Rule 19b–4 [13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2011–128 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–128. 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

[7] The per day average is based on a month containing 20 trading days, in this case between 500,000 and 799,999 [sic] contracts of liquidity per month.

[8] The per day average is based on a month containing 20 trading days, in this case 500,000 contracts of liquidity per month.

[9] *See* Rule 7014. *See also* note 6.

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2011–128 and should be submitted on or before September 28, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24868 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65382; File No. SR–FINRA–2011–050]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Rule Cross-References and Make Non-Substantive Technical Changes to Certain FINRA and NASD Rules

September 22, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 14, 2011, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to update cross-references within certain FINRA rules to reflect changes adopted in the consolidated FINRA rulebook and to make non-substantive technical changes to certain FINRA and NASD Rules.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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, Proposed Rule Change

1. Purpose

FINRA is in the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook'').[4] That process involves FINRA submitting to the Commission for approval a series of proposed rule changes over time to adopt rules in the Consolidated FINRA Rulebook. The phased adoption and implementation of those rules necessitates periodic amendments to update rule cross-references and other non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change would update rule cross-references to reflect changes adopted in the Consolidated FINRA Rulebook. In this regard, the proposed rule change would update references in FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to SEA Rule 19d–1(c)(2)) that are needed as the result of Commission approval of a recent FINRA proposed rule changes [sic].[5] Furthermore, the proposed rule change would make a technical change to paragraph (m) of FINRA Rule 7410 (Definitions) to update FINRA's definition of ''Program Trade'' to correspond with that of the NYSE Rule 132B.[6]

The proposed rule change would also delete from FINRA Manual the Series heading for NASD Rule 3200 (Settlement) to reflect that the NASD Rule 3200 Series has been replaced by FINRA Rules 4311, 4320, and 5330.[7]

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date for the proposed rule changes to FINRA Rules 7410, 9217, and NASD Rule 3200 will be October 17, 2011.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[5] *See* Securities Exchange Act Release No. 64687 (June 16, 2011), 76 FR 36586 (June 22, 2011) (Order Approving File No. SR–FINRA–2011–013).

[6] *See* Securities Exchange Act Release No. 55793 (May 22, 2007), 72 FR 29567 (May 29, 2007) (Order Approving File No. SR–NYSE–2007–34); and Securities Exchange Act Release No. 56726 (October 31, 2007), 72 FR 62719 (November 6, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR–NYSE–2007–96).

[7] *See* Securities Exchange Act Release No. 61338 (January 12, 2010), 75 FR 2899 (January 19, 2010) (Order Approving File No. SR–FINRA–2009–084); Securities Exchange Act Release No. 62533 (July 20, 2010), 75 FR 43588 (July 26, 2010) (Order Approving File No. SR–FINRA–2010–028); and Securities Exchange Act Release No. 63999 (March 1, 2011), 76 FR 12380 (March 7, 2011) (Order Approving File No. SR–FINRA–2010–061).

[8] 15 U.S.C. 78*o*–3(b)(6).

proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2011–050 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number SR–FINRA–2011–050. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2011–050 and should be submitted on or before October 19, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24965 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65383; File No. SR–CBOE–2011–040]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule to Simplify the $1 Strike Price Interval Program

September 22, 2011.

I. Introduction

On July 26, 2011, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change regarding opening index option months and series. The proposed rule change was published for comment in the **Federal Register** on August 9, 2011.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The proposal seeks to amend Interpretation and Policy .01 to Rule 5.5 to simplify the $1 Strike Price Interval Program (the ''Program''). The Exchange established the Program in 2003, and has subsequently modified it on several occasions.[4] The most recent expansion of the Program, in early 2011, increased the number of $1 strike price intervals permitted within the $1 to $50 range.[5] This expansion, however, resulted in complex and lengthy rule text. In its filing, CBOE stated that the proposed changes to simplify the rule text of the Program will benefit market participants since the Program will be easier to understand and will maintain the expansions made to the Program in early 2011.

To simply the rules of the Program and as a proactive attempt to mitigate any unintentional listing of improper strikes, CBOE proposed the following amendments:

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 65031 (August 4, 2011), 76 FR 48935 (''Notice'').

[4] *See* Securities Exchange Act Release No. 47991 (June 5, 2003), 68 FR 35243 (June 12, 2003) (SR–CBOE–2001–60); Release No. 57049 (December 27, 2007), 73 FR 528 (January 3, 2008) (SR–CBOE–2007–125); Release No. 59587 (March 17, 2009), 74 FR 12414 (March 24, 2009) (SR–CBOE–2009–001); Release No. 62443 (July 2, 2010), 75 FR 39608 (July 9, 2010) (SR–CBOE–2010–064).

[5] *See* Securities Exchange Act Release No. 63772 (January 25, 2011), 76 FR 5644 (February 1, 2011) (SR–CBOE–2011–006).

• When the price of the underlying stock is equal to or less than $20, permit $1 strike price intervals with an exercise price up to 100% above and 100% below the price of the underlying stock.[6]

○ However, the above restriction would not prohibit the listing of at least five strike prices above and below the price of the underlying stock per expiration month in an option class.[7]

○ For example, if the price of the underlying stock is $2, the Exchange would be permitted to list the following series: $1, $2, $3, $4, $5, $6 and $7.[8]

• When the price of the underlying stock is greater than $20, permit $1 strike price intervals with an exercise price up to 50% above and 50% below the price of the underlying security up to $50.[9]

• For the purpose of adding strikes under the Program, the ''price of the underlying stock'' shall be measured in the same way as ''the price of the underlying security'' is as set forth in Rule 5.5A(b)(i).[10]

• Prohibit the listing of additional series in $1 strike price intervals if the underlying stock closes at or above $50 in its primary market and provide that additional series in $1 strike price intervals may not be added until the underlying stock closes again below $50.[11]

The early 2011 expansion of the Program permitted for some limited listing of LEAPS in $1 strike price intervals for classes that participate in the Program. The Exchange is proposing to simplify the language and provide clearer examples. These changes are set forth in proposed Rule 5.5.01(b)(2)(v).

For stocks in the Program, the Proposal permits the Exchange to list one $1 strike price interval between each standard $5 strike interval, with the $1 strike price interval being $2 above the standard strike for each interval above the price of the underlying stock, and $2 below the standard strike for each interval below the price of the underlying stock. The proposed rule text defines these strikes as ''$2 wings.'' For example, if the price of the underlying stock is $24.50, the Exchange may list the following standard strikes in $5 intervals: $15, $20, $25, $30 and $35. Between these standard $5 strikes, the Exchange may list the following $2 wings: $18, $27 and $32.[12]

In addition, the proposal permits the Exchange to list the $1 strike price interval that is $2 above the standard strike just below the underlying price at the time of listing. In the above example, since the standard strike just below the underlying price ($24.50) is $20, the Exchange may list a $22 strike.

The proposal also contains certain non-substantive amendments to rule text.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The proposed rule change seeks to simplify the Program, and thereby to reduce the possibility of confusion among investors and market participants. At the same time, the Commission notes that the changes proposed by CBOE would allow a relatively modest increase to the total number of series that may be listed under the $1 Strike Interval Program, and would not alter the range for which $1 interval strikes are permitted to be listed. The Commission also notes that CBOE has represented that it has the necessary systems capacity to support the increase in new options series that will result from the proposed streamlining changes to the Program.

IV. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–CBOE–2011–040) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24918 Filed 9–27–11; 8:45 am]

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[6] *See* proposed Rule 5.5.01(a)(2)(i).

[7] *Id.*

[8] *Id.*

[9] *See* proposed Rule 5.5.01(a)(2)(ii).

[10] *See* proposed Rule 5.5.01(a)(2)(iii). Rule 5.5A(b)(i) provides, ''[t]he price of a security is measured by: (1) For intra-day add-on series and next-day series additions, the daily high and low of all prices reported by all national securities exchanges; (2) for new expiration months, the daily high and low of all prices reported by all national securities exchanges on the day the Exchange determines it preliminary notification of new series; and (3) for option series to be added as a result of pre-market trading, the most recent share price reported by all national securities exchanges between 7:45 a.m. and 8:30 a.m. (Chicago time).''

[11] *See* proposed Rule 5.5.01(a)(2)(iv). The Exchange believes that it is important to codify this additional series criterion because there have been conflicting interpretations among the exchanges that have adopted similar programs. The $50 price criterion for additional series was intended when the Program was originally established (as a pilot) in 2003. *See* Securities Exchange Act Release No. 47991 (June 5, 2003), 68 FR 35243 (June 12, 2003) (SR–CBOE–2001–60) (''CBOE may list an additional expiration month provide that the underlying stock closes below $20 on its primary market on expiration Friday. If the underlying stock closes at or above $20 on expiration Friday, CBOE will not list an additional month for a $1 strike series until the stock again closes below $20.'')

[12] The Exchange notes that a $2 wing is not permitted between the standard $20 and $25 strikes in the above example. This is because the $2 wings are added based on reference to the price of the underlying and as being between the standard strikes above and below the price of the underlying stock. Since the price of the underlying stock ($24.50) straddles the standard strikes of $20 and $25, this provision does not permit a $2 wing to be listed between these standard strikes. Instead, a separate provision, discussed in the next paragraph, permits listing of a strike price between the standard strikes that bracket the current underlying price.

[13] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a Market-Maker Trade Prevention Order

September 22, 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 September 15, 2011, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a Market-Maker Trade Prevention Order. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The Exchange proposes to adopt a Market-Maker Trade Prevention (''MMTP'') Order. The proposed MMTP Order is an immediate-or-cancel order containing a designation that prevents incoming orders for a Market-Maker from executing against resting quotes and orders for the same Market-Maker.

The MMTP Order type designation is intended to prevent a Market-Maker from trading on both sides of the same transaction. Orders would be marked with the MMTP designation on an order-by-order basis. An incoming MMTP Order cannot interact with interest resting on the book from the same Market-Maker. An MMTP Order that would trade against a resting quote or order for the same Market-Maker will be cancelled, as will the resting quote or order. The MMTP Order will trade against other tradable orders and quotes entered by or on behalf of another market participant (other than those entered by or on behalf of the same Market-Maker) in accordance with the execution process described in Exchange Rules 6.45 (Priority of Bids and Offers—Allocation of Trades), 6.45A (Priority and Allocation of Equity Option Trades on the CBOE Hybrid System) and 6.45B (Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System).

However, if the MMTP is received while an order for the same Market-Maker is subject to Rule 6.13A, *Simple Auction Liaison (SAL),* Rule 6.14, *Hybrid Agency Liaison (HAL)*/Rule 6.14A, *Hybrid Agency Liaison 2 (HAL2),* Rule 6.74A, *Automated Improvement Mechanism (''AIM''),* and Rule 6.74B, *Solicitation Auction Mechanism* (each an ''auction''), only the MMTP Order will be canceled. The order being represented in the auction will not be cancelled. This is because the order being represented in the auction will still be able to execute via the auction mechanism against orders originating from other market participants. As auctions are designed to achieve price improvement, the Exchange does not want to interfere with the auction process and cancel an order that is already up for auction, since it can achieve price improvement with an order from another market participant.

For example, assume the Exchange's best bid and offer is $1.00–$1.20, 100 contracts on each side. A Market-Maker marks an order to buy 100 contracts at $1.20 with the MMTP distinction, making it an MMTP Order. The MMTP Order is submitted to the Exchange and it would trade with a resting quote from the same Market-Maker for 100 contracts offered at $1.20, then both the order to buy and the resting offer quote would be canceled. However, if the resting offer quote from the same Market-Maker was for only 60 contracts, then 60 contracts from the order to buy would be canceled (as would the resting quote), but the other 40 contracts could trade with the resting offer interest of the other market participants.

As another example, assume a sell order entered on behalf of a Market-Maker is subject to a HAL auction. A Market-Maker marks an order to buy with the MMTP distinction, making it an MMTP Order. If this incoming MMTP Order is received while the auction is in progress and the MMTP Order would otherwise trade with the order that is subject to the HAL auction, then only the MMTP Order would be cancelled. The order being represented in the auction would not be canceled.

At this time, the Exchange intends to identify an incoming MMTP Order as being for the same Market-Maker if the MMTP Order and resting quote or order share any of the following: (1) User acronym, (2) login ID, or (3) sub-account code. Each Market-Maker is assigned its own acronym (sometimes multiple acronyms). However, a Market-Maker may have multiple different login IDs or sub-account codes. A login ID is the session through which a Market-Maker routes orders to the Exchange. A Market-Maker may elect to use different login IDs to route different types of communications to the Exchange. For example, a Market-Maker may choose to use login ID #1 for all orders it sends to the Exchange and login ID #2 for all quotes it sends to the Exchange. Or the Market-Maker may be much more specific, and use different login IDs for different types of orders and quotes. A sub-account code is simply a field on each order or quote that lists the account into which a trade clears at the Options Clearing Corporation (''OCC''). A Market-Maker may have different sub-account codes for each trader it employs, so that the Market-Maker may track each trader's activity. Finally, Market-Makers sometimes use different acronyms but clear into the same accounts (thereby using the same sub-accounts codes).

Allowing Market-Makers to designate orders as MMTP Orders is intended to allow firms to better manage order flow and prevent unwanted executions resulting from the interaction of executable buy and sell trading interest for the same Market-Maker, as well as prevent the potential for (or appearance of) ''wash sales'' that may occur as a result of the velocity of trading in today's high speed marketplace. When a Market-Maker is preparing to submit an order, the Market-Maker may not know whether or not his order is going to trade against his own resting quote. Further, many Market-Makers have multiple connections into the Exchange due to capacity- and speed-related demands. Orders routed by the same Market-Makers via different connections may, in certain circumstances, trade against each other. Finally, the Exchange notes that offering the MMTP modifiers will streamline certain regulatory functions by reducing false positive results that may occur on Exchange-generated wash trading surveillance reports when orders are executed by the same Market-Maker. For these reasons, the Exchange believes the MMTP Order provides Market-Makers enhanced order processing functionality to prevent potentially unwanted trades from occurring.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act[5] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with

[5] 15 U.S.C. 78s(b)(1).

[6] 15 U.S.C. 78f(b).

the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change advances these objectives by making available to Market-Makers a type of order that will assist Market-Makers in preventing unwanted executions against themselves.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is filed for immediate effectiveness pursuant to Section 19(b)(3)(A)[8] of the Securities Exchange Act of 1934 and Rule 19b–4(f)(6)[9] thereunder because it effects a change that (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–079 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.

All submissions should refer to File Number SR–CBOE–2011–079. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–079 and should be submitted on or before October 19, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24866 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65378; File No. SR–CME–2011–07]

Self-Regulatory Organizations; Chicago Mercantile Exchange, Inc.; Notice of Filing of Proposed Rule Change To Accept Additional Credit Default Index Swaps for Clearing

September 22, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 9, 2011, the Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which items have been prepared primarily by CME. The Commission is publishing this Notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

The text of the proposed rule change is below. Italicized text indicates additions; bracketed text indicates deletions.

* * * * *

Chicago Mercantile Exchange Inc. Rulebook

Rule 100—80203—No Change.

* * * * *

CME Chapter 802 Rules: Appendix 1

Appendix 1

CDX INDICES

CDX Index	Series	Termination date (scheduled termination)
CDX North America Investment Grade (CDX.NA.IG)	*10*	20 Jun 2013.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

CDX INDICES—Continued

CDX Index	Series	Termination date (scheduled termination)
CDX North America Investment Grade (CDX.NA.IG)	11	20 Jun 2015. 20 Jun 2018. 20 Dec 2011. 20 Dec 2013. 20 Dec 2015. 20 Dec 2018.
CDX North America Investment Grade (CDX.NA.IG)	12	20 Jun 2012. 20 Jun 2014. 20 Jun 2016. 20 Jun 2019.
CDX North America Investment Grade (CDX.NA.IG)	13	20 Dec 2012. 20 Dec 2014. 20 Dec 2016. 20 Dec 2019.
CDX North America Investment Grade (CDX.NA.IG)	14	20 Jun 2013. 20 Jun 2015. 20 Jun 2017. 20 Jun 2020.
CDX North America Investment Grade (CDX.NA.IG)	15	20 Dec 2013. 20 Dec 2015. 20 Dec 2017. 20 Dec 2020.
CDX North America Investment Grade (CDX.NA.IG)	16	20 Jun 2014. 20 Jun 2016. 20 Jun 2018. 20 Jun 2021.
CDX North America Investment Grade (CDX.NA.IG)	17	20 Dec 2014. 20 Dec 2016. 20 Dec 2018. 20 Dec 2021.
CDX North America High Yield (CDX.NA.HY)	*11*	*20 Dec 2013.*
CDX North America High Yield (CDX.NA.HY)	*12*	*20 Jun 2014.*
CDX North America High Yield (CDX.NA.HY)	*13*	*20 Dec 2014.*
CDX North America High Yield (CDX.NA.HY)	*14*	*20 Jun 2015.*
CDX North America High Yield (CDX.NA.HY)	*15*	*20 Dec 2015.*
CDX North America High Yield (CDX.NA.HY)	*16*	*20 Jun 2016.*
CDX North America High Yield (CDX.NA.HY)	*17*	*20 Dec 2016.*

* * * * *

Rule 80301–End—No change.

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose 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 III below. CME 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 Purpose of, and Statutory Basis for, the Proposed Rule Change

CME offers clearing services for certain credit default swap index products. Currently, CME offers clearing for Markit CDX North American Investment Grade Index Series 10, 11, 12, 13, 14, 15 and 16 and will offer Series 17 on September 20, 2011. The proposed rule changes that are the subject of this filing are intended to expand CME's credit default swap index product offering by adding clearing for Markit CDX North American High Yield Index Series 11, 12, 13, 14, 15, 16 and 17.

CME notes that it has also submitted the proposed rule changes that are the subject of this filing to its primary regulator, the Commodity Futures Trading Commission (''CFTC''). The text of the CME proposed rule amendments is included above, with additions italicized and deletions in brackets.

CME believes the proposed rule changes are consistent with the requirements of the Exchange Act including Section 17A of the Exchange Act. CME notes that the proposed rule changes involve the addition of new CFTC-regulated swaps for clearing and therefore are primarily related to CME's swaps clearing activities pursuant to its registration as a derivatives clearing organization under the Commodity Exchange Act (''CEA''). CME further notes that the policies of the CEA with respect to clearing are comparable to a number of the policies underlying the Exchange Act, such as promoting market transparency for over-the-counter derivatives markets, promoting the prompt and accurate clearance of transactions and protecting investors and the public interest. The proposed rule changes accomplish those objectives by offering investors clearing for an expanded range of credit default swap products based on broad-based indexes.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) As the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

• Electronic comments may be submitted by using the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*), or send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–CME–2011–07 on the subject line.

• Paper comments should be sent 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–CME–2011–07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME. 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–CME–2011–07 and should be submitted on or before October 19, 2011.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[3]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24864 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2011–0073]

Consent Based Social Security Number Verification (CBSV) Service

AGENCY: Social Security Administration.

ACTION: Notice of Revised Transaction Fee for Consent Based Social Security Number Verification Service.

SUMMARY: We provide limited fee-based Social Security number (SSN) verification service to private businesses and other requesters who obtain a valid, signed consent form from the Social Security number holder. We originally published a notice announcing the CBSV service in the **Federal Register** on August 10, 2007.

Based on the consent forms, we verify the number holders' SSNs for the requesting party. The Privacy Act of 1974 (5 U.S.C. 552a(b)), section 1106 of the Social Security Act (42 U.S.C. 1306) and our regulation at 20 CFR 401.100, establish the legal authority for us to provide SSN verifications to third party requesters based on consent.

The CBSV process provides the business community and other government entities with consent-based disclosures in high volume. We developed CBSV as a user-friendly, internet-based application with safeguards that will protect the public's information. In addition to the benefit of providing high volume, centralized SSN verification services to the business community in a secure manner, CBSV provides us with cost and workload management benefits.

New Information: To use CBSV, interested parties must pay a one-time non-refundable enrollment fee of $5,000. Currently, users also pay a fee of $5.00 per transaction in advance of services. We agreed to calculate our costs periodically for providing CBSV services and adjust the fees as needed. We also agreed to notify our customers who currently use the service and allow them to cancel or continue using the service at the new transaction fee.

Based on the most recent cost analysis, we will adjust the fiscal year 2012 fee to $1.05 per transaction. New customers will still be responsible for the one-time $5,000 enrollment fee.

DATES: The changes described above are effective October 1, 2011.

FOR FURTHER INFORMATION CONTACT: Gerard R. Hart, Office of Public Service and Operations Support, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–8707, for more information about the CBSV service, visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov*.

Gerard R. Hart,

Division Director for Public Service and Operations Support.

[FR Doc. 2011–24900 Filed 9–27–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 7615]

Culturally Significant Objects Imported for Exhibition Determinations: ''Byzantium and Islam: Age of Transition (7th–9th Century)''

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 ''Byzantium and Islam: Age of Transition (7th–9th Century),'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan

[3] 17 CFR 200.30–3(a)(12).

agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, New York, from on or about March 12, 2012, until on or about July 8, 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 Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: September 21, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–24979 Filed 9–27–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7616]

Culturally Significant Objects Imported for Exhibition Determinations: ''Masters of Venice: Renaissance Paintings of Passion and Power from Kunsthistorisches Museum, Vienna''

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 ''Masters of Venice: Renaissance Paintings of Passion and Power from Kunsthistorisches Museum, Vienna,'' 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 de Young Museum, San Francisco, California, from on or about October 29, 2011, until on or about February 26, 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 Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: September 21, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–24983 Filed 9–27–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7613]

Advisory Committee on the Secretary of State's Strategic Dialogue With Civil Society

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of the rules and regulations of the Federal Advisory Committee Act (FACA), the Advisory Committee on the Secretary of State's Strategic Dialogue with Civil Society will convene in Washington, DC on October 4, 2011. The Committee provides advice and assists with the formulation of U.S. policies, proposals, and strategies for engagement with, and protection of, civil society worldwide. The objective of this inaugural meeting is to discuss the general purposes of the Committee and its five subcommittees and set an agenda for future Committee meetings. The meeting is open to the public and will be streamed live at *https://statedept.connectsolutions.com/csenglish.*

DATES: The meeting will be held on October 4, 2011, from 10 a.m. to 11:30 a.m.

ADDRESSES: The meeting will be held at the U.S. Department of State, Room 1107, 2201 C Street, NW., Washington, DC. This meeting is open to public participation, though seating is limited. Entry to the building is controlled. To obtain pre-clearance for entry provide, by September 29th, your name, professional affiliation, valid government-issued ID number, passport number and country of issuance, or drivers license number and state of issuance, date of birth, and citizenship to Dara Duncan via e-mail to *civilsociety@state.gov* or facsimile to (202) 736–7961. One of the following forms of valid photo identification will be required for entry into the: U.S. driver's license, U.S. Government identification card, or any valid passport. Enter the Department of State from the entrance on C Street. In view of escorting requirements, non-Government attendees should plan to arrive 15 minutes before the meeting begins.

Written comments may also be submitted to Dara Duncan via the contact information above. 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 U.S. Department of State, 2201 C Street, NW., Room 1317, Washington, DC 20520. Please call ahead to (202) 736–7824 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Dara Duncan, Committee Executive Secretary, U.S. Department of State, 2201 C Street, NW., Room 1317, Washington, DC 20520; (202) 736–7824; fax (202) 736–7961; *civilsociety@state.gov.*

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 Dara Duncan at the contact information provided above prior to September 26th. Requests made after that date will be considered, but might not be possible to fulfill.

SUPPLEMENTARY INFORMATION: The meeting is open to the public and will be streamed live at: *https://statedept.connectsolutions.com/csenglish.* Agenda items to be covered include: (1) Introductions, (2) Presentations by the Chairs of the Subcommittees, (3) Public Comment, (4) General Discussion, (5) Adjournment. 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 allow time for people to make oral statements of two minutes or less. Individuals wishing to make an oral statement should submit this request in writing by September 28, 2011 to be scheduled on the agenda. Written comments and requests of time for oral comments must be sent to Dara Duncan, Committee

Executive Secretary, at the contact information provided above.

Personal data is requested for building entry pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA Patriot Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Privacy Impact Assessment for VACS–D at *http://www.state.gov/documents/organization/100305.pdf* for additional information.

Dated: September 13, 2011.

Dara Duncan,

Policy Coordinator, U.S. Department of State.

[FR Doc. 2011–24993 Filed 9–27–11; 8:45 am]

BILLING CODE 4710–10–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Section 306 Monitoring of Paraguay: Memorandum of Understanding on Intellectual Property Rights: Request for Public Comment

AGENCY: Office of the United States Trade Representative.

ACTION: Request for written submissions from the public.

SUMMARY: In January 1998, the USTR designated Paraguay as a Priority Foreign Country in the 1998 Special 301 Report. A Section 301 investigation was initiated in February 1998, and was suspended in November 1998 after the United States and Paraguay successfully entered into a Memorandum of Understanding on Intellectual Property Rights. USTR subsequently announced that the MOU would be monitored through Section 306 of the Trade Act of 1974. USTR hereby requests written submissions from the public concerning Paraguay's implementation of the MOU on Intellectual Property Rights, and additional actions that Paraguay should take, if any, to improve the protection and enforcement of intellectual property rights.

DATES: Submissions from the general public and foreign governments must be received by *Tuesday, October 18, 2011.*

ADDRESSES: All comments should be sent electronically to *http://www.regulations.gov*, docket number USTR–2011–0013. Submissions should contain the term ''Paraguay Memorandum of Understanding on Intellectual Property Rights'' in the ''Type comment'' field on *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Paula Karol Pinha, Director, Intellectual Property and Innovation, Office of the United States Trade Representative, at (202) 395–5419.

SUPPLEMENTARY INFORMATION: Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242) requires the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. (The provisions of Section 182 are commonly referred to as the ''Special 301'' provisions of the Trade Act.) The USTR is required to determine which, if any, of these countries should be identified as Priority Foreign Countries. Countries placed on the Priority Foreign Country list are found to have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant U.S. products. Priority Foreign Countries are subject to an investigation under the Section 301 provisions of the Trade Act of 1974.

In 1998, the USTR identified Paraguay as a Priority Foreign Country in the 1998 Special 301 Report. A Section 301 investigation was initiated in February 1998, and was suspended in November 1998 after the United States and Paraguay entered into a Memorandum of Understanding on Intellectual Property Rights (the ''MOU'') that included an Enforcement Action Plan to address the issues that were the subject of the Section 301 investigation. The MOU has been extended since 1998, and it was renegotiated in 2008 to address legislative developments and to better tailor key objectives for the enforcement of intellectual property rights. The MOU is scheduled to expire as of December 31, 2011.

The current MOU includes commitments by Paraguay to protect intellectual property rights and implement effective enforcement mechanisms and practices against intellectual property rights violations. It also includes commitments with respect to transparency in the administration of intellectual property rights, and reporting of enforcement related activities, and commitments with respect to training of government officials. The MOU includes an enforcement action plan and a consultation mechanism for addressing matters related to the MOU.

USTR hereby requests written submissions from the public concerning Paraguay's implementation of the MOU on Intellectual Property Rights, and, if applicable, any additional actions that Paraguay should take to improve the protection and enforcement of intellectual property rights, and any provisions that should be included in the MOU to make it more effective. USTR requests that, where relevant, submissions mention particular examples of which acts, policies, or practices in Paraguay deserve special attention. Submissions may report positive or negative developments with respect to the protection and enforcement of intellectual property rights in Paraguay and market access for U.S. persons who rely on intellectual property.

Requirements for comments: Comments should include a description of the problems or positive developments and the effect of the acts, policies, and practices on U.S. industry. Comments should be as detailed as possible and should provide all necessary information for assessing the effect of the acts, policies, and practices at issue. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses. Comments must be in English. All comments should be sent electronically to *http://www.regulations.gov*, docket number USTR–2011–0013.

To submit comments to *http://www.regulations.gov*, enter docket number USTR–2011–0013 on the home page and click ''search.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a comment.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page).

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''Type comment'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type comment'' field. However, all submissions should contain the term ''Paraguay Memorandum of Understanding on Intellectual Property Rights'' in the ''General Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such, the submission must be marked ''Business Confidential'' at the top and bottom of the cover page and each succeeding page, and should indicate using brackets the specific information which is confidential. Any comment containing business confidential information must be accompanied by a non-confidential summary of the confidential information. The non-confidential summary will be placed in the docket and open to public inspection.

USTR will maintain a docket on the Paraguay Memorandum of Understanding on Intellectual Property Rights, accessible to the public. The public file will include non-confidential comments received by USTR from the public, including foreign governments, with respect to the Paraguay Memorandum of Understanding on Intellectual Property Rights.

Public inspection of submissions: Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. Comments may be viewed on the *http://www.regulations.gov* Web site by entering docket number USTR–2011–0013 in the search field on the home page.

Stanford K. McCoy,

Assistant USTR for Intellectual Property and Innovation.

[FR Doc. 2011–24985 Filed 9–27–11; 8:45 am]

BILLING CODE 3190–W1–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee Meeting on Transport Airplane and Engine Issues

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a public meeting of the FAA's Aviation Rulemaking Advisory Committee (ARAC) to discuss transport airplane and engine (TAE) issues.

DATES: The meeting is scheduled for Wednesday, October 19, 2011, starting at 9 am Eastern Daylight Time. Arrangements for oral presentations must be made by October 12, 2011.

ADDRESSES: The Boeing Company, 1200 Wilson Boulevard, Room 234, Arlington, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Ralen Gao, Office of Rulemaking, ARM–209, FAA, 800 Independence Avenue, SW., Washington, DC 20591, Telephone (202) 267–3168, Fax (202) 267–5075, or e-mail at *ralen.gao@faa.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. app. 2), notice is given of an ARAC meeting to be held October 19, 2011.

The agenda for the meeting is as follows:

- Opening Remarks, Review Agenda and Minutes.
- FAA Report.
- ARAC Executive Committee Report.
- Update on Rulemaking Prioritization Working Group.
- Transport Canada Report.
- Materials Flammability Working Group Report.
- Avionics Harmonization Working Group Report.
- AA Working Group Report.
- Flight Controls Working Group Report.
- Rudder Reversal Tasking.
- Any Other Business.
- Action Items Review.

Attendance is open to the public, but will be limited to the availability of meeting room space. Please confirm your attendance with the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than October 12, 2011. Please provide the following information: Full legal name, country of citizenship, and name of your industry association, or applicable affiliation. If you are attending as a public citizen, please indicate so.

The FAA will arrange for teleconference service for individuals wishing to join in by teleconference if we receive notice by October 12, 2011. For persons participating by telephone, please contact Ralen Gao by e-mail or phone for the teleconference call-in number and passcode. Anyone calling from outside the Arlington, VA, metropolitan area will be responsible for paying long-distance charges.

The public must make arrangements by October 12, 2011, to present oral statements at the meeting. Written statements may be presented to the ARAC at any time by providing 25 copies to the person listed in the **FOR FURTHER INFORMATION CONTACT** section or by providing copies at the meeting. Copies of the documents to be presented to ARAC may be made available by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

If you need assistance or require a reasonable accommodation for the meeting or meeting documents, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Sign and oral interpretation, as well as a listening device, can be made available if requested 10 calendar days before the meeting.

Issued in Washington, DC, on September 20, 2011.

Julie Ann Lynch,

Acting Director, Office of Rulemaking.

[FR Doc. 2011–24592 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

[FHWA–DC–2011–01–F]

Notice of Availability of the Finding of No Significant Impact for the Metropolitan Branch Trail

AGENCIES: Federal Highway Administration, District of Columbia Division; and District Department of Transportation; in cooperation with the National Park Service.

ACTION: Notice of availability of the Finding of No Significant Impact for the Metropolitan Branch Trail (MBT) Project.

SUMMARY: The U.S. Federal Highway Administration (FHWA) and the District Department of Transportation (DDOT) as lead agencies, and in cooperation with the National Park Service (NPS), announce the availability of the Finding of No Significant Impact (FONSI) for the Metropolitan Branch Trail Project, pursuant to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347; the Council on Environmental Quality Regulations (40 CFR parts 1500–1508); and the FHWA Environmental Impact and Related Procedures (23 CFR 771).

FOR FURTHER INFORMATION CONTACT: Federal Highway Administration, District of Columbia Division: Mr. Michael Hicks, Environmental/Urban Engineer, 1990 K Street, NW., Suite 510, Washington, DC 20006–1103, (202) 219–3536; or District Department of Transportation: Heather Deutsch, Bicycle Program Specialist/Trail Planner, Policy, Planning and Sustainability Administration, District Department of Transportation, 55 M Street, SE., Suite 500, Washington, DC 20003, (202) 671–2638.

SUPPLEMENTARY INFORMATION: The proposed action evaluated in the Environmental Assessment (EA) includes construction of a multi-use trail facility following the Metro red line from Fort Totten to Takoma and the Metro green line from Fort Totten to the District border.

This EA analyzed the potential impacts resulting from constructing and operating the MBT on sections of land owned by the NPS within the area north of Fort Totten (Reservation 451 West), the area east of Fort Totten (Reservation 451 East), the Community Gardens (Reservation 497), and Tacoma Park (Reservation 531). Following the public comment period, DDOT identified Alternatives A1, B1, C1 and/or C2 as the Preferred Alternatives.

The FHWA has determined that the Preferred Alternative and options will not have a significant impact on the natural, human or built environment as defined by CEQ. This Finding of No Significant Impact (FONSI) is based on the findings of the proposed project's Final EA, and comments submitted during preparation of the EA. The Final EA has been evaluated by the FHWA, using CEQ regulations and FHWA and NPS guidelines, and determined to adequately discuss the need, environmental issues, and impacts of the proposed project and appropriate mitigation measures. It provides sufficient evidence and analysis for determining that an environmental impact statement is not required.

ELECTRONIC AND HARD COPY ACCESS: An electronic copy of this document may be downloaded from the Project *Web Site: http://www.metbranchtrail.com.* Hard copies of the FONSI may also be viewed at the following locations:

District Department of Transportation, Policy, Planning and Sustainability Administration, 55 M Street, SE., 4th Floor, Washington, DC 20003.

Martin Luther King, Jr. Memorial Library, 901 G Street, NW., Washington, DC 20001.

Joseph C. Lawson,

Division Administrator.

[FR Doc. 2011–24889 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 20, 2011. No comments were received.

DATES: Comments must be submitted on or before October 27, 2011.

FOR FURTHER INFORMATION CONTACT: Anne Wehde, Maritime Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. *Telephone:* 202–366–5469, or e-mail: *anne.wehde@dot.gov*. Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: MARAD Maritime Operator Survey Concerning Mariner Availability.

OMB Control Number: 2133–0537.

Type of Request: Extension of a currently approved collection.

Affected Public: Vessel operating companies representing different sectors of the U.S. maritime industry.

Form(s): MA–1048.

Abstract: Part of the stated statutory policy of the Merchant Marine Act, 1936, is to foster the development and maintenance of an adequate U.S.-flag merchant marine manned with trained and efficient citizen personnel. In order to successfully meet this mandate, MARAD must determine whether a current or projected shortage of mariners exists and if there is an operational or business impact on the merchant marine. MARAD believes that a brief preliminary survey is necessary at this time because it has received an abundance of anecdotal information indicating that there is a serious existing and projected mariner shortage in different market sectors. If the preliminary survey indicates that there is a projected shortage that appears to be more than short-term, MARAD will follow-up with a more detailed survey to analyze the shortage and ascertain the best means to address it.

Annual Estimated Burden Hours: 33.

Addressee: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington DC, 20503, *Attention:* MARAD Desk Officer. Alternatively, comments may be sent via e-mail to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, at the following address: *oira.submissions@omb.eop.gov*.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

By Order of the Maritime Administrator.

Dated: September 22, 2011.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–24951 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0124]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before November 28, 2011.

FOR FURTHER INFORMATION CONTACT: Patricia Thomas, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* 202–366–2646; or *e-mail: patricia.thomas@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Regulations for Making Excess or Surplus Federal Property Available to the U.S. Merchant

Marine Academy, State Maritime Academies and Non-Profit Maritime Training Facilities.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0504.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: The Maritime Administration requires approved maritime training institutions seeking excess or surplus government property to provide a statement of need/justification prior to acquiring the property.

Need and Use of the Information: This information is needed by MARAD to determine compliance with applicable statutory requirements regarding surplus government property.

Description of Respondents: Maritime training institutions such as the U.S. Merchant Marine Academy, State Maritime Academies and non-profit maritime institutions.

Annual Responses: 40.

Annual Burden: 40.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://regulations.gov.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. EDT (or EST), Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://regulations.gov.*

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://regulations.gov.*

Authority: 49 CFR 1.66.

By Order of the Maritime Administrator.

Date: September 22, 2011.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–24980 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0122]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ARIA; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before October 28, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0122. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ARIA is:

Intended Commercial Use of Vessel: ''Private day charters, overnight charters.''

Geographic Region: ''Florida.''

The complete application is given in DOT docket MARAD–2011–0122 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: September 22, 2011.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–24950 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0123]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel WILDFLOWER; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized

to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before October 28, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0123. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, e-mail *Joann.Spittle@dot.gov*.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel WILDFLOWER is:

Intended Commercial Use of Vessel: ''Day and overnight charters focused on outdoor adventure.''

Geographic Region: ''Hawaii, California, Oregon, Washington, and Alaska.''

The complete application is given in DOT docket MARAD–2011–0123 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: September 22, 2011.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–24974 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0070]

Tesla Motors, Inc. Grant of Petition for Renewal of a Temporary Exemption From the Advanced Air Bag Requirements of FMVSS No. 208

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of grant of a petition for renewal of a temporary exemption from certain provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection.*

SUMMARY: This notice grants the petition of Tesla Motors, Inc. (Tesla) for the renewal of a temporary exemption of its Roadster model from the advanced air bag requirements of FMVSS No. 208. The basis for the exemption is that compliance with the standard would cause substantial economic hardship to a manufacturer that has tried to comply with the standard in good faith.

DATES: The exemption remains in effect until November 7, 2011.

FOR FURTHER INFORMATION CONTACT: David Jasinski, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41–326, Washington, DC 20590. *Telephone:* (202) 366–2992; *Fax:* (202) 366–3820.

SUPPLEMENTARY INFORMATION:

I. Advanced Air Bag Requirements and Small Volume Manufacturers

In general, frontal air bags for drivers and right front passengers have large net benefits. NHTSA estimates that they saved 30,232 lives from 1987 through the end of 2009.[1] Air bags reduce overall fatality risk in purely frontal crashes by 29 percent. They reduce overall fatality risk by 12 percent for drivers of passenger cars, and by 14 percent for right front passengers of passenger cars.[2]

In 2000, NHTSA published a final rule that upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as ''advanced air bags.''[3] The upgrade was designed to meet the twin goals of improving protection for occupants of all sizes, belted and unbelted, in moderate-to-high-speed crashes, and of minimizing the risks posed by air bags to infants, children, and other occupants, especially in low-speed crashes. The agency estimated that the upgraded requirements had the potential to reduce fatalities and nonfatal injuries from crashes, as well as protect more than 95 percent of the at-risk population (out-of-position infants, children, and small-statured adults) from the risks presented by air bag deployment.

The issuance of the advanced air bag requirements was a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of some air bag designs. This plan also included an extensive consumer education program to encourage the placement of children in rear seats.

The new requirements were phased-in, beginning with the 2004 model year. Small volume manufacturers were not subject to the advanced air bag requirements until the end of the phase-in period, *i.e.,* September 1, 2006.

In recent years, NHTSA has addressed a number of petitions for exemption from the advanced air bag requirements of FMVSS No. 208. The majority of these requests have come from small manufacturers, each of which has petitioned on the basis that compliance would cause it substantial economic hardship and that it has tried in good faith to comply with the standard. In recognition of the more limited resources and capabilities of small motor vehicle manufacturers, authority to grant exemptions based on substantial economic hardship and good faith efforts was added to the Vehicle

[1] Traffic Safety Facts—2009 Data—Occupant Protection, NHTSA Report No. DOT HS 811 390, Washington, DC 2010.

[2] Kahane, C.J., Lives Saved by the Federal Motor Vehicle Safety Standards and Other Vehicle Safety Technologies, 1960–2002, NHTSA Technical Report No. DOT HS 809 833, Washington, 2004, pp. 108–115.

[3] *See* 65 FR 30680 (May 12, 2000).

Safety Act in 1972 to enable the agency to give those manufacturers additional time to comply with the Federal safety standards.

NHTSA has granted a number of these petitions, usually in situations in which the manufacturer is supplying standard air bags in lieu of advanced air bags.[4] In addressing these petitions, NHTSA recognized that small manufacturers faced particular difficulties in acquiring or developing advanced air bag systems. Specifically, the agency noted that major air bag suppliers initially concentrated their efforts on working with large volume manufacturers and small volume manufacturers had limited access to advanced air bag technology.

Notwithstanding those previous grants of exemption, NHTSA has considered two key issues—

(1) Whether it is in the public interest to continue to grant such petitions, particularly in the same manner as in the past, given the number of years these requirements have now been in effect and the benefits of advanced air bags, and

(2) to the extent such petitions are granted, what plans and countermeasures to protect child and infant occupants, short of compliance with the advanced air bag requirements, should be expected.

The agency requested comments on these issues in recent notices of receipt, including the one for Tesla.

Over time, the number of petitions for exemption from the advanced air bag requirements has decreased, and several small manufacturers that previously received exemptions now produce vehicles that comply with the advanced air bag requirements. The majority of current petitions before the agency are petitions for limited extension of previously granted exemptions.

We discuss comments concerning this issue that were submitted in response to the notice of receipt of the Tesla petition later in this document.

II. Statutory Basis for Requested Part 555 Exemption

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified as 49 U.S.C. Chapter 301, provides the Secretary of Transportation authority to exempt, on a temporary basis and under specified circumstances, motor vehicles from a motor vehicle safety standard or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority for implementing this section to NHTSA.

The Act authorizes the Secretary to grant a temporary exemption to a manufacturer of not more than 10,000 motor vehicles annually, on such terms as the Secretary deems appropriate, if the Secretary finds that the exemption would be consistent with the public interest and also finds that compliance with the standard would cause substantial economic hardship to the manufacturer and that the manufacturer has tried to comply with the standard in good faith.

NHTSA established Part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* to implement the statutory provisions concerning temporary exemptions. Under part 555, a petitioner must provide specified information in submitting a petition for exemption. These requirements are specified in 49 CFR 555.5, and include a number of items. Foremost among them are that the petitioner must set forth the basis of the application under § 555.6 and the reasons why the exemption would be in the public interest and consistent with the objectives of 49 U.S.C. chapter 301.

A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113).

In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether a second vehicle manufacturer also might be deemed the manufacturer of that vehicle. The statutory provisions governing motor vehicle safety (49 U.S.C. chapter 301) do not state that a manufacturer has substantial responsibility as manufacturer of a vehicle simply because it owns or controls a second manufacturer that assembled that vehicle. However, the agency considers the statutory definition of ''manufacturer'' (49 U.S.C. 30102) to be sufficiently broad to include sponsors, depending on the circumstances. Thus, NHTSA has stated that a manufacturer may be deemed to be a sponsor and thus a manufacturer of a vehicle assembled by a second manufacturer if the first manufacturer had a substantial role in the development and manufacturing process of that vehicle.

While 49 U.S.C. 30113(b) states that exemptions from a Safety Act standard are to be granted on a ''temporary basis,'' [5] the statute also expressly provides for renewal of an exemption on reapplication. Manufacturers are nevertheless cautioned that the agency's decision to grant an initial petition in no way predetermines that the agency will repeatedly grant renewal petitions, thereby imparting semi-permanent status to an exemption from a safety standard. Exempted manufacturers seeking renewal must bear in mind that the agency is directed to consider financial hardship as but one factor, along with the manufacturer's on-going good faith efforts to comply with the regulation, the public interest, consistency with the Safety Act, generally, as well as other such matters provided in the statute.

Finally, we note that under 49 CFR 555.8(e), ''If an application for renewal of temporary exemption that meets the requirements of § 555.5 has been filed not later than 60 days before the termination date of an exemption, the exemption does not terminate until the Administrator grants or denies the application for renewal.'' In the case of the petition for renewal from Tesla, the petition for renewal was submitted by the deadline stated in 49 CFR 555.8(e).

III. Overview of Petition

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Tesla Motors, Inc., (Tesla) has submitted a petition asking the agency for renewal of its temporary exemption from certain advanced air bag requirements of FMVSS No. 208, *Occupant Crash Protection.* The basis for the application is that compliance would cause the petitioner substantial economic hardship and that the petitioner has tried in good faith to comply with the standard. In its petition, Tesla requested a renewal of its exemption for a period of two years from January 29, 2011, to January 28, 2013 for the Roadster model.

Specifically, the petition requests an exemption from the advanced air bag requirements (S14), with the exception of the belted, rigid barrier provisions of S14.5.1(a); the rigid barrier test requirement using the 5th percentile adult female test dummy (belted and unbelted, S15); the offset deformable barrier test requirement using the 5th percentile adult female test dummy (S17); and the requirements to provide protection for infants and children (S19, S21, and S23).

In a **Federal Register** document dated January 28, 2008, Tesla was granted a temporary exemption from the advanced air bag requirements of FMVSS No. 208 listed above for the Roadster.[6] The exemption was granted for the period from the date of publication until January 28, 2011. The

[4] *See, e.g.,* Grant of petition of Panoz, 72 FR 28759 (May 22, 2007); Grant of petition of Koenigsegg Automotive AB, 72 FR 17608 (April 9, 2007).

[5] 49 U.S.C 30113(b)(1).

[6] 73 FR 4944 (Docket No. NHTSA–2008–0013).

basis for the grant was that compliance with the advanced air bag requirements of FMVSS No. 208 would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard and that such exemption was in the public interest and consistent with the objectives of traffic safety.

In a November 24, 2010 petition, Tesla sought renewal of its exemption. The basis for Tesla's application is substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. Tesla is a Delaware corporation headquartered in California with sales offices throughout the United States and overseas. Tesla currently sells only one vehicle, the Roadster. Tesla has sold or leased 287 Roadsters in the 12 months prior to filing its petition for renewal. Tesla states that it continues to be eligible for a financial hardship exemption, and that it has suffered substantial losses and will continue to do so while selling the Roadster.

Tesla began production of the all-electric Roadster in 2008. The Roadster has a single-speed electrically actuated automatic transmission and three phase, four pole AC induction motor. The Roadster has a combined range of 245 miles on a single charge. Under an agreement with Group Lotus plc (Lotus), Tesla purchases the Roadster ''glider,'' which uses the chassis and several other systems of the Lotus Elise. The gliders are manufactured under Tesla's supervision and direction at a Lotus factory in the United Kingdom and then shipped to Menlo Park, California, where installation of the power train and other final steps are taken prior to sale of the vehicle in the United States. Tesla asserts in its petition that Lotus will cease manufacturing Roadster gliders in December 2011, and that Tesla plans to finish production in early 2012 and offer remaining Roadsters for sale during 2012.

According to Tesla, the Roadster was conceived as a limited proof-of-concept for later generations of Tesla vehicles. Tesla intends to introduce its next electric vehicle, a four-door fully electric sedan known as the Model S. Tesla states that the Model S would meet or exceed all FMVSSs in effect by the time the vehicle is released for production in 2012.

Tesla contends that it is eligible for an economic hardship exemption. Tesla has produced fewer than 10,000 vehicles since the company's founding in 2003. Worldwide production of the Roadster for calendar year 2010 will be approximately 600 to 700 vehicles. Tesla also states that it will not produce more than 10,000 vehicles (combined Roadster and Model S production) per year during the requested exemption period.

In the January 2008 notice granting Tesla's original exemption, the agency determined that Lotus, as well as Tesla, was considered a manufacturer of the Roadster. The basis for this determination was information in the prior petition that Lotus would be assembling the Roadster. Nevertheless, the agency determined that Tesla was eligible for an economic hardship petition because the combined production of Lotus and Tesla was fewer than 10,000 vehicles.

In its petition for renewal, Tesla contends that the relationship between Lotus and Tesla does not involve ownership, sponsorship, or any type of control of one entity over the other. Tesla also reiterates that, even if the production of Lotus and Tesla vehicles are combined, the total production is far below the threshold 10,000 vehicle per year limit for hardship exemptions.

Tesla cites multiple reasons why the failure to obtain the requested extension of its exemption would cause substantial economic hardship. First, Tesla has incurred cumulative net losses of $360 million since inception through September 30, 2010, and a net loss of $100 million for the first nine months of 2010. Tesla also expects cumulative losses to almost double before launch of the Model S. Second, Tesla has committed certain remaining costs for the Roadster that cannot be cancelled, such as a fixed supply contract with Lotus and other suppliers until the end of 2011. Third, Tesla contends that ending U.S. sales of the Roadster would require Tesla to refund $2.4 million in deposits on Roadster reservations, exacerbating its financial hardship. Additionally, because the Roadster is the only Tesla model available in the United States, Tesla states that cancellation of the program would result in a significant loss of market share.

Tesla also contends that Lotus, and by extension Tesla, has exerted good faith efforts to achieve compliance with the advanced air bag requirements. Tesla notes that the Roadster shares a number of common components and systems with the Lotus Elise, including the passive safety systems. Tesla believes that, for the reasons outlined in Lotus's petition for an renewal of its FMVSS No. 208 exemption for the Elise, Lotus has exerted good faith efforts to comply with the advanced air bag requirements. Furthermore, Tesla states that it is in no better position than Lotus to develop an advanced air bag system for the Elise-based Roadster. Like the Lotus Elise, the Tesla Roadster is coming to the end of its model life. Given the limited number of Roadsters planned for production, Tesla believes that developing an advanced air bag system for the Roadster at this time is economically impracticable. Tesla also contends that it has been using the three years of its current exemption to develop the Model S, which will include advanced air bags.

Tesla also contends that the requested extension of its exemption is in the public interest for five reasons. First, Tesla states that granting the petition would encourage development and sale of highway-capable electric vehicles by Tesla and other manufacturers. Second, Tesla contends that the public interest considerations supporting other similar extension petitions previously granted by NHTSA exist for Tesla as well. Third, Tesla states that the Roadster has a high degree of safety because of its design. Even without advanced air bags, Tesla believes that the requested exemption would have a negligible impact on vehicle safety because of the limited number of vehicles that would be sold in the United States under the extension. Fourth, Tesla contends that the Roadster does not pose an unreasonable risk to safety of infants or children because young children are unlikely to be passengers in the Roadster and neither Tesla nor Lotus has received any complaints, reports, or information of air bag-related injuries. Fifth, Tesla contends that granting its petition will have a positive impact on U.S. employment in the automotive industry, and that denying its petition would not only directly impact the jobs of current Tesla employees supporting the Roadster, but also potentially compromise the company's ability to move forward with the Model S.

IV. Notice of Receipt and Summary of Comments

On June 8, 2011, we published in the **Federal Register** (76 FR 33402) a notice of receipt of Tesla's petition for renewal of a temporary exemption, and provided an opportunity for public comment. We received three comments, two comments from the Advocates for Highway & Auto Safety (Advocates) and one from Tesla.

Advocates first responded to NHTSA's request for comment regarding whether and under what circumstances the agency should continue to grant temporary exemptions from the advanced air bag requirements. Advocates concurred with NHTSA's concerns regarding the continuation of such exemptions. The organization noted that air bag technology is over 35

years old, the current requirements for advanced air bags are over ten years old and full compliance has been required for over five years. Advocates further noted that the FMVSSs are minimum performance requirements necessary for occupant protection and while the cost of production may impose an excessive burden when the technology is new, over time public safety concerns for vehicle occupants must outweigh manufacturer production costs, which the organization argued is especially true for manufacturers of high-end vehicles. Finally, Advocates noted that although physical testing is an essential component of the regulatory validation process, significant reductions in development costs have been realized through advanced computer simulation and should be considered when reviewing exemption petitions.

Advocates also recommended revising the petition process to create a rebuttable presumption that cost alone cannot provide a basis for a temporary exemption beyond four years following the compliance date. Additionally, the organization recommended that NHTSA require applicants to make a showing regarding recent advances in state-of-the-art research, design, and development that pertain to the requirements for which exemption is requested and explain why an exemption is still necessary.

Regarding Tesla's petition, Advocates noted that the company requests exemption from the unbelted test of the 50th percentile male occupant and the belted and unbelted tests of the 5th percentile adult female driver, and the out-of-position portions of the advanced air bag requirements for all children. Advocates asserted that in developing and testing air bag systems to meet these requirements, Tesla would only need to perform component level tests rather than more expensive full vehicle tests. Alternatively, Advocates stated that Tesla could meet these requirements by using an occupant detection system to suppress air bag deployment in specified situations, which, according to Advocates, costs approximately $1,500. Advocates argued that Tesla had multiple ways to meet the requirements without being granted an extension of its exemption.

Advocates also addressed Tesla's assertions that an extension of its exemption would be consistent with the public interest and the objectives of the Safety Act. Specifically, Advocates stated that every safety regulation was developed for a specific reason and intended to provide a specific level of protection, and that the fact that the vehicle will meet other safety requirements does not address the safety concerns that caused NHTSA to promulgate the requirements from which Tesla seeks exemption.

Advocates further argued that exemptions should not be based upon assumptions of the occupant population. The organization noted that, although many consumers would not purchase a Tesla Roadster as the primary means of transporting their children, there was no reason why Tesla vehicles would not be used to transport children and, in vehicles with two seats, any child riding in the vehicle would be located in the front seat. Additionally, the organization noted that one of the requirements from which exemption is sought is meant to address the safety of small-statured adult females, and that Tesla did not indicate why these women would not be occupants of the vehicles.

Advocates stated that, based on the foregoing, it could not support granting Tesla's petition for renewal of its temporary exemption.

Finally, Advocates argued that the procedure under which Tesla received an automatic extension of its exemption violates 49 U.S.C. section 30113(e). That statutory provision provides that an economic hardship exemption may not be granted for more than three years. As provided by 49 CFR 555.8(e), if a petition for renewal of a temporary exemption has been filed not later than 60 days before termination of an exemption, the exemption does not terminate until the Administrator grants or denies the petition for renewal. Advocates stated that this provision allows the agency, through inaction on a petition for renewal of an exemption, to extend the three-year limit of an exemption.

Tesla filed a response to Advocates' comment. With respect to Advocates' assertion regarding Tesla's ability to use off-the-shelf technology that would cost $1,500 to comply with the advanced air bag requirements, Tesla stated that Advocates have understated the complexity of advanced air bag technology. Tesla noted that any modification to a vehicle requires full testing to ensure appropriate operation and compatibility. Further, with respect to the complexity of adding new components, Tesla stated that it has relied on the expertise of Lotus, whose assertions regarding the compatibility of existing air bag components should be given more weight than Advocates' speculative arguments.

With respect to Advocates' assertion regarding the hazard posed by the Roadster's existing air bag system, Tesla noted that Advocates have not provided data or statistics to validate their assertions. In contrast, Tesla stated, it has over 12 million miles of real world driving in over 1,800 vehicles without a single report of serious injury or death caused by passenger air bags in the Roadster.

Advocates filed a second comment on the petition, asking the agency to take note of its comments filed on Tesla's petition for an exemption from the electronic stability control (ESC) requirements of FMVSS No. 126. Those comments raised two issues pertinent to Tesla's advanced air bag petition. First, Advocates believe the agency should consider the interaction between multiple exemptions sought by Tesla. Second, Advocates expressed a concern that, in its ESC petition, Tesla only sought an exemption through December 31, 2010 (later shortened to a 50-day period ending October 20, 2011),[7] whereas it sought an advanced air bag exemption that would not terminate until January 28, 2013.

V. Agency Analysis, Response to Comment, and Decision

In this section, we provide our analysis and decision regarding Tesla's temporary exemption request concerning the advanced air bag requirements of FMVSS No. 208, including our response to the comments received from Advocates and Tesla.

A. General Issues Related to Petitions for Exemptions From Advanced Air Bag Requirements

As noted earlier, NHTSA requested comments in the notice of receipt for the Tesla petition about a number of issues related to the justification for continuing to grant petitions for a hardship exemption from the advanced air bag requirements. The agency also requested comments on these issues in notices of receipt for other petitions.

This is not the first decision document we have issued since beginning to request comments on this issue, and we summarized our new position earlier in this document. In this section, we address the specific comments submitted in response to the notice of receipt for the Tesla petition.

To briefly summarize our new position, and the background for that position, the final rule requiring advanced air bags was published in 2000, and the new requirements were phased-in, beginning with the 2004 model year. Small volume manufacturers were not subject to the advanced air bag requirements until the

[7] Tesla has recently clarified further that it can complete production in less than fifty days.

end of the phase-in period, i.e., September 1, 2006.

In addressing various petitions for exemption from the advanced air bag requirements of FMVSS No. 208 since that time, NHTSA has recognized that small manufacturers faced particular difficulties in acquiring or developing advanced air bag systems. Specifically, the agency noted that major air bag suppliers initially concentrated their efforts on working with large volume manufacturers and small volume manufacturers had limited access to advanced air bag technology.

However, while the exemption authority was created to address the problems of small manufacturers and the agency wishes to be appropriately attentive to those problems, it was not anticipated by the agency that use of this authority would result in small manufacturers being given much more than relatively short term exemptions from recently implemented safety standards, especially those addressing particularly significant safety problems.

Given the passage of time since the advanced air bag requirements were established and implemented, and in light of the benefits of advanced air bags, NHTSA has determined that it is not in the public interest to continue to grant exemptions from these requirements in the same circumstances and under the same terms as in the past. The costs of compliance with the advanced air bag requirements of FMVSS No. 208 are costs that all entrants to the U.S. automobile marketplace should expect to bear. Furthermore, NHTSA understands that, in contrast to the initial years after the advanced air bag requirements went into effect, low volume manufacturers now have access to advanced air bag technology.[8] Accordingly, NHTSA has concluded that the expense of advanced air bag technology is not now sufficient, in and of itself, to justify the grant of a petition for a hardship exemption from the advanced air bag requirements.

Manufacturers are not precluded from submitting petitions for exemption in this area, and NHTSA may grant some such exemptions. However, manufacturers should understand that the circumstances in which we would grant such exemptions is expected to be significantly more limited than in the past.

We are not adopting Advocates' recommendation to change the exemption petition process. Although NHTSA may develop general policies on certain issues, the agency still analyzes each petition on a case-by-case basis and believes that this is the best approach for addressing the individual circumstances of each manufacturer seeking exemption. Moreover, with respect to that organization's suggestion that NHTSA should establish a rebuttable presumption that manufacturing cost alone cannot provide the basis for an application for a temporary exemption from safety requirements beyond four years following the date on which compliance with a vehicle safety standard or requirement is mandatory, we note that manufacturers should not assume that the agency would be likely to grant hardship exemptions based on manufacturing cost alone, even within that four-year period. We evaluate all relevant information and issues in deciding whether to grant petitions for exemptions.

B. Decision on Tesla's Petition

In response to Tesla's petition, and after considering all of the information provided as a response to the notice of receipt of the petition, NHTSA has decided to extend Tesla's temporary exemption from the advanced air bag requirements of FMVSS No. 208 for a period of 40 days after publication of notice of this decision in the **Federal Register**. We are not providing a longer exemption in light of the production plans set forth by Tesla in its petition for an exemption from the ESC requirements of FMVSS No. 126.

First, we find that Tesla is eligible for an economic hardship exemption. As discussed above, a manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator. In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether a second vehicle manufacturer also might be deemed the manufacturer of that vehicle.

We have considered whether an entity other than Tesla can be considered to manufacture the Roadster. Lotus, based on its involvement in the design and manufacture of the Roadster gliders is potentially an additional manufacturer of the Roadster.

However, as we have noted in a prior notice, Lotus is itself a small manufacturer and NHTSA granted a temporary exemption from the advanced air bag requirements for the Lotus Elise.[9] Both Tesla and Lotus separately meet the requirement that a manufacturer make fewer than 10,000 vehicles in a calendar year preceding the petition, counting all vehicles they manufacture (including ones that may also be attributable to another manufacturer). Given this, we find that Tesla continues to be eligible to apply for an economic hardship exemption, whether or not Lotus is considered to be a manufacturer of the Roadster.

Based on the information provided in Tesla's petition and its comments, NHTSA concludes that Tesla has demonstrated a good faith effort to bring its vehicle into compliance with the advanced air bag requirements of FMVSS No. 208. NHTSA also concludes that Tesla has demonstrated the requisite financial hardship. In reaching the conclusion about good faith efforts, we place significant weight on the fact that, before seeking renewals of existing exemptions, Tesla and Lotus again sought to determine whether it was feasible to include advanced air bags on the exempted vehicles.

As noted earlier, Advocates stated that in developing and testing air bag systems for meeting the sections of the standard related to out-of-position testing, Tesla only needs to perform component level tests as compared to full vehicle tests. It cited a retail price for an occupant detection system and claimed that there are cost effective alternative ways to meet the specific sections of the regulation without being granted an extension.

In response to Advocates' comment, we note that, in order to meet the advanced air bag requirements, Tesla's efforts are not limited to achieving compliance with the out-of-position requirements, but its vehicle must comply with all of the advanced air bag requirements including unbelted crash test requirements and crash test requirements using 5th percentile adult female dummies. While Advocates cited a retail price for an occupant detection system, it has not provided analysis demonstrating how a particular system could be incorporated into the Roadster

[8] The recent petitions for exemption support NHTSA's conclusion that advanced air bag technology has become more accessible to small volume manufacturers in recent years. In addition to the fact that several manufacturers who received exemptions in the past have been able to produce fully-compliant vehicles, many of the manufacturers who have recently sought exemption from the advanced air bag requirements have been developing advanced air bag systems in-house or are working with suppliers to develop such systems. *See, e.g.,* Notice of Receipt of Application of Spyker Automobielen, B.V., 76 FR 19179 (Apr. 6, 2011) (manufacturer is working with a supplier to develop advanced air bag system); Notice of Receipt of Petition of Lotus Cars Ltd., 76 FR 33406 (June 8, 2011) (manufacturer has another model that fully complies with the advanced air bag requirements).

[9] See 71 FR 52851 (Sept. 7, 2006).

or analyzing the cost implications of such a redesign for it in the context of an extremely low volume vehicle. As noted earlier, Tesla explained in its petition that it has focused on developing advanced air bags for its successor vehicle, the Model S. Given the challenges that company has cited in meeting the advanced air bag requirements for the existing vehicle and the high costs in redesigning vehicles to meet the advanced air bag requirements, we believe Tesla's approach is consistent with good faith efforts to meet FMVSS No. 208. We caution, however, that vehicle manufacturers should not assume that we will grant multiple extensions of temporary exemptions because of continuing delays in completing the designs of successor vehicles.

Several factors support a finding that an extension of Tesla's exemption is in the public interest. NHTSA has traditionally found that the public interest is served by affording consumers a wider variety of motor vehicles, by encouraging the development of fuel-efficient and alternative-energy vehicles, and providing additional employment opportunities. We believe that all three of these public interest considerations would be served by granting Tesla's petition and note that the denial of this request would remove a vehicle that is currently being sold in the U.S. market.

There are other relevant considerations. The number of vehicles at issue is small. The total number of vehicles produced under this exemption, dating back to the expiration date of the initial exemption, is expected to be fewer than 500. Further, Tesla, based on assertions made in its submissions in support of its petition for exemption from the ESC requirements, expects to produce only 80 additional vehicles under this exemption.

In considering whether to grant a temporary exemption, including a renewal of a temporary exemption, we must consider all relevant factors. We have discussed earlier in this document the benefits provided by advanced air bags. In particular, the requirements for advanced air bags were designed to meet the twin goals of improving protection for occupants of all sizes, belted and unbelted, in moderate-to-high-speed crashes, and of minimizing the risks posed by air bags to infants, children, and other occupants, especially in low-speed crashes. Vehicles without advanced air bags will present greater safety risks in these areas.

After considering all of the relevant information, we have decided to extend Tesla's temporary exemption from the advanced air bag requirements of FMVSS No. 208 for a period of 40 days after publication of this notice in the **Federal Register**. This is a relatively limited time period, but would accommodate the planned end of production of Roadster models for the United States market. In determining this date, we have taken into consideration submissions by Tesla in support of its petition for exemption from the requirements of FMVSS No. 126, Electronic Stability Control Systems, regarding its planned end of production of the Roadster, as suggested by the Advocates.[10]

Although Tesla requested an exemption for the Roadster from the advanced air bag requirements of FMVSS No. 208 based on substantial economic hardship pursuant to 49 U.S.C. 30113(b)(3)(B)(i), the agency has also considered whether the Roadster qualifies for an exemption as a low-emission vehicle pursuant to 49 U.S.C. 30113(b)(3)(B)(iii). Simultaneously with this determination, the agency has made the determination to grant a temporary exemption for the Roadster from the requirements of FMVSS No. 126 based upon 49 U.S.C. 30113(b)(3)(B)(iii). For the reasons explained therein, NHTSA also concludes for purposes of this determination that the Roadster is a low-emission vehicle and that this temporary exemption of the Roadster from the advanced air bag requirements of FMVSS No. 208 would make the development and field evaluation of a low-emission vehicle easier.

We note that, as explained below, prospective purchasers will be notified that the vehicle is exempted from the specified advanced air bag requirements of FMVSS No. 208. Under § 555.9(b), a manufacturer of an exempted passenger car must affix securely to the windshield or side window of each exempted vehicle a label containing a statement that the vehicle conforms to all applicable FMVSSs in effect on the date of manufacture ''except for Standard Nos. [listing the standards by number and title for which an exemption has been granted] exempted pursuant to NHTSA Exemption No. _____.'' This label notifies prospective purchasers about the exemption and its subject. Under § 555.9(c), this information must also be included on the vehicle's certification label.[11]

The text of § 555.9 does not expressly indicate how the required statement on the two labels should read in situations in which an exemption covers part, but not all, of a FMVSS. In this case, we believe that a statement that the vehicle has been exempted from Standard No. 208 generally, without an indication that the exemption is limited to the specified advanced air bag provisions, could be misleading. A consumer might incorrectly believe that the vehicle has been exempted from all of Standard No. 208's requirements. Moreover, we believe that the addition of a reference to such provisions by number would be of little use to consumers, since they would not know the subject of those specific provisions.[12] For these reasons, we believe the two labels should read in relevant part, ''except for the Advanced Air Bag Requirements of Standard No. 208, Occupant Crash Protection, exempted pursuant to * * *.'' We note that the phrase ''Advanced Air Bag Requirements'' is an abbreviated form of the title of S14 of Standard No. 208. We believe it is reasonable to interpret § 555.9 as requiring this language.

In accordance with 49 U.S.C. 30113(b)(3)(B)(i), Tesla is granted a renewal of NHTSA Temporary Exemption No. EX 08–01, from S14 (apart from section S14.5.1(a)), S15, S17, S19, S21, and S23 of 49 CFR 571.208.[13] The exemption is for the Roadster model and shall remain effective until 40 days following publication of notice of this decision in the **Federal Register**, as indicated in the **DATES** section of this document.

(49 U.S.C. 30113; delegations of authority at 49 CFR 1.50. and 501.8)

Issued on: September 22, 2011.

David L. Strickland,

Administrator.

[FR Doc. 2011–24897 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–59–P

[10] With respect to the Advocates' argument that 49 CFR 555.8(e) is unlawful because it allows the agency to grant an exemption for a period longer than three years, we consider the argument moot in light of this decision to extend Tesla's exemption.

[11] Tesla's label would be required to list both its exemption from the advanced airbag requirements of FMVSS No. 208 and its exemption from the ESC requirements of FMVSS No. 126, which has been granted in a separate decision that is published in today's **Federal Register**.

[12] We recognize that, in prior grants of exemptions from the advanced air bag requirements, the agency has required the manufacturer to list the exempted paragraphs by number on the label.

[13] We note that, although the agency granted Tesla an exemption from paragraph S25 in its January 2008 decision, Tesla did not include paragraph S25 in its request for a renewal of its exemption.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0110]

Tesla Motors, Inc.; Grant of Petition for Temporary Exemption From the Electronic Stability Control Requirements of FMVSS No. 126

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of grant of a petition for temporary exemption from Federal Motor Vehicle Safety Standard (FMVSS) No. 126, *Electronic Stability Control Systems.*

SUMMARY: This notice grants the petition of Tesla Motors, Inc. (Tesla) for the temporary exemption of its Roadster model from the electronic stability control requirements of FMVSS No. 126. The basis for the exemption is that the exemption would facilitate the development or field evaluation of a low-emission motor vehicle and would not unreasonably reduce the safety level of that vehicle.

DATES: The exemption is effective September 28, 2011, and remains in effect until November 7, 2011.

FOR FURTHER INFORMATION CONTACT: David Jasinski, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41–326, Washington, DC 20590. *Telephone:* (202) 366–2992; *Fax:* (202) 366–3820.

SUPPLEMENTARY INFORMATION:

I. Statutory Basis for Temporary Exemptions

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified as 49 U.S.C. Chapter 301, authorizes the Secretary of Transportation to exempt, on a temporary basis and under specified circumstances, motor vehicles from a motor vehicle safety standard or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority in this section to NHTSA.

NHTSA established 49 CFR part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* to implement the statutory provisions concerning temporary exemptions. A vehicle manufacturer wishing to obtain an exemption from a standard must demonstrate in its application (A) That an exemption would be in the public interest and consistent with the Safety Act and (B) that the manufacturer satisfies one of the following four bases for an exemption: (i) Compliance with the standard would cause substantial economic hardship to a manufacturer that has tried to comply with the standard in good faith; (ii) the exemption would make easier the development or field evaluation of a new motor vehicle safety feature providing a safety level at least equal to the safety level of the standard; (iii) the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of that vehicle; or (iv) compliance with the standard would prevent the manufacturer from selling a motor vehicle with an overall safety level at least equal to the overall safety level of nonexempt vehicles.

For an exemption petition to be granted on the basis that the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of the vehicle, the petition must include specified information set forth at 49 CFR 555.6(c). The main requirements of that section include: (1) Substantiation that the vehicle is a low-emission vehicle; (2) documentation establishing that a temporary exemption would not unreasonably degrade the safety of a vehicle; (3) substantiation that a temporary exemption would facilitate the development or field evaluation of the vehicle; (4) a statement of whether the petitioner intends to conform to the standard at the end of the exemption period; and (5) a statement that not more than 2,500 exempted vehicles will be sold in the United States in any 12-month period for which an exemption may be granted.

II. Electronic Stability Control Systems Requirement

In April 2007, NHTSA published a final rule requiring that vehicles with a gross vehicle weight rating of 4,536 kilograms (kg) (10,000 pounds) or less be equipped with electronic stability control (ESC) systems. ESC systems use automatic computer-controlled braking of individual wheels to assist the driver in maintaining control in critical driving situations in which the vehicle is beginning to lose directional stability at the rear wheels (spin out) or directional control at the front wheels (plow out). An anti-lock brake system (ABS) is a prerequisite for an ESC system because ESC uses many of the same components as ABS. Thus, the cost of complying with FMVSS No. 126 is less for vehicle models already equipped with ABS.

Preventing single-vehicle loss-of-control crashes is the most effective way to reduce deaths resulting from rollover crashes. This is because most loss-of-control crashes culminate in the vehicle leaving the roadway, which dramatically increases the probability of a rollover. NHTSA's crash data study of existing vehicles equipped with ESC demonstrated that these systems reduce fatal single-vehicle crashes of passenger cars by 55 percent and fatal single-vehicle crashes of light trucks and vans (LTVs) by 50 percent.[1] NHTSA estimates that ESC has the potential to prevent 56 percent of the fatal passenger car rollovers and 74 percent of the fatal LTV first-event rollovers that would otherwise occur in single-vehicle crashes.[2]

The ESC requirement became effective for substantially all vehicles on September 1, 2011.

III. Overview of Petition

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR Part 555, Tesla Motors, Inc. (Tesla) submitted a petition dated June 7, 2011 asking the agency for a temporary exemption from the electronic stability control requirements of FMVSS No. 126. The bases for the application are, first, that the exemption would make the development or field evaluation of a low-emission vehicle easier and would not unreasonably lower the safety level of that vehicle and, second, that compliance would cause substantial economic hardship to a petitioner that has tried in good faith to comply with the standard. However, the agency has decided to grant the petition on the basis that an exemption would make the development or field evaluation of a low-emission vehicle easier and would not unreasonably lower the safety level of the vehicle. Accordingly, this document will not further discuss the portions of the petition related to only the economic hardship arguments.

Tesla has requested an exemption for the Roadster model for a period from September 1, 2011 to December 31, 2011. In a supplemental filing, Tesla stated that it now intends to manufacture no more than 80 vehicles under the requested exemption and that manufacturing would be complete by October 20, 2011.

Tesla is a Delaware corporation headquartered in California with sales offices throughout the United States and overseas. Although Tesla currently sells

[1] Sivinski, R., Crash Prevention Effectiveness of Light-Vehicle Electronic Stability Control: An Update of the 2007 NHTSA Evaluation; DOT HS 811 486 (June 2011).

[2] *Id.*

only one vehicle, the Roadster, Tesla is scheduled to begin production and sale of a new all-electric vehicle, the Model S, in 2012. Tesla is also developing electric vehicle power train solutions for the Toyota Motor Corporation RAV 4 sport utility vehicle and the Daimler AG Mercedes A Class electric vehicle.

Tesla began production of the all-electric Roadster in 2008. The Roadster has a single-speed electrically actuated automatic transmission and three phase, four pole AC induction motor. The Roadster has a combined range of 245 miles on a single charge. Under an agreement with Group Lotus plc (Lotus), Tesla purchases the Roadster ''glider,'' which uses the chassis and several other systems of the Lotus Elise. The gliders are manufactured under Tesla's supervision and direction at a Lotus factory in the United Kingdom and then shipped to Menlo Park, California, where installation of the power train and other final steps are taken prior to sale of the vehicle in the United States.

According to Tesla, the Roadster was conceived as a limited proof-of-concept vehicle for later generations of Tesla vehicles. Tesla is preparing to introduce its next electric vehicle, the four-door fully electric Model S sedan. Tesla states that the Model S will meet or exceed all FMVSSs in effect when the vehicle is released for production in 2012. The Model S will carry up to seven passengers for 300 miles on a single charge, but at less than half the price of the Tesla Roadster. In parallel with the development of the Model S, Tesla is developing electric power trains for two other vehicles intended for wide distribution—the Toyota RAV 4 and Mercedes A Class electric vehicles. For these reasons, Tesla asserts that granting the exemption will support the development and evaluation of electric vehicles by Toyota and Mercedes, as well as by Tesla itself.

Tesla explains in its petition how the continued sale of Roadster vehicles will support development and field evaluation of a highway-capable electric vehicle. Tesla states that the development and sale of the Roadster model has allowed it to develop its next all-electric vehicle, the Model S. Tesla states that, with the permission of vehicle owners, it has used data from computers installed in on-road Roadsters related to vehicle operation, operating conditions, charging conditions, state of charge, and other vehicle performance parameters to determine how best to optimize its battery design and vehicle software for future vehicle offerings such as the Model S. Tesla believes that allowing the sale of additional Roadsters will continue to enrich and add to its database of information for future electric vehicle development. Tesla states that it cannot replicate this data in laboratory or other non-highway conditions. Tesla contends that the database from Roadster vehicles is the most substantial real-world database available to government agencies such as NHTSA that are involved in the evaluation of electric vehicles. Tesla also contends that the 80 additional Roadster vehicles covered by its exemption request have the most up-to-date software, hardware, controls and power electronics of any Tesla vehicles, and that their operation therefore will generate particularly valuable additional data that is most valuable addition to the Tesla database. Because these Roadsters incorporate the latest generation of technology and apply the most up-to-date knowledge developed by Tesla, the company also asserts that they are the most valuable vehicles for the development and release of Tesla's next electric vehicle, the Model S.

Tesla believes that safety will not be unduly compromised if the exemption is granted. In support of this assertion, Tesla cites its inclusion of a traction control system (TCS) on its vehicles. Tesla's TCS is comprised of software, wheel speed sensors, and the drive system electronic control unit (ECU). Tesla states that its TCS has many elements of an ESC system required by FMVSS No. 126. Tesla claims that the TCS is able to detect slip in the drive wheels through the vehicle's ECU and that the vehicle will limit drive power until wheel spin is controlled. However, Tesla notes that the TCS does not have the capability to independently monitor or adjust steering inputs to prevent oversteer or understeer, nor is it capable of applying brakes independent of driver input, both of which are required by FMVSS No. 126.

Further, Tesla believes that the lack of ESC systems on the Roadster will not unduly compromise safety based on the intended use of the Roadster. The Roadster is a low, two-seat sport coupe. Tesla believes that, while the Roadster is capable of handling slippery roads due to ice and snow, most owners either do not use their Roadsters during winter months or sharply limit their use.

Tesla contends that denial of its petition will jeopardize Tesla's ability to make the transition to production of the Model S and other electric vehicles. Tesla states that it currently employs approximately 1,100 people, primarily in Palo Alto and Fremont, California. Tesla had intended its manufacturing and production line workers to complete manufacture of the remaining Roadsters and then so shift their duties over to the Model S. Tesla asserts that it is not yet ready to transfer many Roadster manufacturing employees to the production operations for the Model S, and that it therefore cannot support Roadster manufacturing employees for the final quarter of 2011. Without the additional 80 vehicles covered by its exemption request, Tesla's production and manufacturing would have a significant gap in production time lines. As a result, Tesla may be forced to lay off a significant number of employees if it is not granted an exemption. Further, because the Roadster is the only vehicle Tesla offers for sale in the United States, Tesla contends that the cancellation of the program would result in a significant loss of market for Tesla.

In its petition, Tesla asserts that the continued sale of a high-profile vehicle like the Roadster will make the U.S. public familiar with the new possibilities of electric vehicles. The Roadster was intended to demonstrate that electric vehicles can provide all the performance, range and capabilities of internal combustion engine vehicles, but without any emissions. Tesla contends that continued production of the Roadster will help to ensure that the public remains aware of the viability and practicality of high performance, long range electric vehicles, as it makes the transition to the Model S.

Tesla also believes that the exemption is in the public interest. As stated above, Tesla asserts that, without the exemption, it may be required to lay off a significant number of employees. Further, Tesla notes that denying this petition would result in fewer electric vehicles for sale in the United States. Tesla points out that, on the basis of each mile driven, vehicles like the Roadster that operate only on electricity have the greatest impact on reducing U.S. dependence on foreign oil. As Tesla states in its petition, electric vehicles are not just low-emission vehicles that would qualify for this exemption, but zero emission vehicles. Finally, Tesla believes that continuing to sell a long range, highway-capable, battery-powered electric vehicle in the United States will lead to more electric vehicles entering the fleet.

IV. Notice of Receipt

On August 5, 2011, we published in the **Federal Register** (76 FR 47639) a notice of receipt of Tesla's petition for temporary exemption, and provided an opportunity for public comment. We received one comment from the Advocates for Highway & Auto Safety (Advocates).

V. Agency Analysis, Response to Comment, and Decision

In this section, we provide our analysis and decision regarding Tesla's temporary exemption request concerning the ESC requirements of FMVSS No. 126, including our response to the comment received by the Advocates.

As discussed below, we are granting Tesla's petition for the Roadster to be exempted, for a period of 40 days after the date of publication of this notice in the **Federal Register**, from the requirements of FMVSS No. 126. The agency's rationale for this decision is as follows:

First, we conclude that Tesla has shown that an exemption from the ESC requirements would make the development or field evaluation of a low-emission motor vehicle easier. Specifically, we agree with Tesla that, by producing additional Roadster models, Tesla will be able to use data from computers installed on those vehicles to assist it in optimizing its battery design and vehicle software for future all-electric vehicle offerings, including its upcoming Model S, as well as vehicles produced by other manufacturers working with Tesla. Furthermore, Tesla's willingness to share data from its Roadster database with NHTSA and other federal agencies means that the additional data from the operation of these additional Roadsters will help to advance the development, and to ensure the safety, of other electric vehicles. We believe that the data from the Roadster database can be used to ensure the safety of not only Tesla's future vehicles, but also electric vehicles produced by all other manufacturers.

Further, the production of additional Roadster models would allow consumers of all-electric vehicles an additional option during the exemption period. We agree with Tesla that continued production of a high-profile vehicle like the Roadster, even for the very limited period of 40 days and in the limited quantity of 80 vehicles, will help to demonstrate to the U.S. public the performance, range and capabilities of electric vehicles. We also agree with Tesla that continued production of the Roadster for the limited period requested by Tesla will ease Tesla's transition to the development and production of the all-electric Model S. For that reason we agree that denial of the petition could jeopardize Tesla's ability to produce the Model S and other electric vehicles in the future. For these reasons, we agree with Tesla that granting this petition will encourage the development and sale of highway-capable electric vehicles by Tesla and also by other manufacturers.

Second, NHTSA concludes that the grant of this exemption would not unreasonably lower the safety or impact protection level of the vehicle. In particular, we have considered that Tesla produces a low, two-seat sport vehicle. The low center of gravity provides some additional protection from loss-of-control crashes. Furthermore, the nature of the vehicle is such that we agree with Tesla's assertion that Roadster owners would be less likely to use their vehicles in winter months or during rain. Because the Roadster would be used less during winter months or during rain, a Roadster is likely to be driven fewer miles compared to an average vehicle. We believe that this factor diminishes the likelihood that the failure to include an ESC system on the Roadster would unreasonably lower the safety level of the vehicle.

The Advocates argue that ESC is an important and proven safety improvement. In support of their argument, the Advocates cite agency and industry research, including the agency's most recent study of ESC system effectiveness.[3] While the agency continues to believe that ESC has a substantial effect on the number of vehicle crashes, the relevant inquiry is not the effectiveness of ESC systems. Rather, the relevant inquiry is whether an exemption would unreasonably lower the safety level of the vehicle in question. Although the agency has found substantial benefits resulting from ESC systems on passenger cars, the agency finds that the absence of ESC on the Roadster does not unreasonably lower the safety level of that specific vehicle. We believe that the expected use patterns of the Roadster, including the relatively low number of miles driven by the average Roadster owner, support this finding.

The Advocates also argue that Tesla cannot guarantee the conditions under which the vehicle will be used. That is, although Tesla argues that Roadsters are less likely to be driven in winter months or during rain, Tesla cannot guarantee that. However, we believe that the Advocates would hold Tesla to too high of a burden of proof that would essentially foreclose the possibility of any exemption being granted. Moreover, although Tesla has not provided data in support of its assertions, we find Tesla's assertions that a low, soft-top convertible vehicle is less likely to be driven in the rain, snow, or winter months to be plausible and persuasive.

The Advocates also argue that Tesla's limited production of exempted vehicles does not justify an exemption. The Advocates argue that rarer vehicles are not safer just because they are rarer. While the agency cannot dispute the assertion that rarer vehicles are not safer because they are rarer, it does not follow that the agency should not consider the expected production volume in support of an exemption request. If Tesla intended to produce 2,500 vehicles per year over two years rather than 80 vehicles in a little over a month, the agency would judge Tesla's petition differently than the petition now before it.

Moreover, it is not just the limited number of Roadsters that would be produced under the exemption, but the limited number of miles the average Roadster is driven compared to other cars that Tesla cites in support of its petition. The Advocates do not dispute the relatively small number of vehicles that Tesla intends to produce under the exemption and the relatively low-mileage use of the Roadster when compared to other vehicles.

The Advocates also contend that, because an FMVSS establishes only the minimum performance requirements necessary for occupant protection, an exemption must only be granted when absolutely necessary. However, the statutory requirements for granting an exemption require only a finding that an exemption is in the public interest and meets the objectives of the Safety Act, in addition to the specific requirements set forth for each of the four bases for an exemption.

We also observe that a very limited number of vehicles would be produced under this temporary exemption. Manufacturers granted exemptions on the basis of furthering the development or field evaluation of a low-emission vehicle are allowed to sell as many as 2,500 exempted vehicles in any 12-month period. Tesla has stated that it intends to produce only 80 vehicles during the exemption period.

The Advocates express a concern that Tesla has, in this petition, requested a shorter exemption period than in its request for an exemption from the advanced air bag requirements of FMVSS No. 208. The Advocates suggest that the longer exemption period sought in the advanced air bag exemption petition suggests that Tesla may continue Roadster production beyond the date sought for this exemption. We reject this argument as a basis for denying Tesla's petition. We give greater weight to Tesla's most recent statement

[3] See *supra,* note 1.

that it intends to end Roaster production within less than 50 days of the grant of this exemption than to any prior statements regarding its production plans made in the context of prior submissions to the agency.[4]

Based on the foregoing, we believe that any impact on safety from granting the petition would be negligible and that Tesla has satisfied the eligibility criteria for an exemption for the development or field evaluation of a low-emission motor vehicle.

The Advocates raise other issues in their comments that the agency need not address in detail. Specifically, the Advocates argue that Tesla had ample time to develop an FMVSS No. 126-compliant ESC system because the final rule mandating ESC systems was published in the same year that Roadster production first began. The Advocates also state that the cost of including an ESC system is small relative to the cost of the Roadster.[5] The Advocates further argue that the loss of income from sales of Roadsters that Tesla did not intend to produce cannot be considered an economic hardship. Each of these comments relate to requirements for economic hardship petitions. Because the agency has determined that Tesla's exemption is justified under a different basis, the agency need not address these three issues specifically in this notice.

We also find that this exemption would be consistent with the public interest and the objectives of the Safety Act. NHTSA has traditionally found that the public interest is served by affording consumers a wider variety of motor vehicles, by encouraging the development of fuel-efficient and alternative-energy vehicles, and providing additional employment opportunities. We believe that all three of these public interest considerations would be served by granting Tesla's petition.

We note that the denial of this request would remove one of the few electric vehicles that is currently being sold in the U.S. market and that granting this petition would afford U.S. consumers the continued choice of this all-electric vehicle. As explained above, granting this petition will ease the development of the Model S as well as other electric vehicles, while conversely denial of the petition could compromise Tesla's ability to move forward with the Model S. We believe that granting this petition will have a positive impact on U.S. employment in the automotive industry, and that denial of the petition could directly impact the jobs of current Tesla employees supporting the Roadster.

Additionally, we believe that the requested exemption will have a limited impact on general motor vehicle safety because of the small number of vehicles that can be produced under this exemption. Finally, it is critical to the agency's decision that Tesla is requesting a very short exemption period and intends to sell only vehicles that comply with all applicable FMVSS after the exemption period.

We note that, as explained below, prospective purchasers will be notified that the vehicle is exempted from the ESC requirements of Standard No. 126. Under § 555.9(b), a manufacturer of an exempted vehicle must affix securely to the windshield or side window of each exempted vehicle a label containing a statement that the vehicle conforms to all applicable FMVSSs in effect on the date of manufacture ''except for Standard Nos. [listing the standards by number and title for which an exemption has been granted] exempted pursuant to NHTSA Exemption No. ____.'' This label notifies prospective purchasers about the exemption and its subject. Under § 555.9(c), this information must also be included on the vehicle's certification label.[6]

In consideration of the foregoing, we conclude that granting the requested exemption from FMVSS No. 126, *Electronic Stability Control Systems,* would facilitate the field evaluation or development of a low-emission vehicle, and would not unreasonably lower the safety or impact protection level of that vehicle. We further conclude that granting this exemption would be in the public interest and consistent with the objectives of the Safety Act.

In accordance with 49 U.S.C. 30113(b)(3)(B)(iii), Tesla is granted NHTSA Temporary Exemption No. EX 11–03 from FMVSS No. 126. The exemption is for the Roadster model and shall remain effective from the date on which notice of this decision is published in the **Federal Register** for a period of 40 days, as indicated in the **DATES** section of this document.

Authority: (49 U.S.C. 30113; delegations of authority at 49 CFR 1.50. and 501.8)

Issued on: September 22, 2011.

David L. Strickland,

Administrator.

[FR Doc. 2011–24899 Filed 9–27–11; 8:45 am]

BILLING CODE 4910–59–P

[4] Furthermore, the effect of Tesla expressing different production plans in its submissions related to this petition than in its submissions on the advanced air bag petition are better addressed in the context of the agency's response to the advanced air bag petition because Tesla sought a longer exemption from the advanced air bag requirements.

[5] The agency does take note, however, that the cost of implementing design modifications to the Roadster to accommodate ESC would not be trivial.

[6] Tesla's label would be required to list both its exemption from FMVSS No. 126 and its exemption from the advanced air bag requirements of FMVSS No. 208, which has been extended in a separate decision that is published in today's **Federal Register**.

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

September 22, 2011.

The Department of the Treasury will submit the following public information collection requirements 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 submissions may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding these information collections 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 October 27, 2011 to be assured consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0863.

Type of Review: Extension without change of a currently approved collection.

Title: LR–218–78 (Final) Product Liability Losses and Accumulations for Product Liability Losses.

Abstract: Generally, a taxpayer who sustains a product liability loss must carry the loss back 10 years. However, a taxpayer may elect to have such loss treated as a regular net operating loss under section 172. If desired, such election is made by attaching a statement to the tax return. This statement will enable the IRS to monitor compliance with the statutory requirements.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 2,500.

OMB Number: 1545–1647.

Type of Review: Extension without change of a currently approved collection.

Title: Revenue Procedure 2001–21 Debt Roll-Ups.

Abstract: This revenue procedure provides for an election that will facilitate the consolidation of two or more outstanding debt instruments into a single debt instrument. Under the

election, taxpayers can treat certain exchanges of debt instruments as realization events for federal income tax purposes even though the exchanges do not result in significant modifications under 1.1001–33 of the Income Tax Regulations.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 75.

OMB Number: 1545–1650.

Type of Review: Extension without change of a currently approved collection.

Title: REG–208156–91 (Final) Accounting for Long-Term Contracts.

Abstract: The information collected is required to notify the Commissioner of a taxpayer's decision to sever or aggregate one or more long-term contracts under the regulations. The statement is needed so the Commissioner can determine whether the taxpayer properly severed or aggregated its contract(s). The regulations affect any taxpayer that manufactures or constructs property under long-term contracts.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 12,500.

OMB Number: 1545–1945.

Type of Review: Extension without change of a currently approved collection.

Title: TD 9328 (Final) Safe Harbor for Valuation Under Section 475.

Abstract: This document sets forth an elective safe harbor that permits dealers in securities and dealers in commodities to elect to use the values of positions reported on certain financial statements as the fair market values of those positions for purposes of section 475 of the Internal Revenue Code (Code). This safe harbor is intended to reduce the compliance burden on taxpayers and to improve the administrability of the valuation requirement of section 475 for the IRS.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 49,232.

OMB Number: 1545–2118.

Type of Review: Extension without change of a currently approved collection.

Title: Form 13562, Health Coverage Tax Credit (HCTC) General Registration Information Form; Form 13929, Health Coverage Tax Credit (HCTC) Paper Check Request.

Forms: 13562 and 13929.

Abstract: These forms are used to help manage the HCTC program. Health plan administrators will use these forms to submit requests of; changes to their account information, waivers from the Federal requirement that mandates all payments to be made via Electronic Funds Transfer (EFT), and to provide the required registration information into the HCTC program.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 875.

Bureau Clearance Officer: Yvette Lawrence, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224; (202) 927–4374.

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. 2011–24858 Filed 9–27–11; 8:45 am]

BILLING CODE 4810–01–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Legal Division Performance Review Board

AGENCY: Department of the Treasury.

ACTION: Notice of members of the Legal Division Performance Review Board (PRB).

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Legal Division PRB. The purpose of this Board is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses, and other appropriate personnel actions for incumbents of SES positions in the Legal Division.

DATES: *Effective Date:* September 28, 2011.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Room 3000, Washington, DC 20220, *Telephone:* (202) 622–0283 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Composition of Legal Division PRB

The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed in this notice.

The names and titles of the PRB members are as follows:

Rupa Bhattacharyya, Deputy Assistant General Counsel (International Affairs); Peter A. Bieger, Deputy Assistant General Counsel (Banking and Finance); George Bostick, Benefits Tax Counsel; Michael Caballero, International Tax Counsel; Himamauli Das, Assistant General Counsel (International Affairs); Rochelle F. Granat, Assistant General Counsel (General Law, Ethics and Regulation); Elizabeth Horton, Deputy Assistant General Counsel (Ethics); Catherine E. Livingston, Special Counsel to the Chief Counsel Healthcare Program, Internal Revenue Service; M.J.K. Maher, Jr., Deputy Assistant General Counsel (Enforcement & Intelligence); Margaret V. Marquette, Chief Counsel, Financial Management Service; Christopher J. Meade, Principal Deputy General Counsel; Mark Monborne, Assistant General Counsel (Enforcement & Intelligence); Helen Morrison, Deputy Benefits Tax Counsel; Kevin Rice, Chief Counsel, Bureau of Engraving and Printing; Daniel P. Shaver, Chief Counsel, United States Mint; Brian Sonfield, Deputy Assistant General Counsel (General Law and Regulation); Sean M. Thornton, Chief Counsel, Office of Foreign Assets Control; Robert M. Tobiassen, Chief Counsel, Alcohol and Tobacco Tax and Trade Bureau; Jeffrey Van Hove, Tax Legislative Counsel; Christian A. Weideman, Deputy General Counsel; Curtis G. Wilson, Associate Chief Counsel (Passthroughs & Special Industries), Internal Revenue Service and; Paul Wolfteich, Chief Counsel, Bureau of Public Debt.

Dated: September 20, 2011.

George W. Madison,

General Counsel.

[FR Doc. 2011–24923 Filed 9–27–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Proposed Information Collection; Submission for OMB Review

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information collection, as required by the Paperwork Reduction Act of 1995. Currently, the OCC is soliciting comment concerning a renewal of an existing collection titled ''Customer Complaint Form.'' The OCC

also is giving notice that the collection has been submitted to OMB for review.

DATES: You should submit written comments by: October 27, 2011.

ADDRESSES: You should direct all written comments to: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0232, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274, or by electronic mail to *regs.comments@occ.treas.gov.* You can inspect and photocopy the comments at the OCC, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–5043. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0232, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information or a copy of the collection from Mary Gottlieb, (202) 874–5090, Legislative and Regulatory Activities Division (1557–0202), Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is requesting comment on the following information collection:

Title: Customer Complaint Form.

OMB Control No.: 1557–0232.

Description: The customer complaint form was developed as a courtesy for those who contact the Office of the Comptroller of the Currency's Customer Assistance Group and wish to file a formal, written complaint. The form allows consumers to focus their issues and provide a complete picture of their concerns, but is entirely voluntary. It is designed to give consumers a simple way to provide all necessary information thereby eliminating time-consuming follow-up calls which may delay the resolution process. Completion of the form allows the Customer Assistance Group to process the complaint more efficiently.

The Customer Assistance Group uses the information submitted in these forms to create a record of the OCC's contacts with the consumer, capture information that can be used to resolve the consumer's issues, and create a database of information that is incorporated into the OCC's supervisory process.

On July 21, 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act). As part of the comprehensive package of financial regulatory reform measures enacted, Title III of the Dodd-Frank Act transfers the powers, authorities, rights and duties of the Office of Thrift Supervision to other banking agencies, including the OCC, on July 21, 2011. The Dodd-Frank Act also abolishes the OTS ninety days after the transfer date. As a result of the Dodd-Frank Act, OCC is incorporating the burden from OTS's Consumer Complaint Form (OMB Control Nos. 1550–0126; 1557–0291) of 1,180 consumer complaints to this collection.

The Dodd-Frank Act also requires the transfer of certain consumer protection functions from the OCC to the new Bureau of Consumer Financial Protection. The OCC will revise this collection if it is determined that this collection of information is affected by this transfer.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Number of Respondents: 81,180.

Total Annual Responses: 81,180.

Frequency of Response: On occasion.

Total Annual Burden Hours: 6,738.

An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless the information collection displays a currently valid OMB control number. On March 23, 2011, the OCC issued a notice for 60 days of comment. 76 FR 16477. No comments were received. Comments continue to be 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 on respondents, including through the use of automated collection techniques or other forms of information technology; and

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

Dated: September 22, 2011.

Michele Meyer,

Assistant Director, Legislative & Regulatory Activities Division.

[FR Doc. 2011–24925 Filed 9–27–11; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of One Specially Designated National or Blocked Person Pursuant to Executive Order 13315, as Amended

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of an individual whose property and interests in property have been unblocked pursuant to Executive Order 13315 of August 28, 2003, ''Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions,'' as amended by Executive Order 13350 of July 30, 2004.

DATES: The removal of this individual from the SDN List is effective as of September 21, 2011.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The SDN List and additional information concerning OFAC are available from OFAC's Web site (*http://www.treasury.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is Available via facsimile through a 24-hour fax-on-demand service, *tel.:* 202/622–0077.

Background

On August 28, 2003, the President issued Executive Order 13315 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, section 5 of the United Nations Participation Act, as amended, 22 U.S.C. 287c, section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution 1483 of May 22, 2003. In the Order, the President expanded the scope of the

national emergency declared in Executive Order 13303 of May 22, 2003, to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq. The Order blocks the property and interests in property of, *inter alia*, persons listed on the Annex to the Order.

On July 30, 2004, the President issued Executive Order 13350, which, *inter alia*, replaced the Annex to Executive Order 13315 with a new Annex that included the names of individuals and entities, including individuals and entities that had previously been designated under Executive Order 12722 and related authorities.

The Department of the Treasury's Office of Foreign Assets Control has determined that the individual identified below, whose property and interests in property were blocked pursuant to Executive Order 13315, as amended, should be removed from the SDN List.

The following designation is removed from the SDN List:

Buhler, Bruno, 57 Rue du Rhone, Geneva CH–1204, Switzerland (individual) [IRAQ2]

The removal of this individual's name from the SDN List is effective as of September 21, 2011. All property and interests in property of the individual that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

Dated: September 21, 2011.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2011–24937 Filed 9–27–11; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to the Cuban Assets Control Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of a vessel whose property and interests in property have been unblocked pursuant to the Cuban Assets Control Regulations (31 CFR Part 515).

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the individual and entity identified in this notice whose property and interests in property were blocked pursuant to the Cuban Assets Control Regulations (31 CFR part 515), is effective on September 21, 2011.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The SDN List and additional information concerning OFAC are available at OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On September 21, 2011, OFAC unblocked and removed from the SDN List the vessel listed below, whose property and interests in property were blocked pursuant to the Cuban Assets Control Regulations (31 CFR part 515):

REDESTOS (H2SA) General Cargo 15,180DWT 8,953GRT Cyprus flag (REDESTOS SHIPPING CO. LTD. (SDN)) (vessel) [CUBA].

Dated: September 21, 2011.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2011–24924 Filed 9–27–11; 8:45 am]

BILLING CODE 4810–AL–P

UNITED STATES DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of 18 individuals and 2 entities whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, *Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers.*

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the individuals and entities identified in this notice, whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on September 21, 2011.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and Secretary of State: (a) To play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On September 21, 2011, the Director of OFAC removed from the SDN List the

18 individuals and 2 entities listed below, whose property and interests in property were blocked pursuant to the Order:

AGUDELO, Ivan de Jesus, Avenida 6N No. 47–197 17, Cali, Colombia; c/o INDUSTRIA MADERERA ARCA LTDA., Cali, Colombia (individual) [SDNT]

BAENA CARDENAS, Luis Gonzalo, c/o BANCA DE INVERSION Y MERCADO DE CAPITALES S.A., Cali, Colombia; DOB 30 Jul 1955; Cedula No. 19266564 (Colombia) (individual) [SDNT]

CAMPO RAMIREZ, Guido, c/o VALORCORP S.A., Bogota, Colombia; Cedula No. 16218589 (Colombia) (individual) [SDNT]

CORTES, Polania Raquel, c/o MAPRI DE COLOMBIA LTDA., Bogota, Colombia; DOB 5 Nov 1965; Cedula No. 55150515 (Colombia); Passport 55150515 (Colombia) (individual) [SDNT]

CREDIVIDA, Calle 16 No. 100–88, Cali, Colombia; Cedula No. 31919241 (Colombia) [SDNT]

CUBILLOS CORREDOR, Manuel Antonio, Carrera 69BN No. 43A–70 Apt. 401 Int. 3, Bogota, Colombia; c/ INTERCONTINENTAL DE AVIACION S.A., Bogota, Colombia; c/ INTERFIAR, Bogota, Colombia; DOB 28 Sep 1948;

POB Bogota, Colombia; Cedula No. 19057000 (Colombia); Passport P050296 (Colombia) (individual) [SDNT]

CUBILLOS, Bellanidia, c/o FARMEDIS LTDA., Bogota, Colombia; Cedula No. 36179143 (Colombia) (individual) [SDNT]

DOMINGUEZ GARIBELLO, Freddy Orlando (a.k.a. DOMINGUEZ GARIVELLO, Freddy Orlando), c/o INDUSTRIA AVICOLA PALMASECA S.A., Cali, Colombia; DOB 25 Apr 1960; Cedula No. 16659634 (Colombia) (individual) [SDNT]

LOPEZ URREA, Adriana Patricia, c/o COLPHAR S.A., Bogota, Colombia; DOB 29 Feb 1968; Cedula No. 36378461 (Colombia); Passport 36378461 (Colombia) (individual) [SDNT]

MILLAN SALAS, Jaime, c/o VALORCORP S.A., Bogota, Colombia; c/o ALERO S.A., Cali, Colombia; Cedula No. 16589582 (Colombia) (individual) [SDNT]

OLAYA ROSCIASCO, Patricia Esperanza, c/o LABORATORIOS PROFARMA LTDA., Bogota, Colombia; DOB 30 Mar 1963; Cedula No. 51698439 (Colombia); Passport 51698439 (Colombia) (individual) [SDNT]

ORTIZ CARDONA, Gloria, c/o MACROFARMA S.A., Pereira, Colombia; Cedula No. 34056678 (Colombia); Passport 34056678 (Colombia) (individual) [SDNT]

RODRIGUEZ TELLEZ, Luz Yazmin (a.k.a. RODRIGUEZ TELLEZ, Luz Jazmin), c/o LABORATORIOS PROFARMA LTDA., Bogota, Colombia; c/o MATERIAS PRIMAS Y SUMINISTROS S.A., Bogota, Colombia; DOB 30 Apr 1972; Cedula No. 52030300 (Colombia); Passport 52030300 (Colombia) (individual) [SDNT]

ROJAS VILLARREAL, Andres Mauricio, c/o GIAMX LTDA., Bogota, Colombia; c/o WORLD TRADE LTDA., Bogota, Colombia; Cedula No. 80415760 (Colombia) (individual) [SDNT]

SISTEMAS INTEGRALES DEL VALLE LTDA. (a.k.a. SISVA LTDA.), Avenida 4 Norte No. 6N–67 of. 610, Cali, Colombia; NIT # 805006032–3 (Colombia) [SDNT]

SMITH CORTES, Jorge Emilio, c/o MAPRI DE COLOMBIA LTDA., Bogota, Colombia; Cedula No. 19323175 (Colombia); Passport 19323175 (Colombia) (individual) [SDNT]

SOTO PACHECO, Jhonayn, c/o FARMEDIS LTDA., Bogota, Colombia; Cedula No. 7691290 (Colombia) (individual) [SDNT]

SUAREZ BERNAL, Myriam, c/o FARMA XXI LTDA., Neiva, Huila, Colombia; DOB 2 Nov 1970; Cedula No. 35414723 (Colombia); Passport 35414723 (Colombia) (individual) [SDNT]

VARGAS VARGAS, Flor Yadira, c/o ADMACOOP, Bogota, Colombia; c/o CODISA, Bogota, Colombia; DOB 11 Jul 1971; Cedula No. 52584018 (Colombia); Passport 52584018 (Colombia) (individual) [SDNT]

VELASQUEZ, Miguel Angel, c/o ADMINISTRADORA DE SERVICIOS VARIOS CALIMA S.A., Cali, Colombia; c/o ASESORIAS ECONOMICAS MUNOZ SANTACOLOMA E.U., Cali, Colombia; c/o CHAMARTIN S.A., Cali, Colombia; Cedula No. 16305012 (Colombia); Passport 16305012 (Colombia) (individual) [SDNT]

Dated: September 21, 2011.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2011–24932 Filed 9–27–11; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0565]

Proposed Information Collection (State Application for Interment Allowance) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine a State's eligibility for interment allowances.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 28, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0565'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's

functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: State Application for Interment Allowance Under 38 U.S.C., Chapter 23, VA Form 21–530a.

OMB Control Number: 2900–0565.

Type of Review: Extension of a previously approved collection.

Abstract: Data collected on VA Form 21–530a is used to determine a State's eligibility for burial allowance for eligible veterans interred in a State Veteran's Cemetery.

Affected Public: State, Local or Tribal Government.

Estimated Annual Burden: 1,550 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,100.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24822 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0005]

Proposed Information Collection (Application for Dependency and Indemnity Compensation by Parent(s), (Including Accrued Benefits and Death Compensation)) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine a claimant's eligibility for dependency and indemnity compensation, death compensation, and/or accrued benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 28, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0005'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Dependency and Indemnity Compensation by Parent(s), (Including Accrued Benefits and Death Compensation), VA Form 21–535.

OMB Control Number: 2900–0005.

Type of Review: Extension of a currently approved collection.

Abstract: Surviving parent(s) of veterans whose death was service connected complete VA Form 21–535 to apply for dependency and indemnity compensation, death compensation, and/or accrued benefits. The information collected is used to determine the claimant's eligibility for death benefits sought.

Affected Public: Individuals or households.

Estimated Annual Burden: 4,320 hours.

Estimated Average Burden per Respondent: 1 hour 12 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 3,600.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24823 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0636]

Proposed Information Collection (Accelerated Payment Verification of Completion Letter) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine whether a claimant received his or her accelerated payment.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 28, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.*

gov. Please refer to ''OMB Control No. 2900–0636'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Accelerated Payment Verification of Completion Letter, VA Form 22–0840.

OMB Control Number: 2900–0636.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants electing to receive an accelerate payment for educational assistance allowance must certify they received such payment and how the payment was used. The data collected is used to determine the claimant's entitlement to accelerated payment.

Affected Public: Individuals or households.

Estimated Annual Burden: 44 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 349.

Estimated Annual Responses: 524.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24824 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0171]

Agency Information Collection (Application for Individualized Tutorial Assistance): 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 October 28, 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. 2900–0171'' 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. 2900–0171.''

SUPPLEMENTAL INFORMATION:

Title: Application for Individualized Tutorial Assistance, VA Form 22–1990t.

OMB Control Number: 2900–0171.

Type of Review: Extension of a currently approved collection.

Abstract: Students receiving VA educational assistance and need tutoring to overcome a deficiency in one or more course complete VA Form 22–1990t to apply for supplemental allowance for tutorial assistance. The student must provide the course or courses for which he or she requires tutoring, the number of hours and charges for each tutorial session and the name of the tutor. The tutor must certify that he or she provided tutoring at the specified charges and that he or she is not a close relative of the student. Certifying officials at the student's educational institution must certify that the tutoring was necessary for the student's pursuit of program; the tutor was qualified to conduct individualized tutorial assistance; and the charges for the tutoring did not exceed the customary charges for other students who receive the same tutorial assistance.

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 July 22, 2011, at pages 44090–44091.

Affected Public: Individuals or households.

Estimated Annual Burden: 350 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 700.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24825 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0061]

Proposed Information Collection (Request for Supplies (Chapter 31—Vocational Rehabilitation)); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine whether supplies requested for a veteran's rehabilitation program are necessary.

DATES: Written comments and recommendations on the proposed collection of information should be

received on or before November 28, 2011.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0061'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Request for Supplies (Chapter 31—Vocational Rehabilitation), VA Form 28–1905m.

OMB Control Number: 2900–0061.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 28–1905m is used to request supplies for veterans in rehabilitation programs. The official at the facility providing rehabilitation services to veterans completes the form and certifies that the veteran needs the supplies for his or her program, and do not have the requested item in his or her possession.

Affected Public: Not-for-profit institutions.

Estimated Annual Burden: 16,000 hours.

Estimated Average Burden per Respondent: 60 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 16,000.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24827 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0368]

Proposed Information Collection (Monthly Statement of Wages Paid to Trainee) Activity; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comment on information needed to determine the correct rate of subsistence allowance and wages payable to a trainee in an approved on-the-job training or apprenticeship program.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 28, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or *e-mail nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0368'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Monthly Statement of Wages Paid to Trainee (Chapter 31, Title 38, U.S.C.), VA Form 28–1917.

OMB Control Number: 2900–0368.

Type of Review: Extension of a currently approved collection.

Abstract: Employers providing on-job or apprenticeship training to veterans complete VA Form 28–1917 to report each veteran's wages during the preceding month. VA uses the information to determine whether the veteran is receiving the appropriate wage increase and correct rate of subsistence allowance.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 1,800 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 300.

Estimated Total Annual Responses: 3,600.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24828 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0717]

Agency Information Collection (Child Care Subsidy) Activity Under OMB Review

AGENCY: Human Resources and 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 Office of Human Resources and Administration (OHR&A), 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 October 28, 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. 2900–0717'' 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. 2900–0717.''

SUPPLEMENTARY INFORMATION:

Titles

a. Child Care Subsidy Application Form, VA Form 0730a.

b. Child Care Provider Information (For the Child Care Subsidy Program), VA Form 0730b.

OMB Control Number: 2900–0717.

Type of Review: Extension of a currently approved collection.

Abstracts

a. VA employees complete VA Form 0730a to request participation in VA's child care subsidy program. VA will use the data collected to determine the percentage of monthly cost to be subsidized for child care.

b. VA Form 0730b is completed by the child care provider. The data will be used to determine whether the child care provider is licensed and/or regulated by the state to perform child care.

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 July 22, 2011, at page 44091.

Affected Public: Individuals or households.

Estimated Annual Burden

a. VA Form 0730a—667 hours.
b. VA Form 0730b—333 hours.

Estimated Average Burden per Respondent

a. VA Form 0730a—20 minutes.
b. VA Form 0730B—10 minutes.
Frequency of Response: On occasion.

Estimated Number of Respondents

a. VA Form 0730a—2,000.
b. VA Form 0730b—2,000.

By direction of the Secretary.

Denise McLamb,

Enterprise Records Service.

[FR Doc. 2011–24829 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0085]

Proposed Information Collection (Appeal to Board of Veterans' Appeals) Activity Comment Request

AGENCY: Board of Veterans' Appeals, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Board of Veterans' Appeals (BVA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to process appeals for denial of VA benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 28, 2011.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Sue Hamlin, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *sue.hamlin@va.gov.* Please refer to ''OMB Control No. 2900–0085'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Sue Hamlin at (202) 461–8194.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, BVA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of BVA's functions, including whether the information will have practical utility; (2) the accuracy of BVA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Appeal to Board of Veterans' Appeals, VA Form 9.

b. Withdrawal of Services by a Representative.

c. Request for Changes in Hearing Date.

d. Motions for Reconsideration.

OMB Control Number: 2900–0085.

Type of Review: Extension of a currently approved collection.

Abstract:

a. Appeal to Board of Veterans' Appeals, VA Form 9, may be used by appellants to complete their appeal to the Board of Veterans' Appeals (BVA) from a denial of VA benefits. The information is used by BVA to identify the issues in dispute and prepare a decision responsive to the appellant's contentions and the legal and factual issues raised.

b. Withdrawal of Services by a Representative: When the appellant's representative withdraws from a case, both the appellant and the BVA must be informed so that the appellant's rights may be adequately protected and so that the BVA may meet its statutory obligations to provide notice to the current representative.

c. Request for Changes in Hearing Date: VA provides hearings to appellants and their representatives, as required by basic Constitutional due-process and by Title 38 U.S.C. 7107(b). From time to time, hearing dates and/or

times are changed, hearing requests withdrawn and new hearings requested after failure to appear at a scheduled hearing. The information is used to comply with the appellants' or their representatives' requests.

d. Motions for Reconsideration: Decisions by BVA are final unless the Chairman orders reconsideration of the decision either on the Chairman's initiative, or upon motion of a claimant. The Board Chairman, or his designee, uses the information provided in deciding whether reconsideration of a Board decision should be granted.

Affected Public: Individuals or households, Business or other for profit, and Not for profit institutions.

Estimated Total Annual Burden:

a. Appeal to Board of Veterans' Appeals, VA Form 9—45,850 hours.

b. Withdrawal of Services by a Representative—183 hours.

c. Request for Changes in Hearing Date—1,212 hours.

d. Motions for Reconsideration—846 hours.

Estimated Average Burden per Respondent:

a. Appeal to Board of Veterans' Appeals, VA Form 9—1 hour.

b. Withdrawal of Services by a Representative—20 minutes.

c. Request for Changes in Hearing Date—15 minutes (hearing date change), 15 minutes (request to withdraw a hearing),—1 hour (requests change a motion).

d. Motions for Reconsideration—1 hour.

Frequency of Response: On occasion.

Estimated Total Number of Respondents:

a. Appeal to Board of Veterans' Appeals, VA Form 9—45,850.

b. Withdrawal of Services by a Representative—550.

c. Request for Changes in Hearing Date—2,733.

d. Motions for Reconsideration—846.

Dated: September 22, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–24830 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Disability Compensation will meet on October 17–18, 2011, at the Department of Veterans Affairs Regional Office, 245 West Houston Street, Manhattan, New York, from 8:30 a.m. to 3:30 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising from service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The Committee will receive briefings on issues related to compensation for Veterans with service-connected disabilities and other VA benefits programs. Time will be allocated for receiving public comments in the afternoon. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Robert Watkins, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration, Compensation and Pension Service, Regulation Staff (211D), 810 Vermont Avenue, NW., Washington, DC 20420, or e-mail at *Robert.Watkins2@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Mr. Watkins at (202) 461–9214

Dated: September 22, 2011.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. 2011–24872 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Reasonable Charges for Inpatient MS–DRGs and SNF Medical Services; V3.8, 2012 Fiscal Year Update

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Section 17.101 of Title 38 of the Code of Federal Regulations sets forth the Department of Veterans Affairs (VA) medical regulations concerning ''Reasonable Charges'' for medical care or services provided or furnished by VA to a veteran:

—For a nonservice-connected disability for which the veteran is entitled to care (or the payment of expenses of care) under a health plan contract;

—For a nonservice-connected disability incurred incident to the veteran's employment and covered under a worker's compensation law or plan that provides reimbursement or indemnification for such care and services; or

—For a nonservice-connected disability incurred as a result of a motor vehicle accident in a State that requires automobile accident reparations insurance.

The regulations include methodologies for establishing billed amounts for the following types of charges: acute inpatient facility charges; skilled nursing facility/sub-acute inpatient facility charges; partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by Healthcare Common Procedure Coding System (HCPCS) Level II codes. The regulations also provide that data for calculating actual charge amounts at individual VA facilities based on these methodologies will either be published in a notice in the **Federal Register** or will be posted on the Internet site of the Veterans Health Administration (VHA) Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Sources.'' Certain charges are hereby updated as described in the Supplementary Information section of this notice. These changes are effective October 1, 2011.

When charges for medical care or services provided or furnished at VA expense by either VA or non-VA providers have not been established under other provisions of the regulations, the method for determining VA's charges is set forth at 38 CFR 17.101(a)(8).

FOR FURTHER INFORMATION CONTACT: Romona Greene, Chief Business Office (10NB1A), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW.,

Washington, DC 20420, (202) 461–1595. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: Of the charge types listed in the Summary section of this notice, only the acute inpatient facility charges and skilled nursing facility/sub-acute inpatient facility charges are being changed. Charges are not being changed for: partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by HCPCS Level II codes. These outpatient facility charges and professional charges remain the same as set forth in a notice published in the **Federal Register** on December 27, 2010 (75 FR 81335).

Based on the methodologies set forth in 38 CFR 17.101(b), this document provides an update to acute inpatient charges that were based on 2011 Medicare severity diagnosis related groups (MS–DRGs). Acute inpatient facility charges by MS–DRGs are set forth in Table A and are posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' This Table A corresponds to the Table A referenced in the September 27, 2010, **Federal Register** Notice. Table A referenced in this notice provides updated charges based on 2012 MS–DRGs and will replace Table A posted on the Internet site of the VHA Chief Business Office, which corresponds to the Table A referenced in the September 27, 2010, **Federal Register** notice.

Also, this document provides for an updated all-inclusive per diem charge for skilled nursing facility/sub-acute inpatient facility charge using the methodologies set forth in 38 CFR 17.101(c), and it is adjusted by a geographic area factor based on the location where the care is provided (*See* Table ''N'' Acute Inpatient and Table ''O'' SNF geographic factors found on Web site under ''Reasonable Charges Data Tables''). The skilled nursing facility/sub-acute inpatient facility per diem charge is set forth in Table B and is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' This Table B corresponds to the Table B referenced in the September 27, 2010, **Federal Register** Notice. Table B referenced in this notice provides updated all-inclusive nationwide skilled nursing facility/sub-acute inpatient facility per diem charge and will replace Table B posted on the Internet site of the VHA Chief Business Office, which corresponds to the Table B referenced in the September 27, 2010, **Federal Register** notice.

The charges in this update for acute inpatient facility and skilled nursing facility/sub-acute inpatient facility services are effective October 1, 2011.

In this update, we are retaining the table designations used for acute inpatient facility charges by MS–DRGs which is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' We also are retaining the table designation used for skilled nursing facility/sub-acute inpatient facility charges which is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' Accordingly, the tables identified as being updated by this notice correspond to the applicable tables referenced in the September 27, 2010, notice, beginning with Table A through Table B.

The list of data sources presented in Supplementary Table 1 will be posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Sources'' to reflect the updated data sources used to establish the updated charges described in this notice.

We have also updated the list of VA medical facility locations. As a reminder, in Supplementary Table 3 posted on the internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''VA Medical Facility Locations,'' we set forth the list of VA medical facility locations, which includes the first three digits of their ZIP Codes and provider-based/non-provider-based designations.

Consistent with VA's regulations, the updated data tables and supplementary tables containing the changes described in this notice will be posted on the Internet site of the VHA Chief Business Office, ''Reasonable Charges (Rates) Information'' page currently at *http://www1.va.gov/CBO/apps/rates/index.asp.*

Approved: September 22, 2011.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2011–24946 Filed 9–27–11; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 76 Wednesday,
No. 188 September 28, 2011

Part II

Department of Education

34 CFR Parts 300 and 303
Early Intervention Program for Infants and Toddlers With Disabilities; Assistance to States for the Education of Children With Disabilities; Final Rule and Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Part 303

RIN 1820–AB59

Early Intervention Program for Infants and Toddlers With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities. These regulations are needed to reflect changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act or IDEA).

DATES: These regulations are effective on October 28, 2011.

FOR FURTHER INFORMATION CONTACT: Alexa Posny, U.S. Department of Education, 550 12th Street, SW., Potomac Center Plaza, room 5107, Washington, DC 20202–2641. *Telephone:* (202) 245–7605. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay System (FRS) at 1–800–877–8339. Individuals with disabilities may obtain this document in an alternative format (*e.g.,* braille, large print, audiotape, or computer diskette) upon request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: These regulations implement changes in the regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities necessitated by the reauthorization of the IDEA.

On May 9, 2007, the U.S. Department of Education (the Department) published a notice of proposed rulemaking in the **Federal Register** (72 FR 26456) (NPRM) to amend the regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities. In the preamble to the NPRM, the Secretary discussed, on pages 26456 through 26496, the changes proposed to the regulations for this program, which regulations are set forth in 34 CFR part 303.

In these regulations, the Department is amending and finalizing the regulations proposed in the May 2007 NPRM, except in the maintenance of effort (MOE) provisions (proposed § 303.225) (which implement part C's supplement not supplant requirements). The Department plans to obtain additional public input and conduct further rulemaking in this area.

Due to the economic changes that many States have experienced since the publication of the NPRM in May 2007, the Department has received many informal inquiries requesting guidance on the MOE provisions in the part C regulations (which implement the supplement not supplant requirements under part C of the Act). States also have expressed concern about their ability to meet the MOE requirements and their continued participation in the part C program. In response to these concerns, the Department intends to issue a separate NPRM and seek input from the public on the MOE provisions. Accordingly, these final regulations continue in § 303.225 the MOE requirements in current § 303.124.

Major Changes in the Regulations

The following is a summary of the major changes in these final regulations from the regulations proposed in the NPRM (the rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section of this preamble):

Subpart A—General

Definitions

- The definition of *multidisciplinary* in § 303.24 has been revised with respect to the individualized family service plan (IFSP) Team composition to require the parent and two or more individuals from separate disciplines or professions with one of these individuals being the service coordinator.
- Revised § 303.25(a) and new § 303.321(a)(5) and (a)(6) clarify that in the case of a child who is limited English proficient, *native language* means the language normally used by the parents of the child except that when conducting evaluations and assessments of the child, qualified personnel determine whether it is developmentally appropriate to use the language normally used by the child. Additionally, we have removed the requirement in proposed § 303.25(a)(2) that the native language of the parents be used in all direct contact with the child.
- We have revised the definition of *personally identifiable information* in § 303.29 to cross-reference, with appropriate modifications, the definition of that same term contained in the regulations under the Family Educational Rights and Privacy Act (FERPA) in 34 CFR 99.3, as amended.
- New § 303.32 adds to these regulations a definition of *scientifically based research,* which cross-references, with appropriate modifications, the definition of the same term contained in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

Subpart C—State Application and Assurances

Application Requirements

- Section 303.203(b)(2) clarifies that the State's application must include, as part of coordination of all resources, those methods the State uses to implement the payor of last resort requirements in § 303.511.
- Revised § 303.208(b), regarding public participation policies and procedures, requires lead agencies to hold public hearings, provide at least 30 days' prior notice for the hearings, and provide a public comment period of at least 30 days before adopting any new or revised part C policies or procedures.
- Revised § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) requires that, for toddlers with disabilities who may be eligible for preschool services under part B of the Act, the lead agency notify (consistent with any opt-out policy adopted by the State under § 303.401(e)), not only the local educational agency (LEA) where the toddler resides, but also the State educational agency (SEA), and revise the timeline for the notification to occur not fewer than 90 days before the toddler's third birthday.
- New § 303.209(b)(1)(ii) clarifies that if the lead agency determines a child to be eligible for part C services between 45 and 90 days prior to the toddler's third birthday, the lead agency must notify (consistent with any opt-out policy adopted by the State under § 303.401(e)), not only the LEA where the toddler resides, but also the SEA, as soon as possible after the toddler's eligibility determination.
- New § 303.209(b)(1)(iii) provides that if a child is referred to the lead agency fewer than 45 days before that toddler's third birthday, the lead agency is not required to conduct the initial evaluation, assessment, or IFSP meeting, and if that child may be eligible for preschool services or other services under part B of the Act, the lead agency, with the parental consent required under § 303.414, must refer the toddler to the SEA and appropriate LEA.
- Revised § 303.209(d)(2) clarifies that the transition plan is not a separate document, but is included in the IFSP.
- New § 303.209(e) clarifies that a transition conference under § 303.209(c) or meeting to develop the transition plan under § 303.209(d) must meet the

IFSP meeting requirements in §§ 303.342(d) and (e) and 303.343(a) and that this conference and meeting may be combined.

• New § 303.209(f) clarifies when and what transition requirements in § 303.209 apply to toddlers with disabilities, including toddlers in a State that elects to offer part C services beyond age three under § 303.211.

• Revised § 303.211(b)(6) clarifies the transition requirements that apply to children receiving services under § 303.211 as they transition to preschool, kindergarten or elementary school.

• Proposed § 303.225 has been revised to include the MOE requirements in current § 303.124. The Department intends to issue an NPRM on the MOE provisions and provide an opportunity for the public to comment on the proposed rule.

Subpart D—Child Find, Evaluations and Assessments, and Individualized Family Service Plans

General

• New § 303.300 identifies the major components of the statewide comprehensive, coordinated, multidisciplinary interagency system by specifically distinguishing between pre-referral activities (public awareness and child find), referral, and post-referral IFSP activities (including screening, evaluations, assessments, and IFSP development, review, and implementation).

Pre-Referral Procedures

• Revised § 303.301(c) (proposed § 303.300(c)) requires each lead agency, as part of its public awareness obligation, to provide for informing parents of toddlers about preschool programs under section 619 of the Act not fewer than 90 days prior to the toddler's third birthday.

• Revised new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)) adds the following two programs to the list of programs with which the lead agency must coordinate its child find efforts: (1) The Children's Health Insurance Program (CHIP) and (2) the State Early Hearing Detection and Intervention (EHDI) system. Since the publication of the May 2007 NPRM, the name of the State Children's Health Insurance Program (S-Chip) was changed to the ''Children's Health Insurance Program (CHIP).'' This change is reflected in these final regulations.

• Revised § 303.303(a)(2)(i) requires primary referral sources to refer a child to the part C program ''as soon as possible but in no case more than seven days'' after identification.

Post-Referral Procedures

• New § 303.310 (proposed § 303.320(e)(1)) requires that, within 45 days after the lead agency or early intervention service (EIS) provider receives a referral of a child, the screening (if applicable), initial evaluation, initial assessments (of the child and family), and the initial IFSP meeting for that child must be completed (45-day timeline).

• New § 303.310(b)(2) adds an exception to the 45-day timeline if the parent has not provided consent to the initial screening, evaluation, or assessment of the child, despite documented, repeated attempts to obtain parental consent. Revised § 303.310(c) (proposed § 303.320(e)(2)) requires the lead agency to ensure completion of the initial evaluation, assessments, and IFSP meeting as soon as possible after parental consent is provided.

• Revised § 303.320 (proposed § 303.303) requires the lead agency to provide notice to parents of its intent to screen and clarifies that, at any time during the screening process, a parent may request an evaluation.

• Revised § 303.321(a)(2)(i) (proposed § 303.320) clarifies that (1) the term *initial evaluation* refers to the evaluation of a child that is used to determine his or her initial eligibility under part C of the Act and (2) the term *initial assessments* refers to the assessment of the child and the family assessment that are conducted prior to the child's first IFSP meeting.

• New § 303.322 clarifies that the prior written notice requirements in § 303.421 apply when the lead agency determines, after conducting an evaluation, that a child is not an infant or toddler with a disability.

• Revised § 303.342(e) requires early intervention services to be provided as soon as possible after parental consent.

Subpart E—Procedural Safeguards

Confidentiality of Personally Identifiable Information and Early Intervention Records

• New § 303.404(d) requires that the general notice provided to parents by the lead agency specify the extent to which that notice is provided in the native languages of the various population groups in the State.

• Section 303.405(a), regarding a parent's rights to inspect and review any early intervention records and the timeline the lead agency must follow any time a parent makes such a request, is revised to require that the participating agency must comply with a parent's request without unnecessary delay and in no case more than 10 days after the parent makes the request to inspect and review records.

• New § 303.409(c) requires the participating agency to provide at no cost to the parent, a copy of each evaluation, assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting.

• Section 303.414(b) sets forth the specific exceptions to the parental consent required before a participating agency may disclose personally identifiable information under these regulations.

• Proposed § 303.414(d), regarding limited disclosures of personally identifiable information in early intervention records that may be sought by Protection and Advocacy (P&A) agencies, has been removed.

Parental Consent and Surrogate Parents

• Section 303.420(c) is revised to indicate that a lead agency may not use the due process hearing procedures under this part or under part B of the Act to challenge a parent's refusal to provide any consent required under § 303.420(a), which includes consent for evaluations and assessments.

• New § 303.422(g), concerning lead agency responsibility concerning surrogate parents, adds a 30-day timeline requirement regarding the lead agency's obligation to make reasonable efforts to ensure the assignment of a surrogate parent after a public agency determines that the child needs a surrogate parent.

Dispute Resolution Options

• New § 303.437(c) permits the due process hearing officer, in a State that elects to adopt the part C due process hearing procedures under § 303.430(d)(1), to grant specific extensions of time beyond the 30-day timeline at the request of either party.

• Section 303.446 is revised to permit, but not require, the lead agency to establish procedures that would allow any party aggrieved by the findings and decision in the due process hearing to appeal to, or request reconsideration of the decision by, the lead agency.

Subpart F—Use of Funds and Payor of Last Resort

• Section 303.520(a) establishes three new requirements that are designed to provide important protections for parents of infants and toddlers with disabilities balanced against the need for States to have access to public benefits and public insurance to finance part C services while implementing the system of payments, coordination of

funding sources, and payor of last resort requirements under part C of the Act. Under this section, a State must obtain a parent's consent prior to requiring a parent to enroll in a public benefits or insurance program or if the use of funds from a public benefits or insurance program imposes certain costs on the parent. This section also requires a State to provide written notice to parents of applicable confidentiality and no-cost protections if the State lead agency or EIS provider or program uses public benefits or insurance to pay for part C services.

• Section 303.521(a) is revised to provide that the State's system of payments policies must include the State's definition of ability to pay and indicate when and how the agency makes its determination regarding the parent's ability or inability to pay.

• A new § 303.521(e) is added to address a parent's procedural safeguard rights under a State's system of payments.

Subpart G—State Interagency Coordinating Council

• Proposed § 303.601(a), which states that a parent member on the Council may not be an employee of a public or private agency involved in providing early intervention services, has been removed.

• New § 303.605(c) permits the Council to coordinate and collaborate with the State Advisory Council on Early Childhood Education and Care, which is required to be established by States under the Improving Head Start for School Readiness Act of 2007.

Subpart H—Federal and State Monitoring and Enforcement; Reporting; and Allocation of Funds

• Section 303.702(b) has been revised to indicate that the State annual reporting to the public, on the performance of each EIS program in relation to the State's Annual Performance Report (APR) targets must be ''as soon as practicable but no later than 120 days'' following the State's APR submission to the Secretary.

These final regulations contain additional changes from the NPRM that we explain in the following *Analysis of Comments and Changes.*

Analysis of Comments and Changes

Introduction

In response to the invitation in the NPRM, more than 600 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM immediately follows this introduction. The perspectives of parents, individuals with disabilities, early intervention providers, State and local officials, members of Congress, and others were useful in helping identify where changes to the proposed regulations should be made, and in formulating many of the changes. In light of the comments received, a number of significant changes are reflected in these final regulations.

Substantive issues are discussed under their corresponding subpart. References to subparts in this analysis are to those contained in the final regulations. The analysis generally does not address—

(a) Minor changes, including technical changes made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority; and

(c) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, including requests for information about innovative early intervention methods or matters that are within the purview of State and local decision-makers.

Subpart A—General

Purpose and Applicable Regulations

Purpose of the Early Intervention Program for Infants and Toddlers With Disabilities (§ 303.1)

Comment: A few commenters recommended revising the title of § 303.1 to replace ''early intervention program'' with ''early intervention system.'' These commenters stated that the word ''system'' is consistent with the language in the Act, other recent regulatory changes, and the intent of coordinated interagency efforts.

Discussion: The title of this section refers to the overall purposes of the Federal early intervention program that the Department administers under part C of the Act and is being implemented through these regulations. The term is not intended to refer to the early intervention systems that States must develop and implement under part C of the Act. Therefore, the title of this section has not been changed.

Changes: None.

Purpose of the Early Intervention Program for Infants and Toddlers With Disabilities (§ 303.1(d))

Comment: One commenter suggested that the list of historically underrepresented populations in § 303.1(d) be revised to include infants and toddlers with disabilities who are wards of the State and homeless children. Other commenters recommended that we include infants and toddlers in foster care in this list.

Discussion: The historically underrepresented populations listed in § 303.1(d) are the same as those listed in section 631(a)(5) of the Act, which refers to the need to enhance capacity to identify, evaluate, and meet the needs of all children, including historically underrepresented populations, particularly minority, low-income, inner-city, and rural children, and infants and toddlers in foster care.

The list in § 303.1(d) is not exhaustive. Rather, this list provides examples of historically underrepresented populations, for whom State and local agencies and EIS providers need to improve services. For this reason, including children who are wards of the State and homeless children in § 303.1(d) is not necessary. We also note that other sections of the Act and these regulations identify specific child find and other responsibilities of States for identifying, evaluating, and meeting the needs of children who are homeless and wards of the State. For example, § 303.101(a)(1)(ii) through (a)(1)(iii) requires a State, as a condition of receiving part C funds, to provide an assurance that the State has adopted a policy to make appropriate early intervention services available to infants and toddlers with disabilities who are homeless and their families and infants and toddlers with disabilities who are wards of the State.

Concerning the specific comment that infants and toddlers in foster care should be included in the list, we note that the list in § 303.1(d) already includes ''infants and toddlers in foster care.''

Changes: None.

Eligible Recipients of an Award and Applicability of This Part (§ 303.2)

Comment: One commenter indicated that tribal programs and tribal governments should be included in the list of eligible recipients of an award in § 303.2.

Discussion: Section 303.2 provides that the Secretary of the Interior is an eligible recipient of funds under part C of the Act. Under section 643(b)(2) of the Act, the Department of Interior, through the Bureau of Indian Education, distributes part C funds to Indian entities that are eligible to receive services and funding from the United States. Under section 643(b)(1) of the Act, the Department must distribute part C funds that are used by tribal programs and governments to the Secretary of the

Interior and not directly to tribal programs and governments. Therefore, it would be inappropriate to list these entities as eligible recipients.

Changes: None.

Applicable Regulations (§ 303.3)

Comment: Some commenters expressed concern with and were confused by the multiple terms used to refer to early intervention records across the subparts. The commenters noted, for example, that the proposed regulations use the terms ''part C records,'' ''early intervention records,'' ''education records,'' and ''the records.''

Discussion: We agree that using multiple terms to refer to early intervention records is confusing and, therefore, we have changed all references to ''part C records,'' ''education records,'' and ''the records'' in this part to ''early intervention records.'' Additionally, we have added paragraph (b)(2) to § 303.3 to indicate that any reference to ''records'' or ''education records'' in the applicable regulations means the early intervention records under this part.

Changes: We have changed all references to ''part C records,'' ''education records,'' and ''the records'' in this part to ''early intervention records.'' Consequently, the reference to ''part C records'' in § 303.401(b)(2), regarding confidentiality procedures and the parents' opportunity to inspect and review all part C records, has been changed to ''part C early intervention records.'' Also, the proposed phrase ''education records'' has been changed to ''early intervention records'' in § 303.403(b), regarding the definition of early intervention records; § 303.405(a), regarding parents' right to access such records; § 303.405(b), regarding what the right to inspect and review early intervention records includes; § 303.406, regarding the record of access; § 303.407, regarding records on more than one child; § 303.408, regarding the requirement that agencies must provide parents, upon request, a list of the types and locations of early intervention records collected, maintained, or used by the agency; § 303.410(a), regarding amendment of records at the parents' request; and § 303.411, regarding the opportunity for a hearing to challenge information in early intervention records.

Finally, the references to ''the records'' in the following regulations have been replaced with ''early intervention records'': § 303.7(b), regarding the definition of consent; § 303.310(c)(1), regarding the documentation of exceptional circumstances that may delay the evaluation and initial assessment of a child; § 303.405(b)(1), regarding parents' right to a response to reasonable requests for explanations and interpretations of early intervention records; § 303.405(b)(2), regarding parents' right to request that a participating agency provide copies of early intervention records; § 303.405(b)(3), regarding parents' right to have a representative of the parents inspect and review the early intervention records; § 303.406, regarding the maintenance of a record of parties obtaining access to early intervention records; § 303.412(b), regarding the right of parents to place a statement commenting on information or disagreeing with the decision of the agency following a hearing to challenge information in early intervention records; § 303.412(c), regarding the maintenance of any such explanation in the child's record; § 303.412(c)(1), regarding the length of time any explanation must be maintained as part of the early intervention records; § 303.412(c)(2), regarding the disclosure of any explanation placed in the early intervention records, and § 303.414(b)(2) regarding the modification provisions in applying the exceptions under FERPA to the part C program.

Additionally, we have added § 303.3(b)(2) to indicate that any reference to ''education records'' in EDGAR means ''early intervention records'' under this part.

Eligible Recipients of an Award (Proposed § 303.2) and Limitation on Eligible Children (Current § 303.4)

Comment: Many commenters opposed our proposal to remove current § 303.4, which provides that part 303 does not apply to any child with a disability who is receiving a free appropriate public education (FAPE), in accordance with the part B regulations in 34 CFR part 300. The commenters stated that this long-standing provision was an important component of State EIS systems for children who are transitioning from services under part C of the Act to services under part B of the Act. One commenter suggested retaining current § 303.4 because the regulation helped to clarify that children receiving part C services do not also receive FAPE under part B of the Act. The commenter also indicated that it is important to clarify to whom the part C regulations apply.

Discussion: We agree with the commenters and have included the language from current § 303.4 in a new paragraph (b) under § 303.2 to clarify that the regulations in part 303 do not apply to a child with a disability who is receiving FAPE under part B of the Act.

We also have modified this provision to identify the entities that must comply with part 303. Part 303 applies to the lead agency and any EIS provider that is part of the part C statewide system of early intervention required of each State in sections 634 and 635 of the Act, regardless of whether the EIS provider receives funds under part C of the Act. part 303 also applies to each child referred to part C, as well as to infants and toddlers with disabilities (*i.e.,* children determined eligible for services under part C of the Act) and the families of these children, consistent with the definitions of *child* in § 303.6 and *infant or toddler with a disability* in § 303.21.

Changes: We have revised the title of § 303.2 to read ''Eligible recipients of an award and applicability of this part.'' We have added a new paragraph (b) to provide that the provisions of part 303 apply to the lead agency and any EIS provider that is part of the part C statewide system of early intervention services, regardless of whether that EIS provider receives funds under part C of the Act, and to all children referred to the part C program and infants and toddlers with disabilities and their families. New paragraph (b) also provides that part 303 does not apply to a child with a disability receiving a free appropriate public education or FAPE under 34 CFR part 300.

At-Risk Infant or Toddler (§ 303.5)

Comment: Two commenters supported the proposed definition of *at-risk infant or toddler* in § 303.5. Other commenters recommended revising the definition to expand the list of factors that could cause an infant or toddler to be considered at-risk. The suggested factors included exposure to lead paint, alcohol abuse, fetal alcohol syndrome, abandonment, post-natal drug exposure, homelessness, and family violence. One commenter suggested the list of factors be preceded by the phrase ''including, but not limited to.''

Discussion: The list of factors that may contribute to an infant or toddler being considered at-risk for a developmental delay included in § 303.5 is not meant to be exhaustive. We have not expanded this list further because § 303.5 provides a sufficient number and range of factors that a State may include in its definition of *at-risk infant or toddler* for each State to understand the scope of the regulation. Further, § 303.5 provides discretion and flexibility for each State to define *at-risk infant or toddler* and determine the factors that may contribute to an infant or toddler being considered at-risk for a

developmental delay in light of the unique needs of the State's at-risk population. Therefore, revising the definition of *at-risk infant or toddler* to expand the list of factors included in the definition is not necessary.

For clarity, we have replaced the phrase ''such as,'' which precedes the list of factors, with the word ''including.'' We note that the definitions of *include* and *including* in § 303.18 clarify that the items named in a particular list are not all of the possible items that are covered, whether like or unlike the ones named. This change clarifies that the list of factors is not exhaustive.

Changes: We have replaced the phrase ''such as'' with the word ''including.''

Comment: A few commenters expressed concern that Federal funding of part C of the Act is not sufficient to serve at-risk infants and toddlers and that the inclusion of § 303.5 may give parents the impression that early intervention services are available for at-risk infants and toddlers, when these services are not always available.

Discussion: The statute permits, but does not require, States to offer services to at-risk infants and toddlers. A definition of *at-risk infant or toddler* is necessary to guide implementation by States that choose to provide early intervention services to at-risk infants and toddlers. If a State chooses to provide these services, the State, pursuant to § 303.204(a), must provide a definition of at-risk infant or toddler and a description of the services available to these children in the information the lead agency provides to parents and primary referral sources through the State's public awareness program, as required under § 303.301. For those States that choose to provide part C early intervention services to at-risk infants and toddlers, the definition of *at-risk infant or toddler* in § 303.5, which aligns with the statutory definition, provides the information States need to meet the part C requirements.

Changes: None.

Comment: None.

Discussion: As proposed, the definition of *at-risk infant or toddler* provided that, at the State's discretion, an at-risk infant or toddler may include an infant or toddler who is at risk of experiencing developmental delay because of biological *and* environmental factors, including those listed in the proposed definition. We have determined that this language should be clarified to provide that the term *at-risk infant or toddler* may include an infant or toddler who is at risk of experiencing developmental delays due to biological *or* environmental factors. We have made this change to clarify that States are not required to ensure that an at-risk infant or toddler is at risk due to meeting both types of factors.

Changes: We have replaced the phrase ''biological and environmental'' with ''biological or environmental'' in the definition of *at-risk infant or toddler.*

Child (§ 303.6)

Comment: One commenter expressed concern that the definition of *child* in § 303.6 could be misinterpreted to mean that an infant or toddler under age three would not meet the definition. Another commenter stated that § 303.6 should not be included in the regulations because there is no requirement that early intervention programs serve children over the age of three.

Discussion: The term *child,* as used in part C of the Act, means an individual under the age of six. This is a broad definition that includes children with or without disabilities under the age of three (including infants and toddlers with disabilities) and children with or without disabilities ages three and older. While the commenter is correct that States are not required to provide early intervention services under part C of the Act to a child over the age of three, a State may elect, under § 303.211, to make early intervention services available to children ages three and older who are eligible for services under section 619 of the Act and previously received early intervention services under § 303.211 until the child enters, or is eligible under State law to enter, kindergarten or elementary school. Nothing in § 303.6 or these regulations requires a State to serve children with disabilities beyond age three under part C of the Act.

Additionally, requirements in these regulations, such as the evaluation and assessment requirements in § 303.321, apply to a child who is referred to the State part C program but is determined not to be eligible as an infant or toddler with a disability. Thus, including a definition of *child* in the regulations is necessary, and this definition is clear in its inclusion of infants and toddlers under the age of three.

Changes: None.

Developmental Delay (§ 303.10)

Comment: A few commenters suggested amending the definition of *developmental delay.* One commenter recommended that the definition be revised to specifically reference infants and toddlers with mild disabilities. Another commenter recommended that the regulations clarify that any definition of developmental delay that the State adopts in response to public comments should not exclude from eligibility children who are eligible under the State's pre-existing definition of developmental delay.

Discussion: These comments are addressed in our discussion of the comments on § 303.111.

Changes: None.

Early Intervention Service Program (§ 303.11) and Early Intervention Service Provider (§ 303.12)

Comment: A few commenters expressed concern with the use of the term *early intervention service program* throughout the proposed regulations. One commenter suggested that the terms ''early intervention service program'' (EIS program) and ''early intervention service provider'' (EIS provider) were not used consistently throughout the proposed regulations, that the use of these terms was confusing, that the terms were sometimes used incorrectly, and that the terms did not align with the reporting requirements outlined in §§ 303.700 through 303.702. Another commenter recommended changing all references to ''EIS'' in the regulations to ''EI'' because ''EIS'' is a term used in part B of the Act and has a different meaning under the part B regulations.

Discussion: We do not agree that the terms ''early intervention service program'' and ''early intervention service provider'' are used inconsistently or incorrectly throughout the regulations, or that the terms do not align with the reporting requirements outlined in §§ 303.700 through 303.702. An *early intervention service program,* as defined in § 303.11, is the entity designated by the lead agency for reporting purposes under sections 616 and 642 of the Act and under §§ 303.700 through 303.702; whereas an *early intervention service provider,* as defined in § 303.12, is an entity (whether public, private, or nonprofit) or individual that provides early intervention services under part C of the Act, whether or not the entity or individual receives Federal funds under part C of the Act.

Changing the abbreviation ''EIS'' for purposes of referencing early intervention services is not necessary. ''EIS'' is the long-standing, commonly accepted abbreviation used in the field of early intervention and we do not anticipate any confusion by the abbreviation's continued use in programs administered under part C of the Act.

Changes: None.

Early Intervention Service Provider (§ 303.12)

Comment: One commenter requested that the Department revise the regulations to clarify the distinction between ''early intervention service providers'' as used in part C of the Act and ''related services providers'' as used in part B of the Act.

Discussion: Parts B and C of the Act have different purposes, eligibility criteria, and requirements and the services required by each program are already defined in each part respectively. Part C of the Act requires States to make available to infants and toddlers with disabilities early intervention services to meet their developmental needs. The terms *early intervention services* and *EIS provider* are defined in the part C regulations, respectively, in § 303.13 and § 303.12.

Part B of the Act requires States to make available to children with disabilities a free appropriate public education or FAPE, which includes special education and related services. The term *related services* is defined in the part B regulations in 34 CFR 300.34 as supportive services that are required ''to assist a child with a disability to benefit from special education'' and includes transportation and developmental, corrective, and other supportive services. The term ''related services provider'' is not defined in the part B regulations.

While many examples of early intervention services under part C of the Act, including occupational therapy and speech-language pathology services, are the same as the examples of related services under part B of the Act, there are potential differences between related services and early intervention services, based on differing ages of the populations served and purposes of the programs. Therefore, it is the Department's position that the regulations for part B and part C of the Act, and specifically the definitions of *related services, early intervention services,* and *early intervention service provider,* distinguish sufficiently between the roles and functions of a related services provider under part B of the Act and an early intervention service provider under part C of the Act.

Changes: None.

Early Intervention Services, General (§ 303.13(a))

Comment: One commenter recommended changing the defined term *early intervention services* to ''early intervention'' so that readers would not confuse early intervention services under part C of the Act with the early intervening services described in 34 CFR 300.226 of the part B regulations.

Discussion: The term *early intervention services,* defined in § 303.13(a), mirrors the term ''early intervention services'' referenced throughout part C of the Act. In order to remain consistent with the statutory language, we have not changed the term *early intervention services* within this part.

Changes: None.

Comment: One commenter recommended that we modify the definition of *early intervention services* to reflect the provisions in 34 CFR 300.324(a)(2) of the part B regulations, which require a child's individualized education program (IEP) Team consider special factors when developing a child's IEP.

Discussion: We address this comment in our discussion of the comments on § 303.342.

Changes: None.

Comment: Two commenters recommended that, when describing the purpose of early intervention services in general, we retain the language that these services must be designed to serve ''the needs of the family related to enhancing the child's development'' that is in current § 303.12(a)(1). The commenter stated that meeting family needs is a key component of an early intervention system and should be addressed routinely in IFSP development, rather than only upon family request.

Discussion: Proposed § 303.13(a)(4) provided that early intervention services are developmental services that are designed to meet the developmental needs of an infant or toddler with a disability, and, ''as requested by the family, the needs of the family.'' We agree with the commenters that our inclusion of the language ''as requested by the family'' could be interpreted to mean that addressing the needs of a family of an infant or toddler with a disability is not an essential component of early intervention services under part C of the Act. This was not our intention in proposing this language. Therefore, for clarity we have removed this phrase from § 303.13(a)(4).

Changes: We have removed the phrase ''as requested by the family'' from § 303.13(a)(4).

Comment: A few commenters recommended adding the word ''language'' in § 303.13(a)(4)(iii) regarding communication development because communication and language have separate meanings and the regulations should make that distinction.

Discussion: The list of developmental areas in § 303.13(a)(4) reflects the requirements in section 632(4)(C) of the Act. The Department's position is that communication is a broader developmental area than language but that it includes language, and thus no further change is necessary.

Changes: None.

Comment: One commenter recommended clarifying in § 303.13(a)(4)(iv), which identifies social or emotional development as an area in which early intervention services may be provided, the differences between the terms social development and emotional development because they are separate developmental processes. Another commenter recommended adding ''social skills'' to the list of developmental areas in § 303.13(a)(4).

Discussion: Social and emotional development are two distinct developmental areas. Therefore, section 632(4)(C)(iv) of the Act and § 303.13(a)(4)(iv) use the term ''or'' to make clear that early intervention services may address a child's needs in either developmental area. Consequently, we do not agree that further clarification of these areas is necessary. Concerning the request to add social skills to § 303.13(a)(4), the term social or emotional development includes the acquisition of developmental skills, such as social skills. Thus, adding ''social skills'' to the developmental areas identified in § 303.13(a)(4) is not necessary.

Changes: None.

Comment: None.

Discussion: We realize that the term ''early intervention'' should have been included before the word ''services'' in § 303.13(a)(5), which provides that developmental services must meet the standards of the State in which the services are provided, including the requirements of part C of the Act. We have added the phrase ''early intervention'' before the word ''services.''

Changes: We have revised § 303.13(a)(5) to include the phrase ''early intervention'' before the word ''services.'' Where appropriate, we have made similar changes throughout the regulations.

Comment: One commenter requested that the Department amend § 303.13(a)(8) to require that specific services and methods be provided in natural environments to the maximum extent appropriate. Additionally, the commenter suggested that we add the phrase ''and based on the child's developmental needs and chronological

age'' to § 303.13(a)(8) after the word ''appropriate.''

Discussion: Section 303.13(a)(8) references the definition of natural environment in § 303.26, which provides that *natural environments* are settings that are natural or typical for a same-aged infant or toddler without a disability and may include the home, community, or other settings that are typical for an infant or toddler without a disability. Additional natural environment requirements are in §§ 303.126 and 303.344(d)(1)(ii) and we have added, in § 303.13(a)(8), a cross-reference to both of these regulations. Section 303.126 requires that each State's system include policies and procedures to ensure that early intervention services are provided in natural environments to the maximum extent appropriate. Section 303.344(d)(1)(ii), regarding IFSP content, requires that the IFSP Team include on the child's IFSP a statement that each early intervention service is provided in the natural environment for that child or service to the maximum extent appropriate or a justification, based on the child's outcomes, when an early intervention service is not provided in the natural environment for that child. In light of these other regulatory provisions, amending the language regarding natural environments in § 303.13(a)(8) to reference specific early intervention services or methods of delivering early intervention services is not necessary.

With regard to the commenter's suggestion that we add the phrase ''and based on the child's developmental needs'' to § 303.13(a)(8) after the word ''appropriate,'' § 303.13(a)(4) already provides that early intervention services must be designed to meet the developmental needs of an infant or toddler with a disability. Therefore, adding ''and based on the child's developmental needs'' would be repetitive and thus not necessary. Adding the phrase ''and based on the child's chronological age'' to § 303.13(a)(8) also is not necessary because the definition of *natural environments* in § 303.26 includes environments that are ''natural or typical for a same-aged infant or toddler without a disability.'' This definition takes into account the comparability to same-aged peers as well as the chronological age of the child in the context of natural environments. The Secretary believes that the natural environments provisions in these regulations address sufficiently and appropriately the issues raised by the commenter.

Changes: We have added in § 303.13(a)(8) a cross-reference to § 303.344(d).

Comment: One commenter requested that we clarify in the definition of *early intervention services* that EIS providers who work with infants and toddlers with disabilities and their families should focus their services on ensuring that family members and children have the tools needed to continue developing the skills identified in the IFSP whenever a learning opportunity presents itself even when a teacher or therapist is not present.

Discussion: Section 303.344(d) requires the IFSP to include the early intervention services that are necessary to meet the unique needs of the child and family to achieve the results or outcomes identified in the IFSP. If the IFSP Team determines that a child or family needs services to help the child learn when a teacher or therapist is not present, then that outcome, and services to meet that outcome, must be included in the IFSP. This individualized approach, in which appropriate outcomes and services are determined by the IFSP Team in light of each child's unique needs, is appropriate and is addressed sufficiently under this part. Therefore, clarifying the definition of early intervention services, as requested by the commenter, is not necessary.

Concerning the comment about providing family members with the necessary tools to help an infant or toddler with a disability learn even when a teacher or therapist is not present, we agree that EIS providers should work with the parents of an infant or toddler with a disability so that the parents can continue to assist the child whenever a learning opportunity occurs. However, in addition to the reasons stated, adding language to § 303.13 as requested is not necessary because the definition of *EIS provider* in § 303.12(b)(3) specifies that such providers are responsible for consulting with and training parents and others concerning the provision of early intervention services described in the IFSP of the infant or toddler with a disability. Additionally, this consultation and training will provide family members with the tools to facilitate a child's development even when a teacher or therapist is not present.

Changes: None.

Types of Early Intervention Services (§ 303.13(b))

Comment: One commenter supported our proposal to remove nutrition services and nursing services from the types of early intervention services identified in § 303.13(b) (current § 303.12(d)(6) through (d)(7)), stating that these services are medical in nature and not consistent with the definition of early intervention as a developmental program.

However, many commenters opposed removing nutrition services from the types of early intervention services identified and requested that nutrition services be specifically included as one of the types of early intervention services identified in the final regulations.

Numerous commenters also opposed the removal of nursing services from the definition of *early intervention services* and requested that these services be specifically included in that definition in the final regulations. Other commenters stated that although they recognized that the Act did not include a specific reference to nursing services, these services could nonetheless be provided, where appropriate, pursuant to § 303.13(d), which recognizes that services other than those listed in the definition may constitute early intervention services under certain circumstances.

Additionally, many commenters requested that music therapy be included in the definition of *early intervention services.*

Other commenters requested that respite care be specifically included in the definition of *early intervention services.* One commenter requested that we include parent-to-parent support as a type of early intervention service because of its value and importance.

Discussion: The specific early intervention services that are listed in § 303.13(b) are those identified in section 632(4)(E) of the Act. While nursing services and nutrition services are not specifically mentioned in the Act, they historically have been included in the definition of early intervention services. For clarity, we have included the previous definitions of nursing services and nutritional services from current § 303.12(d)(6) and (7) in new § 303.13(b)(6) and (b)(7). However, as noted in the preamble to the NPRM and in the definition of *early intervention services* in the regulations, this list is not exhaustive. Specifically, § 303.13(d) states that ''(t)he services and personnel identified and defined in paragraphs (b) and (c) of this section do not comprise exhaustive lists of the types of services that may constitute early intervention services or the types of qualified personnel that may provide early intervention services.'' Further, § 303.13(d) states that ''[n]othing in this section prohibits the identification in the IFSP of another type of service as an

early intervention service provided that the service meets the criteria identified in paragraph (a) of this section.''

Section 303.13(d) clearly conveys that the early intervention services identified in § 303.13(b) are not an exhaustive list and may include other developmental, corrective, or supportive services that meet the needs of a child as determined by the IFSP Team, provided that the services meet the criteria identified in § 303.13(a) and the applicable State's definition of early intervention services. We added the previous definitions of nursing services and nutritional services to these final regulations because these definitions are defined in the current regulations and relied upon by the field. However, adding new definitions of additional services identified by the commenters, such as music therapy and respite care, is not necessary.

Changes: We have added new § 303.13(b)(6) to define nursing services to include the assessment of health status for the purpose of providing nursing care, including the identification of patterns of human response to actual or potential health problems; the provision of nursing care to prevent health problems, restore or improve functioning, and promote optimal health and development; and the administration of medications, treatments, and regimens prescribed by a licensed physician.

We have also added new § 303.13(b)(7) to define nutrition services to include: (i) Conducting individual assessments in nutritional history and dietary intake; anthropometric, biochemical, and clinical variables; feeding skills and feeding problems; and food habits and food preferences; (ii) developing and monitoring appropriate plans to address the nutritional needs of children eligible under this part, based on the findings in paragraph (b)(7)(i) of this section; and (iii) making referrals to appropriate community resources to carry out nutrition goals. Subsequent definitions have been renumbered accordingly.

Types of Early Intervention Services—Assistive Technology Device and Service (§ 303.13(b)(1))

Comment: Two commenters recommended that we modify the definition of *assistive technology device* to include the language from the preamble of the NPRM that, under certain circumstances, part C funds may be used to pay for a hearing aid.

Another commenter requested that the Department explicitly state in the regulations or in a memorandum or policy letter issued to part C lead agencies that hearing aids and appropriate related audiological services may be considered, under certain circumstances, an appropriate early intervention service and an assistive technology device.

Discussion: The definition of *assistive technology device* does not identify specific devices; including an exhaustive list of assistive technology devices in the definition would not be practical. Whether a hearing aid or an appropriate related audiological service is considered an assistive technology device or an early intervention service, respectively, for an infant or toddler with a disability depends on whether the device or service is used to increase, maintain, or improve the functional capabilities of the child and whether the IFSP Team determines that the infant or toddler needs the device or service in order to meet his or her specific developmental outcomes. Therefore, we have not revised this definition.

Changes: None.

Comment: Several commenters requested further clarification of the definition of *assistive technology device and service* in § 303.13(b)(1). These commenters stated that the definition should be revised to specifically exclude prosthetic limbs because these are personal devices for daily use.

Discussion: The definition of *assistive technology device and service* in § 303.13(b)(1) aligns with the definitions of those terms in section 602(1) and (2) of the Act and 34 CFR 300.5 and 300.6 of the part B regulations. These definitions provide sufficient clarity about what types of devices or technologies are included in the definition and, therefore, indicating that a specific device or technology is excluded is unnecessary. Additionally, we note that, while part C lead agencies are not responsible for providing personal devices meant for daily or personal use, such as eyeglasses, hearing aids, or prosthetic limbs, to an infant or toddler with a disability, these devices may be an early intervention service if the device is not surgically implanted (§ 303.13(b)(1)(i) specifically excludes medical devices that are surgically implanted), and the IFSP Team determines that the infant or toddler with a disability requires such a personal device to meet the unique developmental needs of that infant or toddler.

Changes: None.

Comment: One commenter recommended that we modify the definition of *assistive technology device and service* to be consistent with the Assistive Technology Act (Pub. L. 105–394).

Discussion: The definitions of *assistive technology device and service* in § 303.13(b)(1) align with section 602(1) and (2) of the Act. The definitions in section 602(1)(A) and (2) of the Act are substantially similar to the definitions of assistive technology device and assistive technology service in section 3(3) and (4) of the Assistive Technology Act of 1998 (Pub. L. 105–394) (AT Act), but the language in section 602 of the Act is more specific to the needs of children with disabilities. Furthermore, unlike the AT Act, section 602(1)(B) of the Act expressly excludes from the definition of assistive technology device those medical devices that are surgically implanted or the replacement of such devices. Thus, while the definitions are similar, it is not appropriate to include in these regulations the specific language from the AT Act.

Changes: None.

Comment: A few commenters supported our clarification in the preamble to the NPRM that the optimization (*e.g.,* mapping) of surgically implanted medical devices is not the responsibility of the lead agency or the EIS program.

Many commenters, however, opposed our proposal to exclude optimization (*e.g.,* mapping) of surgically implanted medical devices, including cochlear implants, from the definition of *assistive technology device.* Commenters stated that excluding optimization (*e.g.,* mapping) of surgically implanted medical devices, including cochlear implants, from the types of early intervention services that could be provided under the Act contradicts the intent of Congress. Many of these commenters also stated that excluding optimization (*e.g.,* mapping) services from the definition of *assistive technology device* would preclude funding of these services under this part and thus some infants and toddlers with cochlear implants would not receive mapping services, ultimately jeopardizing their ability to hear and learn. Another commenter suggested that setting and evaluating a surgically implanted medical device, particularly a cochlear implant, is the same as setting a listening device, which is a covered service.

Discussion: The term ''mapping'' refers to the optimization of a cochlear implant, and more specifically, to adjusting the electrical stimulation levels provided by the cochlear implant that are necessary for long-term post-surgical follow-up of a cochlear implant. Although the cochlear implant must be mapped properly for the child to hear well while receiving early intervention

services, the mapping does not have to be done while the child is receiving early intervention services in order for the mapping of the device to be effective.

We maintain that excluding optimization (*e.g.,* mapping) of a cochlear implant from the definition of *early intervention services* is consistent with the Act. Section 632 of the Act defines *early intervention services* and specifies categories of these services. The categories of early intervention services that relate to optimization (*e.g.,* mapping) are assistive technology devices and assistive technology services.

Section 602(1)(B) of the Act excludes from the definition of an *assistive technology device* ''a medical device that is surgically implanted, or the replacement of such device.'' Section 602(2) of the Act states that *assistive technology service* ''means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.'' A cochlear implant, as a surgically implanted medical device, is excluded from being an assistive technology device under section 602(1)(B) and, therefore, optimization (*e.g.,* mapping) of a cochlear implant cannot directly assist an infant or toddler with a disability with regard to an assistive technology device that is covered under the Act. Thus, optimization (*e.g.,* mapping) is not an assistive technology service and excluding optimization from the definition of *early intervention service* is consistent with the Act.

We also note that the exclusion of mapping does not prevent the appropriate early intervention service provider from checking to ensure the device is working.

We do not agree that optimization of a cochlear implant is the same as setting a listening device. Unlike a cochlear implant, a listening device is not a surgically implanted device. The Act excludes surgically implanted devices, such as cochlear implants, from the definition of *assistive technology device* but does not exclude listening devices. Therefore, we have not revised § 303.13(b)(1) as requested by the commenters.

Changes: None.

Comment: One commenter recommended that the definition of *assistive technology device* include the phrase ''all related and necessary components of the system'' to make clear that the individual components needed to develop a customized device (*e.g.,* ear mold for an FM system or a light pointer for an augmentative and alternative communication device) would be considered an assistive technology device and, therefore, a covered early intervention service under part C of the Act. The commenter also recommended adding the phrase ''specially fit'' to the definition of *assistive technology device.*

Another commenter requested that low-tech assistive technology devices, for example, items that can be purchased at a department store, be expressly included in the definition.

Discussion: The definition of *assistive technology device* adequately addresses the commenters' concerns and is not amended. Section 303.13(b)(1)(i) provides that an assistive technology device includes equipment or product systems that may need to be modified or customized to meet the specific needs of a particular infant or toddler with a disability. A customized assistive technology device would include devices that are ''specially fit'' as well as all components needed to modify or customize that device for an infant or toddler with a disability.

The definition of *assistive technology device* in § 303.13(b)(1)(i) states that an assistive technology device means any ''item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized.'' The language ''acquired commercially off the shelf'' in the definition adequately addresses the commenter's request that low-tech assistive technology devices be included in the definition of *assistive technology device.*

Changes: None.

Comment: One commenter did not agree with the language in § 303.13(b)(1)(ii)(E), which provides that an assistive technology service includes training or technical assistance for an infant or toddler with a disability or, if appropriate, that child's family. The commenter specifically requested that the phrase ''if appropriate'' be removed because, according to the commenter, it is always appropriate to provide training and technical assistance to the family of an infant or toddler with a disability who receives assistive technology services.

Discussion: The language referenced by the commenter in § 303.13(b)(1)(ii)(E) is substantively unchanged from language in current § 303.12(d)(1)(v). We do not agree that providing training to a family of an infant or toddler with a disability who is receiving an assistive technology service will always be appropriate. For example, if training already has been provided to a family about an assistive technology device and the family is familiar with its use, the IFSP Team may determine that it is not necessary to train family members again. As part of the family-directed assessment under § 303.321, the IFSP Team (which includes the parent) determines whether training is necessary. The family assessment identifies the resources, priorities, and concerns and the supports and services necessary to enhance a family's capacity to meet the developmental needs of the infant or toddler with a disability, including whether training of family members regarding assistive technology services is appropriate or necessary.

Changes: None.

Types of Early Intervention Services—Family Training, Counseling, and Home Visits (§ 303.13(b)(3))

Comment: A few commenters requested that we clarify the definition of *family training, counseling, and home visits* in § 303.13(b)(3). One commenter recommended deleting the reference to ''home visits'' in the title of this paragraph because the commenter considered home visits to be a method of providing a service rather than a service in and of itself. The commenter acknowledged that the Department may not be able to make this change, however, because the term home visits is used in the Act. One commenter expressed concern that this definition could be misinterpreted to mean that family training must occur in the home and must include counseling.

Discussion: Section 632(4)(E)(i) of the Act expressly states that early intervention services include family training, counseling, and home visits. Thus, removing the reference to home visits from § 303.13(b)(3) would be inconsistent with the Act.

The language in § 303.13(b)(3) does not mean that family training must occur in the home or include counseling. Section 303.13(b)(3) merely defines three separate early intervention services –- family training, counseling, and home visits—that may be provided to assist the family of an infant or toddler with a disability in understanding the special needs of the child and enhancing the child's development.

Changes: None.

Comment: One commenter questioned how the family training services referenced in § 303.13(b)(3) differ from the parent training referenced in the definition of *psychological services* in § 303.13(b)(10)(iv).

Discussion: The term family training, as used in § 303.13(b)(3), is an example of an early intervention service identified in section 632(4)(E) of the Act and parent training is referenced in § 303.13(b)(10)(iv) as an example of one

component of a program of psychological services for an infant or toddler with a disability. While there may be some overlap in these services, the purposes and providers of the trainings may differ. ''Family training'' as used in § 303.13(b)(3) is broader than ''parent training'' in § 303.13(b)(10)(iv). For example, family training in § 303.13(b)(3) may include training in any area related to the special needs of the infant or toddler with a disability (such as the use of specialized equipment or feeding techniques); whereas, parent training as used in § 303.13(b)(10)(iv) only encompasses training with respect to the child's psychological condition and the psychological services the child is receiving.

Changes: None.

Comment: One commenter recommended adding ''support of the parent-child relationship'' as an area that would be covered by the definition of *family training, counseling, and home visits* in § 303.13(b)(3).

Discussion: Supporting the parent-child relationship may be one of any number of early intervention services provided to assist a family of an infant or toddler with a disability in understanding the special needs of the child and enhancing that child's development. Including specific types of services in § 303.13(b)(3) is not necessary because a wide range of services could fall under the definition of *family training, counseling, and home visits.* Indeed, including such a list could be interpreted to limit the types of services that would be considered family training, counseling, and home visits. We want to ensure that the regulations provide the flexibility for each IFSP Team to determine appropriate early intervention services based on the unique needs of an infant or toddler with a disability and his or her family. Leaving this definition more general will provide IFSP Teams with that flexibility.

Changes: None.

Comment: One commenter recommended adding references to ''family training and home visits'' in the definitions of all other services that are critical components of early intervention service delivery.

Discussion: Adding references to ''family training and home visits'' throughout the regulations is not necessary because § 303.13(b)(3) makes clear that family training, counseling, and home visits are an early intervention service that may be provided under part C of the Act. However, the determination of whether these particular services are provided to a family is made by the IFSP Team in accordance with the provisions in §§ 303.340 through 303.346. Accordingly, adding references to family training and home visits or other specific early intervention services in other sections of the regulations would not be appropriate.

Changes: None.

Comment: One commenter recommended adding language to § 303.13(b)(3) to provide that any training must be provided to all family members.

Discussion: The use of the word ''family'' in this definition is broad enough to encompass all family members if the IFSP Team determines that it is appropriate to provide training to all family members. Further, the decision about whether a family member receives training must be made by the IFSP Team in accordance with section 636(d)(4) of the Act and § 303.344(d)(1) of these regulations. We cannot mandate in these regulations that family training or any other specific early intervention service be provided to an infant or toddler with a disability or that child's family.

Changes: None.

Types of Early Intervention Services—Occupational Therapy (New § 303.13(b)(8)) (Proposed § 303.13(b)(6))

Comment: Several commenters supported our proposed definition of *occupational therapy* in new § 303.13(b)(8) (proposed § 303.13(b)(6)), but suggested that the Department modify the definition to require that such services be provided by qualified occupational therapists as required in 34 CFR 300.34(c)(6) of the part B regulations.

One commenter requested that we clarify the definition to state that an occupational therapy assistant working under the direct supervision of an occupational therapist could provide occupational therapy services.

A few commenters recommended that this definition identify the specific functional domains that occupational therapists facilitate and promote such as physical, cognitive, communication, social, emotional, and adaptive skills.

Discussion: Specifying that occupational therapy must be provided by a qualified occupational therapist, as required in the part B regulations, is not necessary because occupational therapists are identified in § 303.13(c)(4) as a type of qualified personnel who provide the early intervention services listed in § 303.13(b). Additionally, § 303.119(c) provides that paraprofessionals and assistants who are appropriately trained and supervised in accordance with State law, regulation, or written policy, may assist in the provision of early intervention services under part C of the Act. Repeating this language from §§ 303.13(c) and 303.119(c) in new § 303.13(b)(8) is not necessary.

The functional skill domains that the commenter requested be listed in new § 303.13(b)(8) are already listed in § 303.13(a)(4). Thus, under these regulations, occupational therapy services could focus on one or more of these functional skill domains, and the specific occupational therapy services provided to a child would be based on the occupational therapy outcomes in the child's IFSP.

Changes: None.

Types of Early Intervention Services—Special Instruction (New § 303.13(b)(14)) (Proposed § 303.13(b)(11))

Comment: One commenter recommended changing the title of the definition of *special instruction* in new § 303.13(b)(14) (proposed § 303.13(b)(11)) to ''developmental instruction'' because ''special instruction'' services may not be covered by public or private insurance.

Discussion: Section 632(4)(E)(ii) of the Act references ''special instruction'' as an example of an early intervention service. The definition of *special instruction* has not changed substantively from the definition of *special instruction* in current § 303.12(d)(13) and specifically includes developmental instruction. States may refer to this early intervention service as ''developmental instruction'' or use another term, provided that it meets the definition of *special instruction* in § 303.13(b). Moreover, many States currently use the term ''special instruction'' and, thus, revisions to the title of this definition are not necessary.

Changes: None.

Types of Early Intervention Services—Speech-Language Pathology Services (New § 303.13(b)(15)) (Proposed § 303.13(b)(12))

Comment: Some commenters recommended that sign language, cued language, auditory/oral language, and transliteration services be defined separately from, and not included in, the definition of speech-language pathology services because they are different types of services. One commenter supported their inclusion in the definition. A few commenters suggested that separate definitions would reflect that speech-language pathologists and interpreters receive different preparatory training, are

licensed by different boards, and are subject to different professional regulations.

Other commenters noted that sign language, cued language, auditory/oral language, and transliteration services are provided by qualified professionals, such as audiologists, teachers of children who are deaf and hard of hearing, and interpreters, and that speech-language pathologists may not necessarily be qualified to provide these services. Finally, one commenter recommended that, at a minimum, we change the title of this definition to reference sign language and cued language services to be consistent with the list of types of early intervention services specified in section 632(4)(E)(iii) of the Act.

Discussion: We agree that establishing a separate definition of *sign language and cued language services,* which includes auditory/oral language and transliteration services, is consistent with section 632(4)(E)(iii) of the Act. Therefore, we have included in new § 303.13(b)(12) a definition of the term that incorporates the language from proposed § 303.13(b)(12)(iv).

Changes: We have moved proposed § 303.13(b)(12)(iv) to new § 303.13(b)(12). Due to the addition of this separate definition of *sign language and cued language services* in § 303.13(b)(12), the definitions in § 303.13(b) (types of early intervention services), beginning with the definition of *social work services,* have been renumbered.

Comment: A significant number of commenters requested that the Department clarify that sign language and cued language services may be provided not only to children who are deaf or hard of hearing but also to an eligible child who is not deaf or hard of hearing whose IFSP Team has identified such services as appropriate to meet that child's developmental needs.

Discussion: We agree with the commenters and have not included the reference to infants and toddlers with a disability who are deaf or hard of hearing from proposed § 303.13(b)(12)(iv) in the new definition of *sign language and cued language services* in new § 303.13(b)(12).

Changes: The phrase ''as used with respect to infants and toddlers with disabilities who are hearing impaired'' has not been included in the definition of *sign language and cued language services* in new § 303.13(b)(12).

Comment: One commenter suggested that the description of sign language and cued language services, which is now in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), was confusing because of the use of the word ''and'' between ''cued language'' and ''auditory/oral language services.'' The commenter recommended that this phrase be changed to ''cued language or auditory/oral language services'' because the word ''and'' implied that either all services in the list must be provided or none of the services can be provided.

Discussion: In reviewing new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), we determined it was necessary to clarify and distinguish between services that focus on teaching and interpretation. Thus, we have clarified that sign language and cued language services include teaching sign language, cued language, and auditory/oral language, providing oral transliteration services (such as amplification), and providing sign and cued language interpretation.

Regarding the commenter's concern about the use of the term ''and'', this use does not mean that all of the services listed must be identified in the IFSP or provided. The definition of *sign language and cued language services* in new § 303.12(b)(12) provides that sign language and cued language services ''include'' certain services and § 303.18, in turn, defines the term *include* to mean ''that the items named are not all of the possible items that are covered, whether like or unlike the ones named.'' Accordingly, revising the reference to ''and'' in the definition of *sign language and cued language services* is not necessary.

Changes: We have revised new § 303.13(b)(12) to define *sign language and cued language services* to include ''teaching sign language, cued language, and auditory/oral language, providing oral transliteration services (such as amplification), and providing sign and cued language interpretation.''

Comment: One commenter requested that the Department add a parenthetical ''such as amplification'' to the phrase ''oral transliteration'' in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)) and distinguish between ''translation'' and ''transliteration.'' Another commenter recommended moving the reference to cued language interpreting and transliteration services from the definition of *early intervention services* in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)) to the definition of *native language* in § 303.25(b) because, for children who are deaf, native language is defined as the mode of communication normally used by the individual (including sign language).

Discussion: Transliteration, in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)), refers to the rendering of one language or mode of communication into another by sound such as voicing over difficult-to-understand speech in order to clarify the sounds, not the meaning. We agree that including amplification as an example of transliteration is appropriate and have added amplification as an example in the definition. However, because the regulations do not use the term ''translation'' (*i.e.,* rendering one language into another by its meaning), there is no need to define that term. Additionally, we decline to adopt the commenter's suggestion that we move the reference to cued language interpreting and transliteration services to the definition of *native language* in § 303.25(b). These services are types of early intervention services that the IFSP Team may identify as needed by the eligible child and family and therefore including them under the definition of *early intervention services* in new § 303.13(b)(12) (proposed § 303.13(b)(12)(iv)) is appropriate. Further, including the reference recommended by the commenter in § 303.25(b) is not necessary because we believe the examples in paragraph (b) of that definition, regarding mode of communication that is normally used by an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, are appropriate and further examples are not needed to understand the meaning of the term *native language.*

Changes: We have added the parenthetical ''(such as amplification)'' as an example of transliteration services in new § 303.13(b)(12).

Comment: Several commenters recommended adding such services as auditory habilitation and rehabilitation, dysphagia, auditory-verbal therapy, oropharyngeal, or feeding and swallowing services to the definition of *speech-language pathology services* in new § 303.13(b)(15) (proposed § 303.13(b)(12)).

Discussion: The services identified in the definition of *speech-language pathology services* in new § 303.13(b)(15) (proposed § 303.13(b)(12)) are not intended to be exhaustive. Section 303.13(b)(15) (proposed § 303.13(b)(12)) does not preclude an IFSP Team from determining that an infant or toddler with a disability is in need of any of the services suggested by the commenters if the services are necessary to meet the outcomes identified for that child in the child's IFSP.

Changes: None.

Types of Early Intervention Services—Transportation and Related Costs (New § 303.13(b)(16)) (Proposed § 303.13(b)(13))

Comment: Many commenters opposed the proposal to remove expenses for travel by taxi from the costs included in the definition of *transportation and related costs.* The commenters stated that omitting this type of transportation cost could be problematic for families who do not have access to private transportation or reliable public transportation or who live in large urban areas and rely on taxis to transport their child to an EIS provider.

Discussion: We did not include expenses for travel by taxi in the examples of transportation costs included in the definition of *transportation and related costs* because our understanding is that transportation via taxi for the purpose of traveling to an EIS provider is less common than the other examples we included in the proposed regulations such as transportation via common carriers. We did not intend to exclude such expenses specifically from the definition. Indeed, section 632(4)(E)(xiv) of the Act does not list any specific types of transportation and related costs. Accordingly, we have revised new § 303.13(b)(16) (proposed § 303.13(b)(13)) to remove the references to specific types of transportation costs.

Changes: We have revised new § 303.13(b)(16) (proposed § 303.13(b)(13)) to align more closely with the language in section 632(4)(E)(xiv) of the Act. Specifically, we have removed the parenthetical examples of travel and other costs that were in the proposed regulation.

Types of Early Intervention Services—Vision Services (New § 303.13(b)(17)) (Proposed § 303.13(b)(14))

Comment: Some commenters requested that the Department clarify the definition of *vision services* in new § 303.13(b)(17)(iii) (proposed § 303.13(b)(14)(iii)). A few commenters noted that the definition focused on older children and did not include the full scope of instruction available to young children and their families. One commenter expressed concern that the definition of *vision services* in new § 303.13(b)(17) (proposed § 303.13(b)(14)) described an outdated medical model that promotes skills training, rather than developmental adjustments that accommodate vision loss. A few commenters recommended that we add to this definition training and services in the following areas: tactile awareness, sensory utilization and preferences, emergent literacy, precane skills, environmental orientation, environmental adaptations, and modifications and conceptual understanding where visual impairment (including blindness) precludes typical access to early intervention.

One commenter suggested that the services listed could be included instead in the definition of *special instruction* in new § 303.13(b)(14) (proposed § 303.13(b)(11)) and requested guidance about who is qualified to provide these services.

Discussion: We have clarified in the definition of *vision services* in new § 303.13(b)(17) that evaluations and assessments of visual functioning include the diagnosis and appraisal of specific visual disorders, delays, and abilities that affect early childhood development. We also agree that reference to independent living applies to older children and have deleted the reference, which was in proposed § 303.13(b)(14)(iii), to ''independent living skills training.''

Regarding commenters' concerns that vision services are limited to ''training'' services and not skills, we note that the purpose of providing training to a child in specific vision areas is to improve the child's skills in those areas. The definition of *vision services* provides discretion and flexibility for each IFSP Team to identify those vision services necessary to meet the unique needs of an infant or toddler with a disability and the child's family. Therefore, we have not made the changes recommended by the commenter.

Maintaining separate definitions for *special instruction* and *vision services* aligns with sections 632(4)(E)(ii) and (4)(E)(xii) of the Act, regarding the types of services that are included as early intervention services. Vision services should not be included in the definition of *special instruction* because some of the examples of vision services would not be appropriate as examples of special instruction. For example, referral for medical or other professional services necessary for the habilitation or rehabilitation of visual functioning disorders, or both, would not fall under the definition of *special instruction.* The types of qualified personnel who may provide vision services are listed in § 303.13(c). This list includes optometrists and ophthalmologists and is not exhaustive. Thus, providing additional guidance about who is qualified to provide vision services is not necessary.

Changes: We have added the words ''that affect early childhood development'' after the words ''specific visual disorders, delays, and abilities.'' We also have removed the phrase ''independent living skills'' from proposed § 303.13(b)(14)(iii).

Qualified Personnel (§ 303.13(c))

Comment: Several commenters supported our proposal to include in the definition of *qualified personnel* in § 303.13(c) types of personnel that are not included in the current part C regulations. Commenters specifically supported the inclusion of ''registered dieticians,'' ''optometrists,'' ''teachers of children with hearing impairments,'' and ''teachers of children with visual impairments'' in the list of qualified personnel.

A few commenters objected to the inclusion of ''registered dieticians'' and ''vision specialists, including ophthalmologists and optometrists.'' The commenters suggested that the inclusion of medical professionals, *i.e.,* ophthalmologists, might cause confusion about whether diagnostic services provided by ophthalmologists would qualify as early intervention services. Other commenters requested that the Department provide separate guidance about the use of and distinction between ''ophthalmologists and optometrists.'' One commenter requested clarification about whether a lead agency was responsible only for referring families to these specialists or if they also would be responsible for paying for diagnostic services.

One commenter requested that nutritionists be added to the list of qualified personnel because a nutritionist might be available when a registered dietician is not.

Discussion: We appreciate the commenters' support for the proposed definition of qualified personnel in § 303.13(c). We included registered dieticians and vision specialists, including ophthalmologists and optometrists, in the proposed regulations to conform with the language in section 632(4)(F)(viii) and (4)(F)(x) of the Act, which lists these specialists as qualified personnel who provide early intervention services. Any of the personnel listed under this section could perform diagnostic services as part of the ongoing assessment of an infant or toddler or provide direct services to an infant or toddler with a disability and these services would qualify as early intervention services.

Concerning the comment about a lead agency's payment and referral responsibility, the lead agency would be responsible for referring families to ophthalmologists or optometrists and also would be responsible for paying for

diagnostic services, as required under § 303.13(b)(5).

We did not include the term nutritionist in the examples of qualified personnel in § 303.13(c) because this term was not included in section 632(4)(F)(viii) and (4)(F)(x) of the Act. However, nothing precludes lead agencies from utilizing services from a nutritionist if a nutritionist, instead of a registered dietician, can provide the nutrition or other services identified in the child's IFSP.

Changes: None.

Comment: A few commenters recommended listing ''teachers of children with hearing impairments'' and ''teachers of children with visual impairments'' in separate paragraphs in the definition of *qualified personnel* because these teachers are from two distinct disciplines. Another commenter stated that classifying teachers of the visually impaired as special educators is not necessary and suggested that doing so would have no impact on the availability of qualified personnel.

Discussion: We agree with the commenter that teachers of children with hearing impairments and teachers of children with visual impairments are two distinct professions. The list of qualified personnel in § 303.13(c) who provide early intervention services under this part includes special educators. The term ''special educators'' consists of many distinct professions including teachers of children with hearing impairments and teachers of children with visual impairments. Therefore, including teachers of children with hearing impairments and teachers of children with visual impairments as examples of special educators in § 303.13(c)(11) is appropriate and listing these terms separately is not necessary.

Concerning the comment that classifying teachers of the visually impaired as special educators is not necessary, the Department recognizes that there are some special educators that receive their training and certification in visual impairments and hearing impairments. Therefore, teachers of children with hearing impairments and teachers of children with visual impairments remain as examples of special educators in the list of qualified personnel who provide early intervention services under this part to ensure that these teachers are considered qualified personnel to provide early intervention services.

Changes: None.

Comment: A few commenters requested that, in identifying the types of qualified personnel who provide early intervention services, the reference to ''teachers of children with hearing impairments'' be revised to refer to ''teachers of deaf and hard of hearing children.'' Another commenter stated that the appropriate reference to teachers who instruct children who are deaf or hard of hearing is ''teachers of the hearing impaired.'' Commenters who recommended using ''teachers of deaf and hard of hearing children'' opposed the word ''impairment'' as outdated, value-laden, and inconsistent with the language in the part B regulations.

Discussion: The types of qualified personnel listed in § 303.13(c)(11) include ''teachers of children with hearing impairments (including deafness).'' This language is consistent with the part B regulations in 34 CFR 300.8(a)(1), which defines a child with a disability to mean a child as having a ''hearing impairment (including deafness).'' The terms hearing impairment, deafness, hearing impaired, and hard of hearing are all used in the field. For purposes of consistency among the regulations under the Act, we have continued to refer to these teachers as teachers of children with hearing impairments (including deafness).

Changes: None.

Comment: One commenter recommended adding ''low vision specialist'' to the list of qualified personnel because this addition would clarify that not all vision specialists are qualified to work with pediatric populations and that low vision is a subspecialty of optometry and ophthalmology.

Discussion: Section 632(4)(F)(x) of the Act identifies vision specialists, including ophthalmologists and optometrists, as qualified personnel who provide early intervention services. Usually an optometrist or ophthalmologist would make the referral to a low vision specialist if such a referral is warranted. The list of qualified personnel identified in the Act and § 303.13(c) is not exhaustive; accordingly, nothing precludes the lead agency's use of a low vision specialist, if such a referral is made, to provide appropriate early intervention services to an infant or toddler with a disability.

Changes: None.

Other Services (§ 303.13(d))

Comment: One commenter supported proposed § 303.13(d), which provides that the services and personnel identified in § 303.13(b) and (c) do not comprise exhaustive lists of early intervention services and qualified personnel and that IFSP Teams and families also may consider other services that may be appropriate for infants and toddlers with disabilities.

Another commenter requested that the Department revise the language in this paragraph to indicate that any other services identified in the IFSP of an infant or toddler with a disability be based on proven methods or evidence-based practices.

Discussion: We do not agree that requiring services identified in an IFSP to be based on proven methods or evidence-based practices is appropriate. Section 636(d)(4) of the Act provides that the IFSP include a statement of the specific early intervention services, based on peer-reviewed research, to the extent practicable, that are necessary to meet the unique needs of the infant or toddler with a disability and the family. Mirroring this standard, § 303.344(d)(1) requires that each IFSP include a statement of the specific early intervention services based on peer-reviewed research (to the extent practicable) that are necessary to meet the unique needs for the child and the family to achieve the measurable results or outcomes identified in the IFSP. Using the standard recommended by the commenter could limit the breadth of early intervention service options in a manner inconsistent with these provisions. Thus, we have not revised the language in § 303.13(d) as requested by the commenter.

Changes: None.

Comment: One commenter requested that the Department add language to § 303.13(d) to provide that families have the option to identify in the IFSP medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under part C of the Act.

Discussion: Section 303.344(e) provides for the IFSP Team to identify in the IFSP medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under part C of the Act. Thus, making the change requested by the commenter is not necessary.

Changes: None.

Free Appropriate Public Education (§ 303.15)

Comment: One commenter recommended clarifying that the requirement to provide FAPE under part C of the Act only applies when a State chooses to make services under part C available to children ages three and older under the provisions in § 303.211 and is not applicable to the provision of part C services to children ages birth to three years of age.

Discussion: The term FAPE is used in §§ 303.211, 303.501, and 303.521 of these regulations. Section 303.211 provides that a State may elect to offer services under part C of the Act to a child age three or older; however, if a State elects to offer these services and a parent chooses part C services instead of part B services for a child, the State is not required under this part to provide FAPE for the child.

Section 303.501 provides that States may use part C funds to provide FAPE to a child from the child's third birthday until the beginning of the school year following that birthday. Section 303.521 addresses situations in which State law mandates the provision of FAPE for children under the age of three.

To clarify the applicability of the FAPE requirements to these regulations, we have revised § 303.15 to provide that the definition of FAPE is included for purposes of the use of this term in §§ 303.211, 303.501 and 303.521.

Changes: We have added references in § 303.15 to §§ 303.211, 303.501 and 303.521.

Health Services (§ 303.16)

Comment: The comments we received on the proposed definition of *health services* in § 303.16 indicated there was some confusion concerning the conditions under which a child may receive health services under part C of the Act. Some commenters stated that the definition of *health services* was vague and could be read to mean that: (1) Infants and toddlers with disabilities are eligible to receive health services under part C of the Act even when those infants and toddlers are otherwise not eligible to receive early intervention services under part C of the Act and (2) funding of these health services under part C of the Act was required when no other payor was available.

Discussion: The Department's position is that § 303.16 clearly states that a lead agency is only required to fund health services that meet the definition of *health services* in § 303.16 during the time that the child is eligible to receive early intervention services under part C of the Act and regardless of the availability of other payors. However, to avoid confusion, we have added language in § 303.16 clarifying that requirement.

Changes: We have modified the definition of *health services* in § 303.16(a) to add the words ''otherwise eligible'' before the word ''child'' in order to clarify that a child must be eligible to receive early intervention services under this part in order to also receive *health services* as defined in § 303.16.

Comment: A few commenters expressed concern that the definition of *health services* in § 303.16 would broaden the responsibilities of part C lead agencies and result in an increased fiscal burden on States. Another commenter suggested that the definition of *health services* in § 303.16 would make it difficult to differentiate between developmental services and medical services.

Discussion: The only substantive difference between the definition of *health services* in current § 303.13 and the proposed definition of *health services* in § 303.16 is the addition of § 303.16(c)(1)(iii), which states that the definition of *health services* does not include services that are related to the implementation, optimization (*e.g.,* mapping), maintenance, or replacement of a medical device that is surgically implanted, including cochlear implants. This one substantive change limits, rather than expands, the responsibilities of part C lead agencies.

Therefore, the Secretary believes that the definition of health services does not broaden the responsibilities of lead agencies and thus, we do not anticipate that this definition will lead to an increased fiscal burden on States.

We do not agree with the commenter that the definition of *health services* in § 303.16 makes differentiating between developmental services and medical services difficult. Section 303.16(c) provides specific examples of services that are purely medical in nature and, therefore, not included in the definition of *health services.* These examples are sufficient to distinguish medical services from developmental services.

Changes: None.

Comment: Commenters had differing views concerning the Department's proposal to exclude from the definition of *health services* those services related to the implementation, optimization (*e.g.,* mapping), maintenance, or replacement of a medical device that is surgically implanted, including cochlear implants. One commenter supported excluding services related to the optimization (*e.g.,* mapping) of surgically implanted devices. A few commenters opposed the exclusion of services related to the optimization (*e.g.,* mapping) of surgically implanted medical devices, including cochlear implants. One commenter suggested that excluding this service from the definition of *health services* is not consistent with the intent of Congress and would effectively deny eligible infants and toddlers a service necessary for the child to benefit from other part C services.

Discussion: Excluding services related to the optimization (*e.g.,* mapping) of a medical device that is surgically implanted, including cochlear implants, from the definition of *health services* in § 303.16, is consistent with section 602(1)(B) of the Act, which provides that the term *assistive technology device* does not include a medical device that is surgically implanted, or the replacement of such device. Further, this exclusion is consistent with the definition of *related services* in 34 CFR 300.34(b) of the part B regulations, which provides that related services do not include a surgically implanted device, including a cochlear implant or a medical device that is surgically implanted, the optimization of that device's functioning (*e.g.,* mapping of a cochlear implant), maintenance of that device, or the replacement of that device.

The term ''mapping'' refers to the optimization of a cochlear implant and is not included in the definition of *health services* in § 303.16. Specifically, ''mapping'' and ''optimization'' refer to adjusting the electrical stimulation levels provided by the cochlear implant that is necessary for long-term post-surgical follow-up of a cochlear implant. The maintenance and monitoring of surgically implanted devices such as cochlear implants require the expertise of a licensed physician or an individual with specialized expertise beyond that typically available from early intervention service providers. While the cochlear implant must be mapped properly in order for an infant or toddler with a disability to hear well while receiving early intervention services, the mapping does not have to be done as a part of early intervention service delivery in order for it to be effective.

Particularly with young children, EIS providers are frequently the first to notice changes in an infant's or toddler's ability to perceive sounds. A decrease in an infant's or toddler's ability to perceive sounds may manifest itself as decreased attention or understanding on the part of the infant or toddler or increased frustration in communicating. Such changes may indicate a need for remapping, and we would expect that EIS providers would communicate with the child's parents about their observations. To the extent that adjustments to the devices are required, a specially trained professional would provide the remapping, but this is not the responsibility of the lead agency or EIS provider.

While providing mapping as an early intervention service is neither required nor permitted by part C of the Act, § 303.16(c)(1)(iii)(B) makes clear that

nothing in part C of the Act or these regulations prevents an early intervention service provider from routinely checking that the external components of a cochlear implant of an infant or toddler with a disability are functioning properly. Trained lay individuals can routinely check an externally worn processor connected to the cochlear implant to determine if the batteries are charged and the external processor is operating. For example, EIS providers can be trained to check the externally worn speech processor to ensure that it is turned on, the volume and sensitivity settings are correct, and the cable is connected.

The exclusion of mapping as a health service is not intended to deny an infant or toddler with a disability access to any early intervention service. Each infant's or toddler's IFSP Team, which includes the child's parent, determines the early intervention services, and the level of those services, required by an eligible infant or toddler.

Finally, as discussed in our response to comments received on § 303.13(b)(1), it is the Department's position that the exclusion of services related to the optimization (*e.g.,* mapping) of surgically implanted medical devices, such as cochlear implants, from the definition of health services is consistent with the Act.

Changes: None.

Comment: One commenter requested that the Department clarify the difference between medical devices referenced in the definition of *health services* in § 303.16(c)(2) and the medical devices referenced in the definition of *assistive technology device* in § 303.13(b)(1)(i).

Discussion: Both §§ 303.16(c)(2) and 303.13(b)(1)(i) provide examples of devices that are medical in nature and, therefore, not included under this part. Section 303.16(c)(2) states that devices necessary to control or treat a medical condition are not included under the definition of *health services* and provides examples of these devices. Section 303.13(b)(1) states that medical devices that are surgically implanted are not included in the definition of *assistive technology devices and services* or the umbrella term *types of early intervention services* and provides cochlear implants as an example of these medical devices.

Changes: None.

Homeless Children (§ 303.17)

Comment: Commenters generally were supportive of the proposed definition of *homeless children* in § 303.17. One commenter supported including the definition of *homeless children* in the regulations and another appreciated the focus on a traditionally underserved population.

One commenter expressed concern that the definition of *homeless children* may be broader than a State's definition. The commenter requested that we clarify in the regulations that a State is not required to serve children, even if they are homeless, who do not meet the State's eligibility definition.

One commenter recommended that we clarify the definition to provide that *homeless children* also include children over the age of three if a State chooses to implement the provisions of § 303.211, under which a State has the option to make services under part C of the Act available to children ages three and older.

Discussion: We do not agree that the definition of *homeless children* in § 303.17 is broader than any valid State definition of children served. The definition of *homeless children* in § 303.17 is consistent with the definition in section 602(11) of the Act and section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act), as amended, 42 U.S.C. 11431 *et seq.* A State may choose to promulgate a definition of homeless children that is broader than the definition in the McKinney-Vento Act, as amended, but a State may not promulgate a definition that is narrower in scope than the Federal definition.

We agree with the commenter and have clarified the definition to include children over the age of three, specifically in cases where States choose to implement § 303.211 and make services under part C of the Act available to children ages three and older.

Changes: We have removed the phrase ''under the age of three'' from the definition of *homeless children* to make the definition consistent with section 635(c) of the Act, which provides States with the flexibility to serve children three years of age and older until entrance into elementary school, and § 303.211, under which a State may make services under part C of the Act available to children ages three and older.

Individualized Family Service Plan (§ 303.20)

Comment: One commenter supported the provision in the definition of *individualized family service plan* that provides that the plan must be implemented as soon as possible after obtaining parental consent for early intervention services.

One commenter recommended adding a requirement that services begin as soon as possible, but no later than 10 days after receiving parental consent for early intervention services.

Discussion: We address these comments in our discussion of the comments on § 303.342.

Changes: None.

Infant or Toddler With a Disability (§ 303.21)

Comment: Several commenters supported our proposed definition of *infant or toddler with a disability.*

Commenters specifically supported the definition in § 303.21(a)(2) regarding eligibility for children with conditions that have a high probability of resulting in a child's developmental delay. One commenter supported the inclusion of ''chromosomal abnormalities'' in the examples of conditions in § 303.21(a)(2)(ii) that have a high probability of resulting in a child's developmental delay.

A few commenters requested clarification of the list of examples of these conditions in § 303.21(a)(2)(ii). One commenter requested that ''severe attachment disorders'' be added as an example in § 303.21(a)(2)(ii). Another commenter requested that the qualifier ''severe'' be deleted from the reference to ''sensory impairments'' in § 303.21(a)(2)(ii) because mild hearing losses can result in developmental delays. One commenter suggested that we clarify that the definition of *infant or toddler with a disability* in § 303.21(a)(2) does not require that the infant or toddler with a disability have a severe or chronic condition and that the definition includes at-risk infants and toddlers.

Another commenter requested that we revise § 303.21 to provide that a State's definition of *infant or toddler with a disability* can include, at the State's discretion, children with disabilities who are eligible for services under section 619 of the Act and previously were served under part C of the Act until such children enter, or are eligible to enter, kindergarten. Another commenter was concerned that services will be denied to children transitioning between part C of the Act and part B of the Act during the summer months despite the requirements in § 303.21(c) and the definition of *child* in § 303.6.

Discussion: The examples of diagnosed conditions that have a high probability of resulting in developmental delay listed in § 303.21(a)(2)(ii) were taken from Note 1 following current § 303.16, which states:

The phrase 'a diagnosed physical or mental condition that has a high probability of

resulting in developmental delay,' * * * applies to a condition if it typically results in developmental delay. Examples of these conditions include chromosomal abnormalities; genetic or congenital disorders; severe sensory impairments, including hearing and vision; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; disorders secondary to exposure to toxic substances, including fetal alcohol syndrome; and severe attachment disorders.

The reference to ''severe attachment disorders,'' which was included in Note 1, was inadvertently omitted from proposed § 303.21(a)(2)(ii) and we have added it to § 303.21(a)(2)(ii) as an example of a diagnosed condition that has a high probability of resulting in developmental delay.

Concerning the commenter's request that the qualifier ''severe'' be deleted from the phrase ''sensory impairments,'' in § 303.21(a)(2)(ii), we agree with the commenter that even a mild sensory impairment may result in developmental delay and have revised the definition accordingly.

Concerning the commenter's request that we clarify that the definition of *infant or toddler with a disability* does not require that the infant or toddler with a disability have a severe or chronic condition, § 303.21 includes various groups of children such as an infant or toddler who is experiencing a developmental delay, or who has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay and in no way limits eligibility to infants or toddlers with severe or chronic conditions. Thus, the clarification recommended by the commenter is not necessary.

With respect to the commenter's request that the definition of *infant or toddler with a disability* in § 303.21 include at-risk infants and toddlers, § 303.21(b) provides that the definition of *infant or toddler with a disability* may include, at a State's discretion, an at-risk infant or toddler, as defined in § 303.5. It is the Department's position that each State must be provided discretion to develop a definition of infant or toddler with a disability that meets the unique needs of its population. The definition of *infant or toddler with a disability* addresses sufficiently and appropriately the issue of at-risk infants and toddlers and, therefore, we have not revised the definition as requested.

Concerning the request to revise the definition of *infant or toddler with a disability* to include children who are eligible for services under section 619 of the Act and were previously served under part 303, § 303.21(c) already makes clear that the definition of *infant or toddler with a disability* may include, at a State's discretion, a child with a disability who is eligible for services under section 619 of the Act and who previously received services under part 303 until the child enters, or is eligible under State law to enter, kindergarten or elementary school.

Summer services should not be denied to a child transitioning from early intervention services under part C of the Act to programs under part B of the Act simply because that child transitions during the summer months. Once a child is determined eligible for part B services, an IEP, or if consistent with 34 CFR 300.323(b) of the part B regulations, an IFSP, must be developed. If a child's IEP Team determines that extended school year services are necessary for the child to receive FAPE, the child must receive those services in accordance with the IEP (or IFSP under 34 CFR 300.323(b) of the part B regulations). Issues relating to transition of infants and toddlers from part C to part B services are discussed in more detail in the *Analysis of Comments and Changes* for subpart C in response to comments received on § 303.209.

Changes: We have revised § 303.21(a)(2)(ii) to add ''severe attachment disorders'' to the list of diagnosed conditions that have a high probability of resulting in developmental delay. Additionally, we have removed the word ''severe'' as a qualifier to the term ''sensory impairments'' in § 303.21(a)(2)(ii).

Lead Agency (§ 303.22)

Comment: One commenter requested that the Department provide its opinion on whether a State statute that designates the State agency that will serve as the lead agency in that State is consistent with the Act and these regulations.

Discussion: Section 303.22, regarding the designation of the lead agency by the State's Governor, incorporates the requirement in section 635(a)(10) of the Act that the Governor designate the lead agency that is responsible for administering part C of the Act in the State. If a State statute signed into law by the Governor designates the lead agency, such designation would be consistent with this requirement.

Changes: None.

Local Educational Agency (§ 303.23(c))

Comment: None.

Discussion: The proposed definition of local educational agency included a definition for BIA-funded schools, which referred to an elementary or secondary school funded by the Bureau of Indian Affairs (BIA). The Bureau of Indian Affairs is now called the Bureau of Indian Education or BIE and we have updated our references in § 303.23(c) accordingly.

Changes: We have replaced, in § 303.23(c), references to the Bureau of Indian Affairs with the Bureau of Indian Education.

Multidisciplinary (§ 303.24)

Comment: We received a significant number of comments concerning the definition of *multidisciplinary.* Multidisciplinary was defined in proposed § 303.24, with respect to evaluation and assessment of a child, an IFSP Team, and IFSP development under subpart D of this part, as the involvement of two or more individuals from separate disciplines or professions or one individual who is qualified in more than one discipline or profession. Some commenters supported this definition because it would help States allocate personnel and resources and may be less overwhelming for some families.

However, the vast majority of commenters opposed this proposed definition with respect to its reference to the IFSP Team. Specifically, these commenters stated that permitting one individual, even if that individual is qualified in more than one discipline or profession, to serve as the sole member of the IFSP Team (other than the parent), does not reflect best practice. One commenter suggested that the definition of *multidisciplinary* reflect the language in the definition of IEP Team in 34 CFR 300.23 of the part B regulations, which defines the IEP Team as a ''group'' of individuals. Additional commenters interpreted the definition of *multidisciplinary* to mean that one person could represent the entire IFSP Team and expressed concern that the definition, as written, would remove necessary checks and balances and may lead to potential conflicts of interest or decisions based on biased opinions. Additionally, commenters noted that changing this long-standing definition might create confusion for both families and service providers. Commenters requested that the definition be modified to ensure that multiple perspectives are included on each IFSP Team and adequate representation is not hampered or constrained on any given IFSP Team by an individual who is qualified in more than one discipline or profession. A few other commenters requested that the definition of *multidisciplinary* in current § 303.17 be retained.

Some commenters were concerned that multidisciplinary teams are the

only types of teams referenced in the regulations and that the regulations do not acknowledge that other types of teams, including but not limited to transdisciplinary and interdisciplinary teams, are routinely used in determining services under part C of the Act. The commenters suggested that all of these models should be included in the final regulatory definition to give teams the flexibility to choose the type of team model that best meets the needs of the individual situation.

Discussion: We agree with commenters' concerns about the definition of *multidisciplinary* in relation to the IFSP Team as it is important to ensure the involvement of the parent and two or more individuals, one of whom must be the service coordinator (consistent with § 303.343(a)(1)(iv)), from separate disciplines or professions on the IFSP Team and have made this change. With respect to IFSP Team meetings, we believe it is important for the parent to be able to meet not only with the service coordinator (who may have conducted the evaluation and assessments), but also with another individual (whether that person is the service provider or another evaluator) to obtain input from two or more individuals representing at least two disciplines and have revised § 303.24 accordingly. We also have added a reference to multidisciplinary in § 303.340, regarding the general provisions that apply to IFSP development, review, and implementation. Thus, with these changes in §§ 303.24 and 303.340, the term multidisciplinary IFSP Team requires the involvement of two or more individuals from separate disciplines or professions, one of whom must be the service coordinator (consistent with § 303.343(a)(1)(iv)).

With respect to evaluation of the child and assessments of the child and family, § 303.321(a) requires that all evaluations and assessments be conducted by qualified personnel. Qualified personnel, as defined in § 303.31, means personnel who have met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the areas in which the individuals are conducting evaluations or assessments or providing early intervention services. Therefore, if one individual completes an evaluation while representing two or more separate disciplines or professions, that individual would have to meet the definition of qualified personnel in each area in which the individual is conducting the evaluation or assessment. Given these standards and requirements, we have retained the proposed definition to indicate that *multidisciplinary* means the involvement of two or more separate disciplines or professions and may include one individual who is qualified in more than one discipline or profession.

Finally, for clarity, we have added cross-references to the use of the term multidisciplinary, where appropriate, in §§ 303.113, 303.321, and 303.340 regarding multidisciplinary evaluations, assessments, and IFSP Teams.

Concerning adding a reference to transdisciplinary or interdisciplinary, the term multidisciplinary is consistent with section 635(a)(3) of the Act, regarding the requirement that the part C statewide system must include a timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability in the State. Transdisciplinary and interdisciplinary are specific team models. Multidisciplinary teams could be based on these models as long as the team meets the State's definition of *multidisciplinary* and the State's definition meets both statutory and regulatory requirements in this part. Thus, referencing specific team models in the regulatory definition of *multidisciplinary* is not necessary.

Changes: We have revised the definition of *multidisciplinary* in § 303.24 to add paragraphs (a) and (b) and clarified in paragraph (b) that the IFSP Team in § 303.340, must include the involvement of the parent and two or more individuals from separate disciplines or professions and one of these individuals must be the service coordinator (consistent with § 303.343(a)(1)(iv)). We also have added cross-references in § 303.24(a) and (b) to §§ 303.113, 303.321, and 303.340 regarding multidisciplinary evaluations, assessments, and the IFSP Team.

Native Language (§ 303.25)

Comment: We received a number of comments on proposed § 303.25(a)(2). Most commenters opposed the proposed requirement that the native language be used in all direct contact with the child. The commenters stated that such a requirement would be nearly impossible to implement in States where many different languages are spoken and would impose undue fiscal and personnel burdens on States where implementation is feasible.

Additionally, these commenters indicated that the proposed requirement would be inconsistent with section 602(20) of the Act, regarding the definition of *native language,* and section 607 of the Act, regarding requirements for prescribing regulations. One commenter expressed concern that proposed § 303.25(a)(2) would prohibit the delivery of services in English in situations where the child is in either a multilingual living or learning environment, even if the parent wanted the services delivered in English, or would prohibit the parent from serving as a translator for the EIS provider.

Several other commenters requested clarification regarding the applicability of proposed § 303.25(a)(2) in rural areas or areas that suffer from shortages of EIS providers. Other commenters asked what language should be used when conducting evaluations of newborns or young infants. Commenters also requested clarification as to whether and in what manner interpreters could be used when providing services.

A number of commenters supported proposed § 303.25(a)(2) stating that the provision would allow EIS providers to better communicate with families and infants and toddlers with disabilities, and would be consistent with 34 CFR 300.29 of the part B regulations, regarding the definition of *native language,* and section 607(a) of the Act.

Discussion: We agree with commenters that requiring the native language to be used in all direct contact with a child, especially in providing early intervention services to an infant or toddler with a disability, may not be necessary or feasible in all circumstances. For example, a child may not require the use of native language when part C services are directly provided to the child when the child's receptive or expressive language has not yet developed to indicate a clear spoken language preference. Thus, we have not included in these final regulations the requirement in proposed § 303.25(a)(2) that native language be used in all direct contact with the child. However, as recipients of Federal financial assistance, part C lead agencies must comply with the requirements in Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs or activities receiving Federal financial assistance.

Changes: We have removed proposed § 303.25(a)(2).

Comment: None.

Discussion: To better align the definition of *native language* in these part C regulations with the definition of this term in section 602(2) of the Act and in 34 CFR 300.29 of the part B regulations and to ensure internal consistency between the *native language* definition in § 303.25(b) and the requirement in § 303.321 to use

native language when conducting evaluations and assessments, we have made the following changes.

First, we added to § 303.25(a) the definition of *native language* for individuals with limited English proficiency (LEP) that is in 34 CFR 300.29(a) of the part B regulations and we cross-referenced the statutory definition of LEP that is in section 602(18) of the Act. With this revision, § 303.25(a)(1) provides that the native language of an individual with limited English proficiency is the language normally used by that individual, or in the case of a child, the language normally used by the parents of the child, except as provided in § 303.25(a)(2). We added new § 303.25(a)(2) to provide that, for evaluations and assessments of a child, the native language of a child with limited English proficiency is the language normally used by the child if qualified personnel conducting the evaluation or assessment determine that this language is developmentally appropriate for the child given the child's age and communication skills.

These changes do not change the long-standing native language requirements in § 303.342, concerning IFSP meetings, § 303.420, concerning obtaining parental consent, and § 303.421, concerning prior written notice and procedural safeguards. As discussed in the *Analysis of Comments and Changes* for subpart E of this part, we have added a native language requirement in § 303.404, concerning the general notice of confidentiality procedures provided to parents.

Changes: We have revised § 303.25(a)(1) to state that, when used with respect to an individual who is limited English proficient (LEP) as that term is defined in section 602(18) of IDEA, the term *native language* means—(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in § 303.25(a)(2). We also added a new paragraph (a)(2) to this section to provide that the native language for an individual who is limited English proficient means, for evaluations and assessments conducted pursuant to § 303.321(a)(5) and (a)(6), the language normally used by the child if determined developmentally appropriate for the child by qualified personnel conducting the evaluation or assessment.

Natural Environments (§ 303.26)

Comment: Many commenters suggested changes to the proposed definition of *natural environments* in § 303.26. A few commenters recommended adding the phrase ''community settings where children without disabilities participate'' to make the definition consistent with section 632(4)(G) of the Act. Other commenters recommended retaining the reference to the ''child's age peers'' in current § 303.18. Some commenters recommended replacing the word ''normal'' with ''typical'' because the term ''normal'' is value-laden, vague, and open to interpretation.

One commenter recommended providing a list of natural environments in which an infant or toddler with a disability may receive services. Several commenters, some in response to § 303.26 and others in response to § 303.126, recommended adding specific examples of settings to § 303.26, including Early Head Start or child care programs, day care, play groups, churches, grocery stores, parks, public libraries, community settings, and settings where parents with infants and toddlers with similar disabilities gather.

Two other commenters recommended the definition indicate that a clinical setting could be the natural environment, particularly when the service requires the use of specialized equipment that cannot be transported to the child's home. One commenter expressed concern that mandating services to be provided in settings where non-disabled children are present may suggest that the alternative is less than acceptable. Another commenter recommended that the definition of *natural environments* require that services be provided within family routines and activities and opposed identifying specific settings. *Discussion:* Three sections of these regulations describe natural environments requirements that apply to States receiving funds under part C of the Act: §§ 303.26, 303.126, and 303.344(d)(1). We address comments that relate to § 303.26, regarding the definition of *natural environments,* in this discussion section. We address comments that relate to § 303.126, regarding the requirements related to natural environments in State applications, in the *Analysis of Comments and Changes* for subpart B. Finally, we address comments that relate to § 303.344(d)(1), regarding the requirements related to natural environments for IFSPs and IFSP Team decision-making processes concerning appropriate service settings, in the *Analysis of Comments and Changes* for subpart D.

The definition of *natural environments* in § 303.26 remains substantively unchanged from current § 303.18 and is consistent with the language in section 632(4)(G) of the Act, as well as the following statutory sections:

Section 635(a)(16) of the Act, which is reflected in § 303.126 and requires that the part C statewide system include policies and procedures to ensure that, consistent with section 636(d)(5) of the Act, to the maximum extent appropriate, early intervention services are provided in natural environments and the provision of early intervention services for any infant or toddler with a disability occurs in a setting other than the natural environment that is most appropriate, as determined by the parent and IFSP Team, only when early intervention cannot be achieved satisfactorily for the infant or toddler in the natural environment.

Section 636(d)(5) of the Act, which is reflected in § 303.344(d)(1)(ii) and which requires that an IFSP contain a statement of the natural environments in which early intervention services will be provided appropriately, including a justification of the extent, if any, to which the services will not be provided in the natural environment. Section 632(4)(G) of the Act provides that natural environments may include home and community settings. However, the reference to community settings was not included in the proposed regulations. We have added a reference to ''community settings'' in § 303.26 to ensure greater conformity with the statutory language, to address commenters' concerns, and to clarify that the term natural environments includes not only the home but community settings in which one finds same-aged children who do not have disabilities (diagnosed conditions, developmental delays, or, at the State's option, at-risk children).

The term ''normal'' was introduced into the regulations implementing the Individuals with Disabilities Education Act Amendments of 1991 and at that time, ''normal'' was commonly used and accepted. However, we agree with commenters that ''normal'' is less commonly used today and have replaced the word ''normal'' with the word ''typical'' in the definition of *natural environments* in § 303.26.

Concerning commenters' requests to add a list of settings or examples of community settings, it would not be appropriate or practicable to include a list of every setting that may be the natural environment for a particular child or those settings that may not be natural environments in these

regulations.[1] In some circumstances, a setting that is natural for one eligible child based on that child's outcomes, family routines, or the nature of the service may not be natural for another child. As further discussed in § 303.344(d)(1) of the *Analysis of Comments and Changes* for subpart D, the decision about whether an environment is the natural environment is an individualized decision made by an infant's or toddler's IFSP Team, which includes the parent. Additionally, a variety of community settings exist that may be natural environments, and we do not wish to limit the types of service settings that the IFSP Team may consider appropriate. Thus, we have not added a list of settings or specific community-based settings as requested by commenters.

We appreciate the commenters' requests for clarification as to whether clinics, hospitals, or a service provider's office may be considered the natural environment in cases when specialized instrumentation or equipment that cannot be transported to the home is needed. Natural environments mean settings that are natural or typical for an infant or toddler without a disability. Section 635(a)(16) of the Act and § 303.126 require services be provided, to the maximum extent appropriate, to infants and toddlers with disabilities in natural environments (including the home and community settings). We do not believe that a clinic, hospital or service provider's office is a natural environment for an infant or toddler without a disability; therefore, such a setting would not be natural for an infant or toddler with a disability.

However, § 303.344(d)(1) requires that the identification of the early intervention service needed, as well as the appropriate setting for providing each service to an infant or toddler with a disability, be individualized decisions made by the IFSP Team based on that child's unique needs, family routines, and developmental outcomes. If a determination is made by the IFSP Team that, based on a review of all relevant information regarding the unique needs of the child, the child cannot satisfactorily achieve the identified early intervention outcomes in natural environments, then services could be provided in another environment (*e.g.* clinic, hospital, service provider's office). In such cases, a justification must be included in the IFSP, pursuant to § 303.344(d)(1)(ii)(A).

Concerning the comment to add a reference to family routines and activities to the definition of *natural environments,* § 303.26 allows for and supports providing services within family routines and activities.

Changes: We have added in the definition of *natural environments* in § 303.26 the phrase ''or community settings'' after ''home'' and the phrase ''same-aged'' before the phrase ''infant or toddler without a disability.'' We also have replaced the reference to ''normal'' with ''typical.''

Parent (§ 303.27)

Comment: While a few commenters supported the changes to the definition of *parent,* a majority of commenters did not support the proposed changes and recommended that the definition of *parent* in § 303.27 be amended. One commenter requested that ''non-relative caregivers'' be included in the definition of parent.

Discussion: The definition of *parent* in § 303.27 reflects section 602(23) of the Act and is consistent with the definition of *parent* in 34 CFR 300.30 of the part B regulations. Adding ''non-relative caregivers'' to these regulations is not necessary because when the child lives with a non-relative caregiver, that individual is considered a parent under the provisions in § 303.27(a)(4). Further, including non-relative caregivers with whom the child does not reside in the definition of *parent* would not be consistent with section 602(23)(c) of the Act.

Changes: None.

Comment: A few commenters suggested that the definition of *parent* include a specific reference to foster child, in addition to the current reference to ward of the State.

Discussion: The definition of *ward of the State* in § 303.37 includes foster children. Therefore, adding ''foster child'' to ''ward of the State'' in the definition of *parent* would be redundant.

Changes: None.

Comment: One commenter recommended that the Department clarify the definition of *parent* to provide that foster parents, absent custody or other legal right, do not have the right to consent to or deny early intervention services. Another commenter requested clarification concerning the role of the foster parent when the biological parent is available, as well as when the whereabouts of the biological parent are unknown or when the biological parent is incarcerated. The commenter also requested guidance on how assertively the State should seek out the biological parent to obtain consent.

Discussion: Section 602(23) of the Act provides that a foster parent may act as the parent for the purposes of part C of the Act, unless the foster parent is prohibited from acting as the parent by State law. Thus, it would be inconsistent with the Act to require that a foster parent have custody of the child, or other legal right, to act on the child's behalf in matters of early intervention services if, under State law, the foster parent is not precluded from serving as the parent for that child.

When more than one individual seeks to act as the parent, § 303.27 provides that the biological parent attempting to act as the parent is presumed to be the parent unless that person does not have legal authority to make decisions for the infant or toddler concerning early intervention service matters, or there is a judicial order or decree specifying another individual to act as the parent under part C of the Act. Thus, when the whereabouts of the biological parent are unknown (*e.g.,* cases in which the parent is concerned about revealing his or her location due to safety concerns) or the biological parent is incarcerated, but the parent is attempting to act as the parent, the biological parent would be presumed to be the parent. However, when the whereabouts of the biological parent are unknown or the parent is incarcerated, and the biological parent is not attempting to act as the parent, an individual identified in § 303.27, including the foster parent would be presumed to be the parent unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent.

The Act and the regulations are silent on how assertively a State, for purposes of obtaining consent, should seek out the biological parent of an infant or toddler who is undergoing an eligibility determination or who has been determined eligible to receive early intervention services under part C of the Act. It is the Department's position that these regulations should not prescribe the efforts, including specific procedures or timelines, that a State must make in its attempts to contact the biological parent(s). The procedures and timelines will vary depending on numerous factors, including how judicial orders or decrees are routinely handled in a State or locality, and are best left to the State and local officials

[1] Lead agencies currently provide data on service settings under Information Collection 1820–0578. Examples of community settings identified in response to this information collection include: child care centers (including family day care), preschools, regular nursery schools, early childhood centers, libraries, grocery stores, parks, restaurants, and community centers (*e.g.,* YMCA, Boys and Girls Clubs).

to determine in light of State law and policy.

Changes: None.

Comment: Some commenters asked that we clarify the phrase ''when attempting to act as the parent'' as used in § 303.27(b)(1) to describe the situation when a biological or adoptive parent attempts to act as the parent and more than one party is qualified under the regulations to act as a parent. One commenter noted that keeping the biological parent involved in decisions concerning the child is always important because the child may return to the care of the biological parent.

A few commenters suggested that the determination of whether a parent is ''attempting to act'' as the parent must be based on a comprehensive assessment of whether the parent is attempting to perform her or his role as a participant and decision-maker in the early intervention process and not on whether a parent misses a meeting. One commenter requested that the phrase ''attempting to act as a parent'' be deleted if specific clarification is not offered. Another commenter raised concerns that lead agencies will misinterpret this paragraph to mean that biological or adoptive parents must affirmatively assert their rights or take action in order to be presumed to be the parent for the purposes of this section. Another commenter requested that the regulations reinforce the affirmative obligation under these regulations to provide notice to, and accommodate the schedules of, biological and adoptive parents when scheduling IFSP meetings.

Discussion: Section 303.27(b) was added to assist lead agencies and EIS providers in determining the appropriate individuals who may act as a ''parent'' under part C of the Act in those difficult situations when more than one individual is attempting to act as a parent under these regulations. This definition recognizes that the biological or adoptive parent is presumed to be the parent for purposes of making decisions for a child unless those rights have been legally terminated or modified.

The phrase ''attempting to act as a parent'' refers to situations when an individual attempts to assume the rights and responsibilities of a parent under the Act and these regulations. An individual may ''attempt to act as a parent'' under the Act in many situations, such as providing consent for an evaluation and assessment, attending an IFSP Team meeting, and filing a complaint. Identifying all of the circumstances under which an individual may ''attempt to act as a parent'' would be difficult and is unnecessary.

The biological or adoptive parent would be presumed to be the parent under these regulations, unless a question is raised about their legal authority. There is nothing in the Act that requires the biological or adoptive parent to affirmatively assert their rights to be presumed to be the parent.

Pursuant to § 303.27(b), unless a judicial order or decree identifies a specific person or persons to act as the parent of an infant or toddler, the biological or adoptive parent, when attempting to act as a parent, must be determined to be the ''parent'' for purposes of part C of the Act and thus retains all the rights and responsibilities of a parent under the Act, including the right to receive written notice and attend meetings.

Changes: None.

Comment: One commenter requested that the Department remove the reference to ''health'' decisions in proposed § 303.27(b)(1) and (b)(2), regarding individuals that may act as the parent of an infant or toddler with a disability for purposes of making health, educational, or early intervention services decisions for the child. The commenter stated that decisions concerning a child's health could cover a broad range of issues and a judicial decision to appoint a decision-maker to make health decisions for an eligible infant or toddler in place of the child's biological or adoptive parent should not necessarily have an impact on a biological or adoptive parent's authority to make early intervention and educational decisions.

Discussion: We agree with the commenter that a judge may appoint a person to make health-related decisions for an eligible infant or toddler without intending to limit the biological parent's or adoptive parent's role in early intervention decision-making. Therefore, we have revised paragraphs (b)(1) and (b)(2) to remove the reference to ''health'' decisions.

Changes: We have removed the word ''health'' from § 303.27(b)(1) and (b)(2).

Comment: One commenter recommended that the Department clarify that a judicial appointment of a parent for the purposes of part C of the Act may be a temporary or permanent appointment.

Discussion: The length of a judicial appointment of a parent for the purposes of part C of the Act is at the discretion of the judge issuing the appointment, is subject to State law, and is often decided on a case-by-case basis. State law or the judge issuing the appointment would determine whether an appointment is temporary or permanent and the length of any appointment. Therefore, we have not revised the definition as requested.

Changes: None.

Comment: None.

Discussion: For clarity and to eliminate redundancy, we have revised the definition of *parent* in § 303.27(b)(2) to state that if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child. We have replaced ''early intervention services or other services'' in proposed § 303.27(b)(2) with ''any services'' in new § 303.27(b)(2). This change is necessary to make clear that if a public agency provides services other than early intervention services to a family member of the child, that public agency may not serve as the parent for that child.

This change strengthens protections against potential conflicts of interest by providing that a public agency that provides services to a child or any family member of that child cannot act as the parent under these regulations.

Changes: We have replaced in § 303.27(b)(2) the phrase ''an EIS provider or public agency that provides early intervention or other services to a child or any family member of that child may not act as the parent'' with ''if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child.''

Comment: Some commenters requested that the phrase ''other services'' as used in proposed § 303.27(b)(2) be replaced with ''child welfare services.'' Another commenter asked if law guardians and child welfare case managers appointed by a judge would meet the definition of *parent* because neither ''law guardian'' nor ''child welfare case manager'' meets the definition of *public agency* in § 303.30. One commenter requested that private agencies be added to the list of entities that are excluded from acting as a parent in § 303.27(b)(2) because private agencies should not have the option to serve in the place of a parent.

Discussion: As discussed previously, we have revised the definition of *parent* to state that if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child, which would preclude a public agency that provides child welfare services (including a child welfare case manager) to the child or any family member of the

child from acting as the parent for that child.

The meaning of the term ''law guardians'' referred to in the comments is unclear. However, a guardian with a limited appointment that does not authorize the guardian to act as a parent of the child generally, or does not authorize the guardian to make early intervention services decisions for the child, is not a *parent* within the meaning of these regulations. The legal authority that the judicial order grants to the individual is the controlling factor, not the term used to identify that individual. Whether a person appointed as a financial guardian, guardian *ad litem,* or other guardian (*e.g.,* a law guardian) has the requisite authority to be considered a *parent* under this section depends on State law and the nature of the person's appointment.

Adding a reference to private agencies in § 303.27(b)(2), regarding entities that are prohibited from acting as a parent, is unnecessary because the language in § 303.27(b)(2) expressly references an EIS provider and the definition of *EIS provider* in § 303.12 includes any entity, whether public, private, or non-profit, or an individual that provides early intervention services under part C of the Act, whether or not that entity receives Federal funds under part C of the Act. Therefore, a private agency that provides early intervention services to a child cannot serve as the parent for that child.

Changes: None.

Parent Training and Information Center (§ 303.28)

Comment: One commenter recommended adding language to this definition to require that the parent training and information centers provide training that is targeted to all family members.

Discussion: Making the change suggested by the commenter is not appropriate because § 303.28 defines *parent training and information centers* solely by reference to sections 671 and 672 of the Act, which provide the substantive definitions of *parent training and information centers* and *community parent resource centers* and identify the responsibilities and activities of these centers. We cannot include in these regulations changes that would alter the statutory requirements for these centers under the Act.

Changes: None.

Personally Identifiable Information (§ 303.29)

Comment: Some commenters requested clarification of the confidentiality provisions. One commenter requested that the information protected under the part C confidentiality provisions align with the information that is protected under FERPA.

Discussion: We agree it is important to align the definition of personally identifiable information in these regulations with the definition of that same term in 34 CFR 99.3 under the Family Educational Rights and Privacy Act (FERPA) (in section 444 of the General Education Provisions Act). Examples of data that would be considered personally identifiable information under both the FERPA regulations in 34 CFR 99.3, as well as under part C of the Act, include the child's or parent's name and social security number, date and place of birth, race, ethnicity, gender, physical description, and disability or level of developmental delay, because some of this information can also indirectly identify an individual depending on the combination of factors and level of detail released.

The definition of personally identifiable information in 34 CFR 99.3 was the subject of the Department's December 9, 2008 Final Regulations under FERPA in the **Federal Register** (73 FR 74805). Given that the confidentiality provisions in §§ 303.401 through 303.417 reference other specific FERPA provisions, we believe it is appropriate to add in § 303.29 a cross-reference to the FERPA definition, as amended, rather than separately revising the definition in these regulations. Thus, we adopt by reference in § 303.29, with appropriate modifications, the FERPA definition in § 99.3, as amended.

Changes: We have revised the definition of personally identifiable information in § 303.29 to cross-reference the definition in 34 CFR 99.3, as amended, except that the terms ''student'' and ''school'' mean ''child'' and ''EIS providers'' respectively as used in this part.

Public Agency (§ 303.30)

Comment: None.

Discussion: We use the term public agency in this part to refer to public agencies that provide early intervention services as well as public agencies that provide other services or are sources of funding for early intervention services. Therefore, we have revised the definition of *public agency* in § 303.30 to make clear that the term includes the lead agency and any other agency or political subdivision of the State. We also have clarified, in § 303.12, that a public agency that is responsible for providing early intervention services to infants and toddlers with disabilities under this part and their families is an *EIS provider* under § 303.12.

Changes: We have removed the phrase ''that is responsible for providing early intervention services to infants and toddlers with disabilities under this part and their families'' from § 303.30.

Qualified Personnel (§ 303.31)

Comment: One commenter requested that the word ''area'' in the definition of *qualified personnel* in § 303.31 be changed to ''type of early intervention services.'' The commenter expressed concern that an individual could provide services in the ''area'' of occupational therapy, but not be a licensed or qualified occupational therapist. Another commenter requested clarification of the role of qualified personnel in conducting evaluations.

Discussion: States have the authority to establish standards for licensure or certification and to determine on a case-by-case basis personnel who meet those standards. Therefore, an individual could only provide services in the area of occupational therapy if that individual meets State approved or recognized certification, licensing, registration or other comparable requirements that apply to the area in which the individual is providing early intervention services. Paraprofessionals or assistants could assist in the provision of occupational therapy if they are appropriately trained and supervised in accordance with State law, regulation, or written policy to assist in the provision of early intervention services under part C of the Act to infants and toddlers with disabilities pursuant to § 303.119(c).

The term ''area'' as used in § 303.31 refers to the specific domain in which the individual has qualified through State certification, licensing, registration, or other comparable requirements to provide early intervention services. Thus, revising § 303.31 as suggested by this commenter is not necessary.

We agree with the commenter's request to clarify the role of qualified personnel in conducting evaluations. Thus, we have added in § 303.31 a reference to conducting evaluations or assessments to reflect the long-standing requirement in current § 303.322 and new § 303.321 (proposed § 303.320) that evaluations and assessments must be conducted by qualified personnel.

Changes: We have added ''conducting evaluations or assessments or'' before ''providing early intervention services.''

Scientifically Based Research (§ 303.32)

Comment: None.

Discussion: We determined that adding a definition for *scientifically based research* to subpart A would be helpful because the definition will provide clarity and understanding when the term scientifically based research is used in this part. Thus, we have added the defined term *scientifically based research* and provided that the term has the same meaning as in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). When applying this definition to the regulations under part C of the Act, any reference to ''education activities and programs'' refers to ''early intervention services.''

Change: A cross-reference to the definition of *scientifically based research* in section 9101(37) of the ESEA has been added as new § 303.32. Subsequent definitions have been renumbered accordingly.

Service Coordination Services (Case Management) (Proposed § 303.33) (New § 303.34)

Comment: Numerous commenters expressed a need for clarification of this section. A substantial number of commenters stated that the regulations should have included the language from the definition of *service coordination (case management)* in current § 303.23(a)(2)(ii), which provides that the service coordinator is responsible for ''serving as the single point of contact in helping parents to obtain the services and assistance they need.'' The commenters suggested that only requiring the service coordinator to assist parents in ''gaining access to * * * services,'' in proposed § 303.33(a)(2), would decrease the level of assistance and limit the types of services that families will receive.

Discussion: We agree that the proposed language and structure of this section may cause confusion and, therefore, we have made several structural and organizational revisions to improve clarity and readability. Additionally, while the proposed language in this section was not meant to limit or decrease the level of assistance that a service coordinator would provide to an infant or toddler with a disability and his or her family, we recognize that removing the phrase ''serving as the single point of contact in helping parents to obtain the services and assistance they need'' from the regulations has caused concern and confusion. Therefore, we have clarified in these final regulations that the service coordinator is responsible for assisting parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP. Additionally, for clarity, we have provided examples of activities that the service coordinator may engage in when assisting parents in obtaining access to needed early intervention services and other services identified in the IFSP.

We have further clarified that service coordination services assist and enable an infant or toddler with a disability and the child's family to receive the services and rights, including procedural safeguards, required under part C of the Act. Such activities include: (1) The coordination of early intervention services and other services that the child needs or is being provided; (2) conducting referral and other activities; (3) ensuring the timely provision of services; and (4) conducting follow-up activities to determine that appropriate part C services are being provided.

Changes: We have reorganized paragraph (a) of new § 303.34 (proposed § 303.33(a)) as follows: Paragraph (a)(1) defines *service coordination services;* paragraph (a)(2) provides that each infant or toddler with a disability and the child's family must be provided a service coordinator and describes the responsibilities of the service coordinator; and paragraph (a)(3) describes the activities involved in service coordination. Section 303.34(b) (proposed § 303.33(b)) has been revised to indicate in § 303.34(b)(1) that service coordination services include assisting parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP. Section 303.34(b)(2) has been added to indicate that service coordination services include coordinating the provision of early intervention services and other services (such as educational, social, and medical services that are not provided for diagnostic or evaluative purposes) that the child needs or is being provided. We have modified § 303.34(b)(5) (proposed § 303.33(b)(3)) to add the phrase ''conducting referral and other activities'' as an example of activities that may assist families in identifying available EIS providers. We also have revised § 303.34(b)(6) (proposed § 303.33(b)(4)) to add the phrase ''to ensure that the services are provided in a timely manner.'' Finally, we have added § 303.34(b)(7) to clarify that service coordination services also include conducting follow-up activities to determine that appropriate part C services are being provided.

Comment: Several commenters expressed concern that the proposed regulation was unclear about who could serve in the capacity of a service coordinator, and some commenters requested that the regulations specify exactly who may serve as a service coordinator. Other commenters expressed concern that the qualifications for service coordinators may have been eliminated. One commenter recommended modifying the definition to require that a service coordinator be selected from the profession most immediately relevant to the needs of the child or family.

Discussion: Section 303.13(a)(7) requires that service coordination services must be provided by *qualified personnel* as defined in § 303.31. The definition of *qualified personnel* in § 303.31 states that personnel are qualified if they meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing early intervention services. Additionally, § 303.344(g), which provides that an IFSP contain information about the service coordinator, requires that the service coordinator be selected from the profession most immediately relevant to the child's or family's needs or be a person who is otherwise qualified to carry out all applicable responsibilities under part C of the Act. Thus, repeating these criteria in new § 303.34 (proposed § 303.33) is not necessary.

Changes: None.

Comment: Some commenters suggested that the regulations could be read to require parents to coordinate early intervention services. Two commenters expressed concern that, as proposed, the regulation could be read to mean that more than one person may fill the role of a service coordinator for a particular infant or toddler and, thereby compromise consistency and quality of services.

Discussion: Nothing in these regulations requires a parent to coordinate early intervention services. Section 303.34(a)(2)(i) (proposed § 303.33(a)(3)) specifies that the service coordinator, or case manager, is responsible for coordinating all services required under part 303 across agency lines. Section 303.34(a)(2)(ii) (proposed § 303.33(a)(3)) stipulates that a service coordinator, or case manager, serves as the single point of contact for the family. This provision means that only one person may serve as the service coordinator or case manager for a particular family at a given time. However, the regulations do not

prohibit more than one person from serving as the service coordinator or case manager over the entire period that the eligible infant or toddler is receiving early intervention services under part C of the Act, provided that only one service coordinator or case manager is assigned to an infant or toddler at a given time to ensure that parents and EIS providers for a particular child have a single point of contact.

Changes: None.

Comment: One commenter requested that the Department clarify the statement in proposed § 303.33(c) that the lead agency's or an EIS provider's use of the term service coordination or service coordination services does not preclude characterization of the services as case management or any other service that is covered by another payor of last resort.

Discussion: The legislative history of the 1991 amendments to the Act indicates that use of the term ''service coordination'' is not intended to affect authority to seek reimbursement for services provided under Medicaid or any other legislation that makes reference to ''case management'' services. See H.R. Rep. No. 198, 102d Cong., 1st Sess. 12 (1991); S. Rep. No. 84, 102d Cong., 1st Sess. 20 (1991). Accordingly, this paragraph is intended to reflect the intent of Congress. For the same reason, we added the parenthetical reference to case management in the title of this section.

Changes: None.

Comment: One commenter requested that the definition of *service coordination services (case management)* be amended to include those services that are not directly early intervention services, but that are essential to the well-being of the child and the family, in accordance with § 303.344(e). Section 303.344(e) provides that a child's IFSP must identify medical and other services that the child or family member needs or is receiving through other sources, but that are neither required nor funded under part C of the Act.

Discussion: The commenters' concern is addressed sufficiently by the requirements in new § 303.34(a)(3)(ii) (proposed § 303.33(a)(2)), which provides that service coordination involves coordinating the other services identified in the IFSP under § 303.344(e) that are needed or are being provided to the infant or toddler with a disability and that child's family.

Changes: None.

Comment: One commenter recommended that proposed § 303.33(a)(2), which provides that a service coordinator or case manager must assist parents of infants and toddlers with disabilities to coordinate early intervention services and other services identified in the IFSP that are needed or are being provided to the infant or toddler with a disability, be revised to state that a service coordinator or case manager must coordinate early intervention and other services identified in the IFSP for ''other family members'' in addition to ''parents.''

Discussion: Including a reference to ''other family members'' in this section would be inconsistent with sections 636(e) and 639(a)(3) of the Act, which provide that a parent, and not ''other family members,'' has the authority to consent to the eligible child and family member's receipt of any early intervention services identified in the IFSP by the IFSP Team.

Changes: None.

Subpart B—State Eligibility for a Grant and Requirements for a Statewide System

State Eligibility—Requirements for a Grant Under This Part (§ 303.101)

Comment: A few commenters recommended adding the phrase ''Native American'' before the words ''Indian infants and toddler'' in § 303.101(a)(1)(i). A few commenters suggested that in addition to referencing ''wards of the State,'' the regulations, including § 303.101(a)(1)(iii), should also refer to ''children in foster care.''

Discussion: Section 303.101(a)(1)(i) provides that, as a grant condition, a State must assure that it has adopted a policy that appropriate early intervention services are available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State. Adding the phrase ''Native American'' before the words ''Indian infants and toddlers'' in § 303.101(a)(1)(i) is not appropriate because the language in § 303.101(a)(1)(i) reflects the language in section 634(1) of the Act, which does not use the term ''Native American'' in referring to Indian infants and toddlers. Additionally, it is not appropriate to add the phrase ''Native American'' before the words ''Indian infants and toddlers'' in § 303.101(a)(1)(i) because the term *Indian* is specifically defined in section 602(12) of the Act and § 303.19(a) of these regulations. Given that *Indian* is a defined term in these regulations, it could cause confusion to refer to ''Native American'' Indian infants and toddlers in this section.

Similarly, adding the phrase ''children in foster care'' each time the regulations refer to ''wards of the State'' is unnecessary because the definition of *wards of the State* in § 303.37 makes clear that a foster child is a ward of the State unless that child has a foster parent who meets the definition of *parent* in § 303.27. Therefore, adding the phrase ''children in foster care'' to § 303.101(a)(1)(iii) would be redundant.

Changes: None.

Comment: None.

Discussion: To incorporate the long-standing requirement that States have in place policies and procedures that address each of the components of the part C statewide system, we have clarified in § 303.101(a)(2) that the State's application must include an assurance that the State has in effect policies and procedures that address each of the components required in §§ 303.111 through 303.126.

Changes: We have added to § 303.101(a)(2) the words ''policies and procedures that address'' after the word ''including'' and before the words ''at a minimum.''

Comment: None.

Discussion: Based on further review, we have determined that it is more appropriate to describe in subpart B—rather than subpart C—of these regulations the State's obligation to obtain prior Secretarial approval of those policies and procedures that are required to be submitted with the State's application. For this reason, we have moved proposed § 303.208(b) to new § 303.101(c), and further specified in § 303.101(c), those policies and procedures that are required to be submitted as part of the State's application.

Changes: We have added a new § 303.101(c), based on proposed § 303.208(b), to describe the State's obligation to obtain approval by the Secretary before implementing any policy or procedure that is required to be submitted as part of its application under §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211.

Acquisition of Equipment and Construction or Alteration of Facilities (§ 303.104)

Comment: None.

Discussion: The word ''Act'' was inadvertently omitted from the title ''Americans with Disabilities Accessibility Guidelines for Buildings and Facilities'' in § 303.104(b)(1). We have revised this section to reflect the correct title of the guidelines.

Changes: We have added the word ''Act'' following the words ''Americans with Disabilities.''

Positive Efforts To Employ and Advance Qualified Individuals With Disabilities (§ 303.105)

Comment: Some commenters requested that this section be amended to include positive efforts to employ and advance parents of individuals with disabilities because such efforts would benefit the part C system by encouraging parent leadership at all levels. A few commenters indicated general support for the language in this section, but requested that the regulations require States to report to the Office of Special Education Programs (OSEP) on their plan and efforts to employ qualified individuals with disabilities.

Discussion: We agree with the commenter that positive efforts to employ and advance parents of individuals with disabilities would encourage parent participation in State part C programs. However, the language in § 303.105 reflects the requirement in section 606 of the Act, concerning the employment and advancement of qualified individuals with disabilities themselves, and, therefore, we do not believe that it is appropriate to expand this requirement to include the parents of individuals with disabilities, as suggested by the commenters. Nothing in the Act precludes a State from making positive efforts to employ and advance in employment parents of individuals with disabilities if such a policy is consistent with State statute, regulation, and policy. Additionally, section 606 of the Act does not require that States report to OSEP on their efforts to employ and advance qualified individuals with disabilities. In carrying out its monitoring function, OSEP may review, as appropriate, State plans and efforts to employ and advance qualified individuals with disabilities, but the Department's position is that it would not be useful to require States to report this information to OSEP because State hiring and retention plans and efforts vary based on the individual employment needs of each State as do the State laws, regulations, or written policies that govern the certification, licensing, and registration of qualified personnel providing early intervention services in each State part C program.

Changes: None.

State Definition of Developmental Delay (§ 303.111)

Comment: Some commenters strongly supported the flexibility afforded States through the regulatory language in § 303.111, regarding a State's definition of *developmental delay*. Other commenters requested that the Department define the term ''rigorous'' in § 303.111. One commenter requested that the regulations clarify that a ''rigorous'' definition of *developmental delay* does not necessarily mean that States must change their definitions to make them more rigorous than they were before the enactment of the 2004 amendments to the Act. The same commenter expressed concern that any definition of *developmental delay* under § 303.111 would exclude certain children who are eligible under the State's existing definition of developmental delay.

Another commenter suggested that § 303.111 be amended to include ''children'' with delays, and not only ''infants and toddlers,'' because of a State's option to make part C services available to children ages three and older pursuant to § 303.211.

Discussion: The definition of *developmental delay* in § 303.111, which is aligned with section 635(a)(1) of the Act, replaces the definition of developmental delay in current §§ 303.161 and 303.300. Consistent with § 303.203(c), a State's definition of *developmental delay* is considered to be rigorous under part C of the Act if the definition meets the requirements in § 303.111(a) and (b), and, was established in accordance with the public participation requirements in new § 303.208(b).

As required in § 303.111, a State's definition of *developmental delay* must include: (1) Consistent with § 303.321, a description of the evaluation and assessment procedures that will be used to measure a child's development; and (2) a description of the specific level of developmental delay in functioning or other comparable criteria that constitute a developmental delay in one or more of the developmental areas identified in § 303.21(a)(1). Additionally, in order to be ''rigorous'', each State's definition of developmental delay must be established in accordance with the public participation requirements in new § 303.208(b) to enable parents, EIS providers, Council members and other stakeholders and members of the public to comment on the State's definition. Section 303.111 does not require a State to revise, or preclude a State from using, its existing definition of developmental delay as long as the definition meets the requirements in § 303.111 and was established in accordance with the public participation requirements that are set forth in new § 303.208(b) after December 2004.

We decline to replace the phrase ''infants and toddlers,'' as used in § 303.111, with the term ''child,'' as one commenter requested, because this change is unnecessary. The definition of ''infant or toddler with a disability'' in § 303.21(c) includes any child to whom the State elects to offer part C services under section 635(c) of the Act and § 303.211.

Changes: None.

Availability of Early Intervention Services (§ 303.112)

Comment: Several commenters requested that specific terms in this section be defined or clarified. Many commenters requested that these regulations define the term ''scientifically based'' and that the definition of the term be aligned, similar to part B of the Act, with the definition in Title I of ESEA. A few commenters recommended replacing the phrase ''scientifically based'' with ''peer-reviewed'' (or vice versa) to provide for consistency throughout the regulations. One commenter requested that the Department clarify that ''scientifically based research'' and ''peer-reviewed research'' are two distinct terms, that they cannot be used interchangeably, and that the terms apply to both lead agencies and IFSP Teams. Finally, one commenter requested that the regulations define the term ''practicable.''

Discussion: We agree with the commenters that the definitions of ''scientifically based research'' under parts B and C of the Act should be aligned with and explicitly cross-reference the definition of ''scientifically based research'' from section 9101(37) of the ESEA. We have added a cross-reference to this definition in new § 303.32.

We also agree that the term ''scientifically based research'' is not interchangeable with ''peer-reviewed research.'' The definition of *scientifically based research* is broader and includes the concept of peer-reviewed research. Peer-reviewed research generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, there is no single definition of ''peer-reviewed research'' because the review process varies depending on the type of information being reviewed.

We do not agree with the commenter, however, that the terms ''scientifically based research'' and ''peer-reviewed research'' apply to both lead agencies and IFSP Teams because these terms are used in different sections of the regulations for different purposes.

Use of the term ''scientifically based research'' in § 303.112 reflects the requirement in section 635(a)(2) of the

Act that a lead agency must include as a part of its part C statewide system a policy that ensures that appropriate early intervention services based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families. The use of the term peer-reviewed research, on the other hand, reflects the requirement in section 636(d)(4) of the Act, which provides that an IFSP must include a statement of the specific early intervention services, based on peer-reviewed research (to the extent practicable), that are necessary to meet the unique needs of the child and the family to achieve the results or outcomes as required by these regulations. Finally, with regard to the comment requesting that the Department define the term ''practicable'' in both §§ 303.112 and 303.344(d)(1), it is the Department's position that this change is not necessary. In the context of these regulations, the term has its plain meaning (*i.e.,* feasible and possible). As used in § 303.112, ensuring that ''appropriate early intervention services are based on scientifically based research, to the extent practicable'' means that services and supports should be based on scientifically based research to the extent that it is feasible or possible, given the availability of scientifically based research concerning a particular early intervention service.

Changes: None.

Comment: Some commenters suggested revising § 303.112 to require States to ensure that early intervention services are not only available, but also accessible, to all infants and toddlers with disabilities and their families, including families in rural areas.

Discussion: Section 303.112 reflects the language of, and requirements in, section 635(a)(2) of the Act that each part C statewide system must have in effect a State policy that ensures that appropriate early intervention services, based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State, and infants and toddlers with disabilities who are homeless children and their families. Children living in rural areas are a historically underrepresented population and as stated in § 303.1(d), one of the purposes of this program is to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of rural children. Additionally, under § 303.227(a), States must ensure that policies and practices have been adopted to ensure that traditionally underserved groups, including minority, low-income, homeless, and rural families and children with disabilities who are wards of the State, are meaningfully involved in the planning and implementation of all the requirements of this part. Given these requirements, we expect that accessibility issues, such as transportation, that may be specific to these groups will be addressed by the lead agency.

Lead agencies must comply with the requirements in Title II of the Americans with Disabilities Act of 1990 (ADA), which apply to public entities (*i.e.,* State and local governments), and the requirements in section 504 of the Rehabilitation Act of 1973 (Section 504), which apply to recipients of Federal financial assistance. Both Title II of the ADA and Section 504 prohibit discrimination on the basis of disability, including exclusion from participation in, and the denial of the benefits of, any program or activity of a lead agency. Both of these laws and their implementing regulations generally require appropriate auxiliary aids and services be made available where necessary to afford a qualified individual with a disability an equal opportunity to participate in, and enjoy the benefits of, any program or activity conducted by a lead agency that receives a grant under part C of the Act. Thus, lead agencies are required to ensure that early intervention services are accessible under Title II of the ADA and Section 504, as appropriate. It would be redundant for the part C regulations to include these accessibility requirements.

Changes: None.

Comment: Two commenters recommended that we specifically reference, in § 303.112, children who have experienced or have been exposed to abuse, neglect, or family violence.

Discussion: Section 303.112 of these regulations reflects the requirement in section 635(a)(2) of the Act that a State's system include a policy that ensures that early intervention services are available to all infants and toddlers with disabilities and their families, including Indian children with disabilities and their families residing on a reservation geographically located in the State and homeless children with disabilities and their families. We define the word *including* in § 303.18 of subpart A of these regulations to mean that the items named are not all the possible items that are covered, whether like or unlike the ones named. The use of the term ''including'' in § 303.112 is meant to make clear that the list of groups (*i.e.,* Indian children and homeless children) is not exhaustive. We also note that provisions regarding the identification of infants and toddlers with disabilities who have experienced or have been exposed to abuse, neglect, or family violence (and other subpopulations that were specifically added in the 2004 Amendments to the Act) are reflected in § 303.302(c) of these regulations, which address the scope and coordination of the State's child find system. Thus, revising § 303.112 to specifically identify additional subgroups of infants and toddlers with disabilities and their families is not necessary.

Changes: None.

Evaluation, Assessment, and Nondiscriminatory Procedures (§ 303.113)

Comment: Two commenters recommended adding the word ''voluntary'' before ''family-directed identification of the needs of the family'' in paragraph (a)(2) of this section to clarify that the part C program is voluntary and that the assessment cannot take place unless and until parents agree to the assessment.

Discussion: We agree that the family-directed identification of the needs of the family referenced in § 303.113(a)(2) is voluntary on the part of the family. However, it is not necessary to revise § 303.113 because, in § 303.113(b), we make clear that the family assessment must meet the requirements in § 303.321. Section 303.321(c)(2), in turn, provides that the family assessment must be voluntary on the part of the family. We decline to make the requested change because it would be redundant to repeat the family assessment requirements in § 303.113.

Changes: None.

Individualized Family Service Plans (IFSPs) (§ 303.114)

Comment: One commenter recommended adding the words ''and his/her family'' after the term ''disability'' in this section.

Discussion: We agree that the IFSP is designed to address the needs of both the infant and toddler with a disability and the child's family. Accordingly, we have revised § 303.114 to make clear that the State's system must provide an IFSP for each infant or toddler with a disability and the child's family in the State. Additionally, we have reworded § 303.114, without changing the substantive meaning.

Changes: We have (a) added the words ''and his or her family'' following the phrase ''each infant or toddler with a disability'' in § 303.114, (b) replaced

the word ''include'' with the word ''ensure,'' and (c) clarified that the IFSP developed and implemented for a child must meet the requirements in §§ 303.340 through 303.346 and include service coordination services.

Comprehensive Child Find System (§ 303.115)

Comment: One commenter recommended that language be included in this section to explicitly require States to seek out and serve all infants and toddlers under the age of three, regardless of when they were referred to the lead agency for early intervention services. The commenter expressed the belief that many children referred to the part C program after age two are not served.

Discussion: We do not believe that the requested change is appropriate or necessary because § 303.115 provides that the State's comprehensive child find system must meet the requirements in §§ 303.301 through 303.303. Section 303.302(b)(1) expressly requires a lead agency to ensure that all infants and toddlers with disabilities in the State who are eligible for services under part C of the Act are identified, located, and evaluated. Additionally, the definition of an *infant or toddler with a disability* in § 303.21 expressly includes any eligible child until that child reaches the age of three.

Thus, even if a child is referred to the part C program after the age of two, the lead agency, with parental consent, must conduct an evaluation under § 303.321 or provide the parent with notice (under § 303.421(b)) explaining why an evaluation is not being conducted (*i.e.,* the child is not suspected of having a disability). Additionally, if the parent consents to an evaluation, new § 303.310(b) requires that the initial evaluation and the initial assessment of the child and the initial IFSP meeting must be conducted within 45 days of the child's referral to the part C program. (However, as provided under § 303.209(b)(1)(iii), if a child is referred less than 45 days prior to his or her third birthday, the lead agency is not required to evaluate the child; instead, if the child may be eligible for services under part B of the Act, the lead agency, with parental consent, is required to refer the child to the part B program.)

Section 303.342(e) requires that when a child is determined eligible for part C services and the parent consents to the provision of part C services identified on the child's IFSP, the lead agency must ensure that those early intervention services are available and provided to the child.

Changes: None.

Central Directory (§ 303.117)

Comment: Some commenters objected to proposed § 303.117, regarding the central directory being published on the lead agency's Web site because many families may not have access to a computer. The commenters recommended that we require lead agencies to disseminate printed central directories. Two of these commenters requested that we specify the means, other than through a Web site, by which lead agencies may disseminate the central directory. Another commenter stated that a Web-only directory could be easily updated and could provide greater access to all parents.

A few commenters requested that the regulations require that material placed on the Web site be accessible to and usable by individuals with disabilities and for non-English speaking families. One commenter requested that the Department require that the central directory be made available in the main languages spoken in the State.

Discussion: Section 303.117 specifies that each system's central directory must be accessible to the general public through publication on the lead agency's Web site and ''other appropriate means.'' This section does not permit the lead agency to make the central directory accessible and available only through its Web site. The lead agency must make the central directory available through other appropriate means.

''Other appropriate means'' may include providing printed copies of the central directory at locations, such as libraries, and offices of key primary referral sources. Given that needs vary from State to State, each State is in the best position to determine the additional, appropriate means that the lead agency will use to make its central directory accessible. Thus, it would not be constructive to include in § 303.117 an exhaustive list of the methods a lead agency could use to make its central directory accessible to the general public.

In response to commenters' concerns about the ability of individuals with disabilities to access the central directory, accessibility to the central directory requires not only the ability of the general public to obtain a copy of the directory, but also the ability to access the contents in the directory. Lead agencies must comply with the requirements in the ADA, which apply to public entities (*i.e.,* State and local governments), and the requirements in Section 504, which apply to recipients of Federal financial assistance. Both of these statutes and their implementing regulations generally require that communications with individuals with disabilities be as effective as communications with individuals without disabilities, and that appropriate auxiliary aids and services be made available where necessary to afford a qualified individual with a disability an equal opportunity to participate in, and enjoy the benefits of, any program or activity conducted by a lead agency that receives a grant under part C of the Act. Further clarification in § 303.117 is not necessary because the lead agency is already responsible in § 303.117 for ensuring that the central directory is accessible and is also subject to the requirements of these other Federal laws.

Regarding access to the central directory by non-English speaking families, recipients of Federal funds, including lead agencies, must take reasonable steps to ensure that persons of limited English proficiency (LEP) have meaningful access to programs and activities funded by the Federal government under Title VI of the Civil Rights Act of 1964 and implementing regulations (42 U.S.C. 2000d *et seq.* and 34 CFR 100.1 *et seq.*). Because the lead agency is responsible for ensuring that the central directory is accessible in § 303.117 and such accessibility includes providing LEP persons with meaningful access under Title VI of the Civil Rights Act of 1964, we decline to make the changes requested by the commenters.

Changes: None.

Comment: One commenter requested that the Department revise § 303.117 to include more guidance on the actual contents of the central directory. A few commenters recommended that lead agencies be required to update the central directory at least annually.

Discussion: Section 635(a)(7) of the Act requires that the central directory include information on early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State. To the extent consistent with this statutory requirement, § 303.117 provides more detail on the information that must be included in the directory. Section 303.117 requires the central directory to include information about: public and private early intervention services, resources, and experts available in the State; professional and other groups that provide assistance to infants and toddlers with disabilities eligible under part C of the Act and their families; and research and demonstration projects being conducted in the State relating to

infants and toddlers with disabilities. Section 303.117 identifies the minimal information that the directory must include for the directory to be useful to the general public. Nothing in the Act or these regulations prohibits a State from including other relevant information that it deems appropriate.

Section 303.117 requires that the central directory contain accurate and up-to-date information. To comply with the requirement that the information be accurate and up-to-date, States likely may update their central directories more often than annually. Thus, including a requirement that the directory be updated at least annually might be interpreted as setting a lower standard than the requirement in § 303.117 that States maintain an accurate and up-to-date directory.

Changes: None.

Comprehensive System of Personnel Development (CSPD) (§ 303.118)

Comment: Some commenters requested that this section require a State's CSPD to include training that is targeted to particular groups of service providers or training on techniques and services that address the specific needs of particular groups of infants and toddlers. For example, one commenter requested that the CSPD provide training specific to serving children who are homeless and children who have been exposed to, or have experienced, violence or trauma. Another commenter requested that training for occupational therapists be explicitly included. Other commenters requested that the regulations require that all training available under the CSPD be mandatory.

Discussion: The requirements for a CSPD in § 303.118 incorporate the requirements in section 635(a)(8) of the Act. With respect to the request that a State's CSPD specifically require training that is targeted to address the early intervention service needs of infants and toddlers with disabilities who are homeless or who have been exposed to or experienced violence or trauma, we do not believe that it is appropriate for the Department to require that a State's CSPD mandate particular types of training or training targeted to specific populations. Each State is in the best position to evaluate the training needs of personnel providing early intervention services in that State and to design the CSPD to meet those needs. Similarly, it is the Department's position that it is not necessary to list in the regulations occupational therapy or other specific fields in which training must be provided, particularly given that § 303.13(a)(7) requires that qualified personnel provide all early intervention services, including occupational therapy. Moreover, § 303.119(a), which requires that a State's system include policies and procedures relating to the establishment and maintenance of qualification standards to ensure that personnel are appropriately and adequately prepared and trained, is sufficiently broad to ensure that each State will address, as appropriate, the needs of its specific subpopulations and identify any providers or personnel that may need more specific training.

We disagree that the regulations should require a State's CSPD to mandate all training, including the training described in § 303.118(b). As noted in the preceding paragraph, we want to provide each State with flexibility to create a CSPD with the appropriate components to meet that State's unique training and personnel development needs.

Changes: None.

Comment: One commenter stated that lead agencies do not have authority over higher education systems and curriculum and recommended that § 303.118 be revised to only require that the lead agency make efforts to work with higher education systems and other training providers, including national associations, to ensure that training programs have adequate space and an updated curriculum to train the necessary early intervention services personnel.

Discussion: Section 303.118 does not imply that lead agencies have authority over institutions of higher education (IHEs) and IHE curricula. Nothing in § 303.118 prescribes IHE curricula; rather, § 303.118(a)(2) requires only that a CSPD promote the preparation of EIS providers who are fully and appropriately qualified to provide early intervention services under part C of the Act. For this reason, we do not believe that the requested change is necessary.

Changes: None.

Comment: Some commenters suggested that the Department retain the language from current § 303.360(b)(4)(iii), which requires the CSPD to include training related to assisting families in enhancing the development of their children, and in participating fully in the development and implementation of IFSPs. The commenters stated that, if such training is included in the regulations, it should be required and not optional. One commenter recommended that this section include training for parents concerning their rights, identifying functional outcomes, and IFSP processes.

Discussion: The 2004 amendments of the Act revised section 635(a)(8) of the Act to mandate that each State's CSPD include three specific personnel training components. In the NPRM, we added as an optional training component in § 303.118(b)(3) the training of personnel to support families in participating fully in the development and implementation of the child's IFSP because it was important to retain this component from current § 303.360(b)(4)(iii). However, we recognize that the Act identifies only three mandatory components and believe that States should have the flexibility to identify appropriate personnel training components of their CSPD. In reviewing the introduction and paragraph (a) of this section, we have made additional edits for clarification that are not substantive.

Changes: We have made technical edits to the introductory paragraph and paragraph (a)(1) of this section to clarify the subject of the training in the CSPD and to clarify that the items listed in this paragraph are training requirements.

Comment: None.

Discussion: In the Improving Head Start for School Readiness Act of 2007 (Head Start Act, 42 U.S.C. 9801 *et seq.*), Congress authorized the Governor of each State to designate or establish a State Advisory Council on Early Childhood Education and Care for children from birth to school entry (referred to as the State Advisory Council). The overall responsibility of each State Advisory Council on Early Childhood Education and Care is to lead the development or enhancement of a high-quality, comprehensive system of early childhood development and care that ensures statewide coordination and collaboration among the wide range of early childhood programs and services in the State, including child care, Head Start, the IDEA programs (including the IDEA program under part C of the Act, and the preschool program under section 619 of part B of the Act), and pre-kindergarten programs and services. Under the Head Start Act, the State Advisory Council is required to conduct periodic statewide needs assessments on the quality and availability of programs and services for children from birth to school entry, identify opportunities for and barriers to coordination and collaboration among existing Federal and State-funded early childhood programs, and develop recommendations for a statewide professional development system and career ladder for early childhood educators and high-quality State early learning standards.

Another activity of the State Advisory Council under the Head Start Act is to assess the capacity and effectiveness of institutions of higher education in the State to support the development of early childhood educators. The Department strongly encourages lead agencies to assist the State Advisory Council in strengthening State-level coordination and collaboration among the various sectors and settings of early childhood programs in the State to support professional development, recruitment, and retention initiatives for early childhood educators. Regarding personnel standards, nothing would prevent a State from adopting or recommending more rigorous personnel standards under part C than those developed or recommended by the State Advisory Council.

Because this requirement regarding State Advisory Councils on Early Childhood Education and Care was established after the proposed part C regulations were published, in final § 303.118 we have added coordination with these State Advisory Councils as an authorized activity of the CSPD. This change will not impose an additional burden on the CSPD because it is an optional duty under § 303.118(b) and not a required duty under § 303.118(a).

Changes: New § 303.118(b)(4) has been added to allow the CSPD to include training personnel who provide services under this part, using standards that are consistent with early learning personnel development standards funded under the State Advisory Council on Early Childhood Education and Care established under the Head Start Act, if applicable.

Personnel Standards (§ 303.119)

Comment: Some commenters disagreed with our proposal to remove the provision in current § 303.361(a)(2), which requires State education personnel standards to meet the highest requirement for a profession or discipline. The commenters asserted that the removal of this provision, while perhaps deemed necessary to alleviate an immediate personnel shortage crisis and serve children who are currently eligible, could undermine the quality of early intervention programs. The commenters expressed concern that not requiring State education personnel standards to meet the highest requirement for a profession or discipline will promote a two-tiered system in which infants and toddlers with disabilities served in natural settings receive services provided by personnel who are less qualified than personnel providing services in other settings, such as hospitals and private clinics. One commenter recommended that the Department revise this section to require lead agencies to ensure that early intervention services providers who deliver services in their discipline or profession have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

Discussion: Section 303.119, which is consistent with section 635(a)(9) of the Act, does not contain the provision in current § 303.361(a)(2), requiring State EIS personnel standards to be based on the highest State requirement for a profession or discipline, because this requirement was removed from section 635(a)(9) in the 2004 amendments to the Act.

Section 303.119(b) requires that all qualification standards for EIS providers under part C of the Act must meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the profession, discipline, or area those personnel are providing early intervention services. This requirement applies equally to EIS providers regardless of the setting in which they provide part C services.

Concerning the comment requesting that the Department prohibit EIS providers from providing services if their certification or licensure requirements are waived on an emergency, temporary, or provisional basis, nothing in the Act prohibits early intervention service providers from receiving a waiver or other type of emergency credential to provide early intervention services so long as the provision of early intervention services by such providers is consistent with State law, regulation, or other policy governing certification and licensure. Under section 635(b) of the Act, a State may adopt a policy that includes making ongoing good-faith efforts to recruit and hire appropriately and adequately trained personnel to provide early intervention services to infants and toddlers, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards previously described.

Changes: None.

Qualification Standards (§ 303.119(b))

Comment: One commenter recommended that the Department revise this section to require that qualification standards be consistent with professional scope of practice provisions in State practice laws (*i.e.,* State statutes that govern the practices of specific professions).

Discussion: Section 303.119 requires the State to establish and maintain qualification standards that are consistent with State-approved professional standards. To maintain State flexibility in updating State qualification standards for part C personnel, we will continue to require that these standards be consistent with the requirements of any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the profession, discipline, or area that personnel are providing early intervention services.

Changes: None.

Use of Paraprofessionals and Assistants (§ 303.119(c))

Comment: Two commenters requested that paraprofessionals and assistants be required to meet the same State licensure requirements as early intervention service providers and that, in the absence of such a policy, States not be allowed to create ''State-certified paraprofessionals'' or ''State-certified'' assistants who might encroach upon the practice of certified early intervention service providers. Two other commenters requested that this section clarify that States must comply with State laws governing the practices of specific professions and the appropriate supervision of assistants as well as the professional codes of ethics for the different disciplines. One commenter requested that this section be revised to require the supervision of paraprofessionals and assistants. A few commenters recommended that additional guidance be provided on the definitions of the terms ''paraprofessional,'' ''assistant,'' and ''supervision,'' and that the regulations require States to file with the Department their regulations regarding the scope of work performed by paraprofessionals and assistants and the supervision provided them.

Discussion: Nothing in the Act requires paraprofessionals and assistants who assist in the provision of early intervention services under part C of the Act to meet State licensure requirements for early intervention service providers. However, consistent with section 635(a)(9) of the Act, § 303.119(c) requires that paraprofessionals and assistants who assist in the provision of early intervention services be appropriately trained and supervised in accordance with State law, regulation, or written policy. We decline to require, in these regulations, that paraprofessionals and

assistants providing early intervention services meet State licensure requirements for EIS providers. We believe that section 635(a)(9) of the Act and § 303.119(c) are, in conjunction with State law or policy, sufficiently adequate to ensure that paraprofessionals and assistants are appropriately trained to assist in the provision of early intervention services made available under part C of the Act.

Neither the Act nor the regulations prohibit a State from establishing a State certification for paraprofessionals or assistants who assist in the provision of early intervention services, so long as the requirements in § 303.119(c) are met. The Department's position is that it would not be appropriate to preclude a State from establishing a State certification for paraprofessionals or assistants who assist in the provision of early intervention services because specific certification and licensure requirements are best left to a State to determine.

For the purposes of part C of the Act, paraprofessionals and assistants are individuals who assist in the provision of early intervention services to infants and toddlers with disabilities. We do not believe it is necessary to define these terms with greater specificity because defining these terms is best left to individual States based on their laws, regulations, and written policies. Further, it is most appropriate for States to develop, if needed, a definition of supervision. Concerning commenters' requests that States file with the Department their regulations on paraprofessionals and assistants, section 634 of the Act requires States to assure but not necessarily demonstrate their compliance with the requirements in section 635 of the Act, including section 635(a)(9). Therefore, we decline to include definitions of these terms or a filing requirement in these regulations.

Changes: None.

Policy To Address Shortage of Personnel (§ 303.119(d))

Comment: One commenter requested that we include definitions of the terms ''geographic area of the State,'' ''geographic area where there is a shortage,'' ''good-faith effort,'' and ''most qualified individuals available'' in this section of the regulations.

Discussion: Section 303.119(d) provides that a State may adopt a policy to address a shortage of personnel, including efforts to recruit and hire appropriately and adequately trained personnel in a geographic area of the State where there is a shortage of personnel. The Department's position is that the phrases ''geographic area of the State'' and ''geographic area where there is a shortage,'' as used, in this section are best left to the State to define.

The Department's position is that the term ''good faith effort'' reflects the common understanding of the term and that States will make the reasonable efforts necessary to enable the State to recruit, hire, and retain appropriately and adequately prepared and trained personnel to provide early intervention services to infants and toddlers with disabilities. Thus, defining the term in these regulations is not necessary.

Finally, States can best determine how to define the term ''most qualified individual available,'' provided that the State's definition is consistent with the provisions in § 303.119(a) and (b). This approach gives States the flexibility they need to determine which individuals would be considered the ''most qualified individual available'' in light of unique State personnel needs.

Changes: None.

Lead Agency Role in Supervision, Monitoring, Funding, Interagency Coordination, and Other Responsibilities (§ 303.120)

Comment: None.

Discussion: Based on further review of § 303.120, we have determined it is appropriate to add references to EIS providers in paragraphs (a)(2)(i) and (d) of this section to clarify that a lead agency's responsibilities include monitoring EIS providers as well as agencies, institutions, and organizations used by the State to carry out part C of the Act and to ensure the timely provision of early intervention services to infants and toddlers with disabilities and their families under part C of the Act, pending reimbursement disputes between public agencies and EIS providers. We also have made § 303.120(a) internally consistent by adding references where needed in paragraphs (a)(1), (a)(2), and (a)(2)(i) to make clear that the lead agency's monitoring responsibility extends to ''agencies, institutions, organizations, and EIS providers'' that are receiving financial assistance under part C of the Act.

Changes: We have added references to EIS providers in § 303.120(a)(2)(i) and (d) and appropriate references to ''agencies, institutions, organizations, and EIS providers'' in paragraphs (a)(1), (a)(2), and (a)(2)(i) of this section.

Comment: One commenter recommended that § 303.120(a)(2)(iv), regarding the lead agency's monitoring of part C programs, include an additional provision requiring States to demonstrate ''improvements that will result in the delivery of quality services to reach compliance within one year of identification.''

Discussion: To ensure compliance with the requirements in § 303.120(a)(2)(iv), States must demonstrate improvement in the implementation of their part C programs; under §§ 303.700 through 303.702, each lead agency reports in its APR on its improvement efforts under the SPP. For example, by correcting noncompliance in accordance with § 303.120(a)(2)(iv) a State might require an EIS program or EIS provider to revise any noncompliant policies, procedures, and practices to be consistent with the requirements of part C of the Act. Additionally, in order to comply with § 303.120(a)(2)(iv), a State might demonstrate improvement through, for example, follow-up review of data, other appropriate documentation, or through interviews showing that the noncompliant policies, procedures, and practices were corrected and are consistent with part C requirements. Demonstration of improvement is an integral part of § 303.120(a)(2)(iv) and the State's SPP/APR reporting; for this reason, we decline to make the requested change to § 303.120(a)(2)(iv).

Changes: None.

Comment: One commenter recommended that the regulations expressly require all EIS providers, including those who do not receive Federal part C funds from the lead agency, to comply with the requirements of the Act and these regulations.

Discussion: The changes recommended by the commenter are not necessary because the Act and the regulations already require, under section 635(a)(10)(A) of the Act and § 303.120(a)(2), that the lead agency monitor EIS providers as defined in § 303.12(a), regardless of whether such EIS providers receive Federal part C funds. Under the definition of *EIS provider* in § 303.12(a), the EIS provider must provide services in compliance with part C of the Act, even if the EIS provider does not receive Federal part C funds. Therefore, no further changes are required.

Changes: None.

Comment: A few commenters disagreed with the one-year timeline to correct noncompliance in § 303.120(a)(2)(iv) because, according to these commenters, one year is too long and not in the best interests of children and families. Another commenter recommended, instead, that we revise § 303.120(a)(2)(iv) to provide that a lead agency have three years to demonstrate correction of noncompliance.

One commenter recommended that the Department require in § 303.120(a)(2)(iv) that lead agencies report to the public the correction of noncompliance in order to ensure that parents and others are informed of the correction of the noncompliance.

Discussion: Correcting noncompliance as soon as possible but not later than one year from identification is a critical responsibility of lead agencies and it is the Department's position that one year, and not three years—as one commenter suggested—is a reasonable timeframe for an EIS provider to correct noncompliance identified by the lead agency and for the lead agency to verify that the EIS provider is complying with part C of the Act and its implementing regulations.

The Department's position is that a shorter timeframe (*e.g.,* 90 days from identification) is not appropriate because, in many cases, it would not provide sufficient time to correct noncompliance. For example, a lead agency may determine that an EIS provider is not in compliance with requirements relating to making decisions about the settings where infants or toddlers with disabilities receive early intervention services. To take corrective action and verify the correction in a case such as this would likely take more than 90 days. Therefore, we continue to believe that an outside timeframe of one year will provide lead agencies adequate time to correct noncompliance identified through monitoring while at the same time ensuring that lead agencies timely correct noncompliance.

Concerning commenters' requests to have lead agencies publicly report on timely correction, subpart H of these regulations identifies the specific reporting requirements, including timelines for reporting the correction of noncompliance. Pursuant to § 303.702(b)(1)(i)(A), a lead agency is required to report annually to the public on the performance of each EIS program on the targets in the SPP. Additionally, every State is required to report on the timely correction of noncompliance in its APR. We decline to add a reporting requirement to § 303.120(a)(2)(iv) because the SPP/APR reporting requirements regarding timely correction of noncompliance are adequate to ensure that the public and the Department are informed about a lead agency's performance in correcting noncompliance under § 303.120(a)(2).

Changes: None.

Data Collection (§ 303.124)

Comment: One commenter opposed the requirement in § 303.124(b) that statewide data systems include a description of the State's sampling methods, if sampling is used, for reporting certain data required by the Secretary. The commenter opposed this requirement stating that sampling is not supported by the Act.

Discussion: We disagree with the commenter that sampling is not supported by the Act. Section 635(a)(14) of the Act provides that the part C statewide system include a system for compiling data requested by the Secretary under section 618 of the Act that relates to part C of the Act, and section 618(b)(2) of the Act specifically states that the Secretary may permit States and the Secretary of the Interior to obtain data through sampling.

Changes: None.

State Interagency Coordinating Council (§ 303.125)

Comment: One commenter recommended that this section require the establishment and maintenance of a Federal interagency coordinating council that also meets the requirements of subpart G of these regulations.

Discussion: The 2004 amendments to the Act eliminated the authority for a Federal interagency coordinating council. Therefore, it would be inconsistent with the Act and the intent of Congress to require the establishment and maintenance of a Federal interagency coordinating council.

Changes: None.

Early Intervention Services in Natural Environments (§ 303.126)

Comment: A few commenters requested that § 303.126, regarding the provision of early intervention services in the natural environment, include the phrase ''necessary to meet the unique needs of the infant or toddler with a disability and the family'' when referring to early intervention services.

Discussion: Section 303.126 cross-references § 303.344(d)(1), which requires the child's IFSP to include a statement of the specific early intervention services that are necessary to meet the unique needs of the child and the family to achieve the measurable results or outcomes identified in the IFSP. Section 303.344(d)(1) requires that early intervention services be individualized according to the child's needs. Therefore, it is not necessary to repeat this requirement in § 303.126 in connection with a statewide system that includes policies and procedures to ensure that early intervention service settings, to the maximum extent appropriate, are provided in natural environments.

Changes: None.

Comment: Many commenters stated that the language in § 303.126(b) should incorporate the language in section 635(a)(16) of the Act and requested that the phrase ''provided satisfactorily'' be replaced with the statutory phrase ''achieved satisfactorily.''

Discussion: Our use of the phrase ''provided satisfactorily'' in proposed § 303.126(b) was not intended to be a substantive change from section 635(a)(16) of the Act or current practice. We agree that the language in this section should incorporate the language in section 635(a)(16) of the Act.

Changes: We have replaced the word ''provided'' in § 303.126(b) with the word ''achieved.''

Comment: Several commenters requested that § 303.126(b) be reworded to clarify that parents are members of the IFSP Team.

Discussion: It is certainly true that, under section 636(a)(3) of the Act and § 303.343(a)(1)(i) of these regulations, parents are required members of a child's IFSP Team. However, we decline to make the requested change because § 303.126(b), which is taken directly from section 635(a)(16)(b) of the Act, underscores the important role parents have in deciding, together with the rest of the members of the IFSP Team, whether early intervention services will be provided in settings other than the child's natural environment. Given that other provisions in the regulations and the Act make clear that the child's parents are required members of a child's IFSP Team, we do not believe it is necessary to revise § 303.126(b) as requested by the commenters.

Changes: None.

Subpart C—State Application and Assurances

General

Comment: A few commenters requested clarification about State application requirements regarding how States ensure the coordination of all available resources and whether interagency agreements, State laws or regulations, or other methods were required.

Discussion: Each State must have policies and procedures to ensure the coordination of all available resources in the State and to implement the payor of last resort requirements in § 303.511. Section 303.511(b) requires the State to use one or more of the following methods to implement part C's payor of

last resort requirements: State law or regulation, interagency agreements, or other appropriate written methods that are approved by the Secretary.

We have added a new § 303.203(b)(2) to clarify that the State must include in its application, those methods used by the State to implement the payor of last resort requirements in § 303.511(b)(2) and (b)(3), such as interagency agreements and other appropriate written methods. We require submission of the methods referenced in § 303.511(b)(2) and (b)(3) in the State's application because these methods must be approved by the Secretary before implementation.

Changes: We added in new § 303.203(b)(2), regarding State application requirements, that States must submit ''methods used by the State to implement the requirements in § 303.511(b)(2) and (b)(3).''

Comment: Some commenters requested that the Department define ''rigorous'' as that term is used in the phrase ''rigorous definition of developmental delay'' in § 303.203(c). One commenter expressed concern that some State definitions of developmental delay exclude infants and toddlers with mild developmental delays from part C eligibility. The commenter requested that the Department clarify that a State's definition of developmental delay should include mild developmental delays.

Discussion: Within each State, eligibility for part C services turns, in part, on how the State defines developmental delay. We interpret the term ''rigorous'' in the phrase ''rigorous definition of developmental delay'' in § 303.203(c) to mean that the State has obtained public input on its definition pursuant to § 303.208 (because the definition constitutes a State policy), and that its definition meets the requirements in § 303.111(a) and (b).

Under § 303.111(a) and (b), the State's definition of developmental delay must include: (1) A description of the evaluation and assessment procedures that will be used, consistent with § 303.321, to measure a child's development; and (2) a description of the specific level of developmental functioning or other comparable criteria that constitute a developmental delay in one or more of the developmental areas identified in § 303.21(a)(1). Under § 303.208, the State must receive, and respond to, public comments (including comments from parents, EIS providers, members of the Council and other stakeholders) and conduct public hearings on its definition of developmental delay.

Requiring public scrutiny of the definition of developmental delay in each State before the State adopts it helps ensure that the definition ultimately adopted by the State is appropriate for that State. As noted in the preamble discussion for § 303.111 of subpart B of these regulations, a State is not required to change its definition of *developmental delay* in order for it to be ''rigorous'' provided that the definition (regardless of the level of developmental delay it covers) meets the requirements in § 303.111(a) and (b) and met the public participation requirements in § 303.208(b) since the Act was amended in December 2004.

Given that section 635(a)(1) of the Act provides each State with the flexibility to define the term developmental delay, as it is used in the State's part C program, the requirements in §§ 303.111 and 303.208 address the public's desire to ensure appropriate identification of all infants and toddlers with disabilities while providing each State the continued flexibility to develop its definition.

Changes: None.

Application's Definition of At-Risk Infants and Toddlers and Description of Services (§ 303.204)

Comment: One commenter supported the requirements of this section and the definition of the term *at-risk infant or toddler* in § 303.5, but expressed concern that serving at-risk infants and toddlers would be an additional fiscal burden on States.

Discussion: Serving at-risk infants or toddlers is a State option under section 632(5)(B)(i) of the Act. Section 303.204 incorporates the requirement from section 637(a)(4) of the Act that the State describe the services to be provided to at-risk infants and toddlers through the part C statewide system only if the State chooses to make ''at-risk infants and toddlers'' eligible for part C services in the State.

If a State elects to provide services to at-risk infants and toddlers with disabilities, the State must include the definition of at-risk infants and toddlers with disabilities in its application. A State also must include in its application a description of the early intervention services to be provided to at-risk infants and toddlers with disabilities. Section 303.204 does not require a State to provide services to at-risk infants and toddlers; therefore, these requirements and the financial responsibilities associated with their implementation are applicable only to those States that choose to include ''at-risk infants and toddlers'' in their definition of infant or toddler with a disability under § 303.21(b).

Changes: None.

Comment: One commenter recommended adding language in § 303.204(a) to encourage States to examine closely the percentage of premature infants who eventually receive part C services and to use this information to develop presumptive eligibility criteria for at-risk infants and toddlers to receive part C services.

Discussion: The Act does not require States to develop presumptive eligibility criteria for at-risk infants and toddlers. Sections 632(1), 632(5)(B)(i), and 637(a)(4) of the Act provide States with the option to make at-risk infants and toddlers eligible under part C of the Act, and further to determine the part C services that will be made available to these children. This flexibility enables each State to determine the eligibility criteria for at-risk infants and toddlers that are most appropriate in the State. Examining data on premature infants who eventually receive part C services is one method a State could use to help determine its eligibility criteria for at-risk infants or toddlers, but there are other methods that might be more appropriate for other States. For example, a State with a large number of homeless infants and toddlers who have high rates of developmental delay could determine that such children should be presumptively included in its definition of at-risk infants and toddlers.

Therefore, while a State could certainly use data on premature infants who eventually receive part C services to inform its decision on the eligibility criteria the State will use for at-risk infants or toddlers, it is not appropriate to require all States to do so.

Changes: None.

Availability of Resources (§ 303.207)

Comment: A few commenters recommended replacing the word ''resources'' in § 303.207 with the term ''services'' because the term ''resources'' is not defined in the regulations or the Act.

Discussion: Section 303.207 incorporates the language (including the term ''resources'') from section 637(a)(7) of the Act. We decline to make the requested change because we interpret the term ''resources,'' as used in section 637(a)(7) of the Act and § 303.207, to be broader than the term ''services.'' We interpret ''resources'' to include not only services but also funding, personnel, and other materials. This regulatory provision ensures that resources—not just services—are available in all geographic areas within a State.

Changes: None.

Public Participation Policies and Procedures (§ 303.208)

Comment: Commenters requested that the Department clarify when the public participation requirements in § 303.208 apply. Some commenters requested that the public participation requirements in current § 303.110(a)(1), including a 30-day comment period, be retained. A number of commenters, including parents of infants and toddlers with disabilities, service providers, and national disability rights organizations, requested that the 30-day timeline for notice of public hearings from current § 303.110(a)(3) be retained in § 303.208 to ensure meaningful public participation at public hearings. These commenters stated that the phrase ''adequate notice'' as used in proposed § 303.208(a)(1) is too vague.

A few commenters opposed the public participation requirements in proposed § 303.208. One commenter suggested that States use their State Administrative Procedure Act (APA) procedures instead of the procedures in § 303.208. Another commenter stated that the State's part C application should not be subject to any public participation requirements if the application does not include policies or procedures that affect direct services to eligible infants and toddlers and their families. Another commenter stated that it would be too burdensome to require public hearings when States amend their policies and procedures.

Finally, a few other commenters recommended that the public participation requirements expressly identify foster parents and other caregivers of infants and toddlers with disabilities as stakeholders in the public participation process.

Discussion: The purpose of § 303.208 is to require each State to engage the public in the development of its part C application and to include, in its application, information on its public participation policies and procedures. Section 303.208 is based, in part, on section 637(a)(8) of the Act, which requires each State's application to include a description of State policies and procedures that ensure that, prior to the adoption by the State of any other policy or procedure necessary to meet the requirements of part C of the Act, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of infants and toddlers with disabilities.

We have restructured this section in response to comments requesting clarification on the applicability of the public participation requirements. As restructured, paragraph (a) of this section describes the applicability of the public participation requirements to the part C application itself. Section 303.208(b) describes the applicability of the public participation requirements to any new policy or procedure (including any revision to an existing policy or procedure) needed to comply with part C of the Act and these regulations.

The requirements in § 303.208(a) that States publish their part C applications for 60 days and obtain public comments during a 30-day period within that 60-day period are consistent with the requirements in current § 303.110(a)(1) and section 441 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232d(b)(7)(B)). Under § 303.208(b), a State is required to conduct public hearings when the State is adopting or revising a policy or procedure that is necessary to meet the requirements of part C of the Act and these regulations. This public hearing requirement is intended to ensure that States obtain, consistent with section 637(a)(8) and (b)(7) of the Act, meaningful involvement from the public (including underrepresented populations) on the State's policies and procedures necessary to carry out the requirements of part C of the Act prior to implementing those policies and procedures.

Restructuring § 303.208 in this manner addresses requests by commenters to retain language from current §§ 303.110(a)(1) and (a)(3). Specifically, § 303.208(a) ensures that the public has at least 30 days to comment on a State's part C application before the State submits the application to the Department. Additionally, we agree with commenters that specifying a minimum timeline for notice of public hearings is preferable to simply requiring that States provide ''adequate notice'' of the hearings. It is the Department's position that 30 days prior notice is the minimum notice needed to ensure meaningful public participation at public hearings. For this reason, in § 303.208(b)(2), we have added the requirement from current § 303.110(a) that States must provide notice of public hearings at least 30 days prior to the hearing. Regarding the comments opposing the public participation requirements in § 303.208, we appreciate the concern about the potential burden these requirements place on States and lead agencies; however, we strongly believe that the benefits of public input outweigh any potential burden because States have flexibility under part C of the Act in many areas (*e.g.,* developing their definition of developmental delay, serving at-risk infants and toddlers, serving children beyond age three, using part B or C due process procedures, and system of payments), and the part C policies and procedures in these and other areas affect the fundamental rights of infants and toddlers with disabilities and their families. For this reason, it is critical that the public have an opportunity to weigh in on a State's policies and procedures, regardless of whether they are new or revised or if they involve direct part C services.

In response to the comment recommending that States be permitted to use their State APA procedures to ensure public participation in connection with part C policies and procedures, we decline to make any changes to § 303.208. State APA procedures vary from State to State, and because the Department views meaningful public participation as critical for the part C program, it is appropriate to establish in § 303.208 the minimum steps States must take to ensure meaningful public participation. This will ensure that all States participating in the part C program have procedures that are consistent at least with the requirements in § 303.208.

Finally, when referring to the ''general public,'' § 303.208 specifically lists ''parents of infants and toddlers with disabilities.'' The definition of the term *parent,* as used in these regulations, includes foster parents, guardians authorized to act as a child's parent, caregivers who are individuals acting in the place of a biological parent with whom the child is living, or surrogate parents who have been appointed in accordance with § 303.422. Therefore, adding a reference to foster parents and caregivers in this section is not necessary.

Changes: We have restructured § 303.208 to clarify the applicability of the public participation requirements to (a) the State's part C application, and (b) the State's policies and procedures (including any revision to an existing policy or procedure) that are necessary to comply with part C of the Act.

Finally, as described in the discussion of new § 303.101(c) earlier in this preamble, we have moved the requirement that States obtain approval by the Secretary before implementing any policy, procedure, method, or budget information that is required in §§ 303.200 through 303.212 to be submitted as part of the States' application. This requirement was reflected in proposed § 303.208(b). We did deviate from the language in proposed § 303.208(b) by referring to

policies, procedures, methods and budget information required in §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211—rather than those required in §§ 303.200 through 303.212, more generally.

Comment: A few commenters recommended that the Department add the word ''shall'' to the end of § 303.208(a)(2).

Discussion: As noted elsewhere in this discussion, we have restructured § 303.208 to clarify the entire section. Given the revisions made to this section, the commenters' requested change is no longer applicable.

Changes: None.

Comment: One commenter expressed concern that requiring States to seek approval of the Secretary before implementing policies, procedures, and methods that are subject to the public participation requirements in proposed § 303.208(b) (new § 303.101(c)) will impede a State's ability to respond in a timely way to the local needs of eligible children, families, and early intervention programs.

Discussion: Section 637(a) of the Act requires each State that seeks part C funding to submit an application to the Secretary for approval. This section of the Act also describes the information that must be included in the State application. Pursuant to section 637(a)(3)(A) of the Act, each State must submit as part of its application ''information demonstrating to the Secretary's satisfaction that the State has in effect the statewide system required by section 633'' of the Act.

Pursuant to section 637(a)(3)(A) of the Act, we continue to require each State to submit in its application the policies, procedures, methods and budgetary and other information required in §§ 303.201 through 303.212, though, for the sake of clarity, we list the specific regulatory sections (*i.e.,* §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211). This requirement ensures that a State's application includes, for example, its policies regarding its system of payments (*i.e.,* financial sources such as insurance or family fees to pay for part C services) and its definition of developmental delay. These policies and procedures, among others required in §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211, are critical to understanding a State's implementation of part C of the Act, such as the individuals whom the State is serving and the funding sources used to pay for the provision of early intervention services.

We have retained in § 303.101(c) the long-standing Departmental policy of requiring a State to obtain approval of policies and procedures that must be submitted to the Secretary prior to implementation. The purpose of the Secretary's review is to ensure that State policies and procedures are consistent with the Act, thereby ensuring that the rights of infants and toddlers with disabilities and their families are protected and the responsibilities of lead agencies, EIS providers, and parents are explicitly defined.

Changes: None.

Transition to Preschool and Other Programs (§ 303.209)

Application Requirements (§ 303.209(a))

Comment: None.

Discussion: Upon further review of § 303.209, we determined that it would be helpful to clarify that the transition requirements in § 303.209 apply to all toddlers with disabilities before those toddlers turn three years old, including those toddlers with disabilities served by States that elect to provide services pursuant to § 303.211.

To distinguish the transition requirements in § 303.211(b)(6), which apply to toddlers receiving services under the part C extension option in § 303.211, who by definition are age three or older, we have revised § 303.209(a) to state that the transition policies and procedures it must describe relate to the transition of infants and toddlers with disabilities under the age of three and their families. As further discussed elsewhere in this *Analysis of Comments and Changes* section, we have made corresponding changes to § 303.211 to clarify that the transition requirements in § 303.209 apply to all infants and toddlers under the age of three who are transitioning from the part C program (as described in § 303.211(b)(6)(i)) and that the transition requirements described in § 303.211(b)(6)(ii) apply to children age three and older who are transitioning from services provided pursuant to § 303.211.

Changes: We have deleted in new § 303.209(a)(1) (proposed § 303.209(a)(1)(i)) the parenthetical ''(including toddlers receiving services under § 303.211).'' We also have revised § 303.209(a)(1) to clarify that each State must describe in its application, the policies and procedures it will use to ensure a smooth transition for infants and toddlers with disabilities under the age of three and their families from receiving early intervention services to (i) preschool or other appropriate services (for toddlers with disabilities) or (ii) exiting the program (for infants and toddlers with disabilities). We have addressed separately in new § 303.211(b)(6)(ii) the substance of proposed § 303.209(b)(2)(i) and (b)(2)(ii) regarding transition from services under § 303.211.

Comment: Some commenters opposed § 303.209(a)(3)(i)(B), which requires a State whose lead agency is the SEA to include in its application an intra-agency agreement between the program within the SEA that administers part C of the Act and the program within the SEA that administers section 619 of the Act. These commenters stated that requiring two programs within one SEA to have an agreement with each other is unnecessary and would create an undue paperwork burden. A few other commenters expressed concern that the requirement would be particularly burdensome for States with seamless ''Birth to Five'' programs.

Discussion: Section 303.209(a)(3)(i) requires all States, including those in which the SEA is the lead agency, to establish an interagency or an intra-agency agreement between the early intervention program under part C of the Act and the preschool program under section 619 of part B of the Act. We included the requirement for intra-agency agreements because, through the Continuous Improvement Focused Monitoring System (CIFMS) process and State reporting under the SPP/APRs, the Department has identified noncompliance with transition requirements under both part C of the Act (*e.g.,* noncompliance with section 637(a)(9) of the Act, regarding notification of the LEA and conducting transition conferences, and, with sections 636(a)(3) and (d)(8) and 637(a)(9) of the Act, regarding the transition steps and services in the IFSP) and part B of the Act (*e.g.,* noncompliance with section 612(a)(9) of the Act, regarding development and implementation of an IEP by a child's third birthday). Given this noncompliance and the need for States to have clearly defined transition coordination policies and procedures between the early intervention program under part C of the Act and the preschool program under part B of the Act, requiring an intra-agency agreement will be a useful tool to enhance coordination and communication between the part C and part B preschool programs.

Developing interagency or intra-agency agreements should not be a significant burden for States because approximately two-thirds of lead agencies already have interagency agreements and the remaining third, where the lead agency is also the SEA, currently are required to have transition policies and procedures that address the

transition of toddlers from early intervention to preschool services under parts B and C of the Act. For lead agencies that are also SEAs, the Department's position is that the benefits associated with requiring intra-agency agreements pursuant to § 303.209(a)(3)(i)(B) outweigh the minimal burden associated with this requirement. An intra-agency agreement serves the useful purpose of ensuring that there is an appropriate level of coordination and communication across the early intervention and preschool programs in a lead agency that is also an SEA. The burden of developing this agreement is minimal because the requirement does not involve the development of new transition policies and procedures—these policies and procedures are already required pursuant to § 303.209(a). Moreover, the Council often serves to advise the lead agency when it develops these agreements; in fact, the Council is specifically required under section 641(e)(1)(C) of the Act to advise and assist the SEA (which in this case would be the lead agency) regarding the transition of toddlers with disabilities to preschool and other appropriate services.

There are only a few States that have adopted ''Birth to Five'' programs (*i.e.,* programs in which the SEA and LEA provide both preschool services under part B of the Act and early intervention services under part C of the Act to children from ages birth to five). In these States, the same State and local agencies administer part C of the Act and section 619 of the Act. Therefore, States with these programs must include one or more intra-agency agreements to satisfy the requirement in § 303.209(a)(3)(i)(B). As stated in the preceding two paragraphs, the benefits associated with intra-agency agreements pursuant to § 303.209(a)(3)(i)(B) outweigh the minimal burden associated with the requirement.

Changes: None.

Comment: None.

Discussion: Based on further review of § 303.209(a)(3)(ii), we have determined that additional clarification is needed with regard to the required transition-related content of the interagency and intra-agency agreements under § 303.209(a)(3)(i). To clarify that these agreements must address how the lead agency and the SEA will meet the confidentiality requirements in § 303.401(d) and (e), we have added specific references to those provisions in § 303.209(a)(3)(ii). Additionally, we have specified that the agreements required pursuant to § 303.209(a)(3)(i) must address how the agency and the SEA will meet, for all children transitioning from part C services to part B services, the requirements in 34 CFR 300.101(b)—that is, how the lead agency and the SEA will ensure that FAPE is made available to each eligible child residing in the State no later than the child's third birthday.

Changes: We have added the words ''including any policies adopted by the lead agency under § 303.401(d) and (e)'' as well as a reference to 34 CFR 300.101(b) to § 303.209(a)(3)(ii).

Notification to the SEA and Appropriate LEA (§ 303.209(b))

Comment: None.

Discussion: Upon further consideration of this section of the regulations, we have determined that the requirement in proposed § 303.209(b)(1) that each family member of a toddler with a disability receiving part C services be included in the development of the transition plan is better addressed under the transition plan requirements in § 303.209(d) and not with the SEA and LEA notification requirements in § 303.209(b). This change does not reflect a substantive change to the regulations.

Changes: We moved the text from proposed § 303.209(b)(1) to new § 303.209(d)(1)(ii).

Comment: Some commenters supported the requirement, reflected in new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)), that the lead agency notify the LEA, at least nine months before the third birthday of a toddler who resides in the area served by the LEA, that the toddler will reach the age of eligibility for preschool services under part B of the Act. Other commenters opposed this nine-month timeline stating that it would be an undue burden and inconsistent with the Act. Several of these commenters recommended alternative timelines (*i.e.,* timelines ranging from 10 days to 3 or 6 months before a child's third birthday). One commenter recommended aligning the timeline requirement for LEA notification in new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) with the 90-day timeline for transition plans in § 303.209(d)(2).

Discussion: Establishing a timeline within which a lead agency must notify the appropriate LEA that a child is about to transition from part C services and may be eligible for services under part B of the Act is challenging. The timeline must allow sufficient time for both the lead agency to fulfill its transition responsibilities under sections 636(a)(3) and (d)(8) and 637(a)(9) of the Act and the SEA and LEA to meet their respective child find and early childhood transition responsibilities under sections 612(a)(3), 612(a)(9), 612(a)(10)(A)(ii), and 614(d)(2)(B) of the Act and 34 CFR 300.124.

For the reasons outlined in the following paragraphs, we agree with the commenter who recommended aligning the LEA notification requirement with the 90-day timeline for transition plans in § 303.209(d)(2).

We have revised new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) to require that LEA notification occur no fewer than 90 days prior to the toddler with a disability's third birthday. This ''not fewer than 90 days'' timeline for LEA notification aligns with the date by which: (1) A transition conference must be conducted for a toddler with a disability who may be eligible for services under part B of the Act (as required in section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c)(1)); and (2) a transition plan must be in place for all toddlers with disabilities (as required in § 303.209(d)(2)).

We also are making this change in order to provide SEAs and LEAs with enough time to carry out their responsibilities in implementing part B of the Act. These responsibilities include, under section 612(a)(9) of the Act and 34 CFR 300.124(c) of the part B regulations, participation by a representative from the LEA where the toddler with a disability resides in the transition conference that the lead agency is required to conduct under section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c)(1). In addition, when the LEA receives notice from the lead agency or an EIS provider that a specific toddler with a disability who has been receiving services under part C of the Act is potentially eligible for services under part B of the Act, the LEA must treat this as a referral and provide parents with the procedural safeguards notice under 34 CFR 300.504(a)(1) and determine if an evaluation for eligibility must be conducted under part B of the Act.

Further, if the parent consents to the initial evaluation under part B of the Act, the LEA must conduct the evaluation within 60 days of receiving parental consent or pursuant to a State-established timeline as required in section 614(a)(1)(C) of the Act and 34 CFR 300.301(c)(1) of the part B regulations. If the child is determined eligible under part B of the Act, the LEA must conduct, pursuant to 34 CFR 300.323(c)(1) of the part B regulations, a meeting to develop an IEP for the child with a disability within 30 days of

the eligibility determination. For toddlers with disabilities who are referred from the part C program to the part B program, this 60-day evaluation timeline (reflected in 34 CFR 300.301(c)(1) of the part B regulations) and the 30-day IEP meeting timeline (reflected in 34 CFR 300.323(c)(1) of the part B regulations) are subject to the requirement in section 612(a)(9) and 34 CFR 300.101(b) and 300.124(b) of the part B regulations that the SEA and LEA ensure that, for a child who transitions from services under part C of the Act to part B of the Act, an IEP is developed and implemented for the child by the time the child reaches age three. Thus, the 90-day period prior to the toddler's third birthday is the minimal time period necessary for an LEA to meet its responsibilities to ensure that an IEP is developed and implemented by the child's third birthday.

We recognize that some States may have a State-established timeline for conducting an evaluation under part B of the Act that is different than the 60-day timeline in 34 CFR 300.301(c)(1). Even if a State adopts a longer part B evaluation timeline under 34 CFR 300.301(c)(1) of the part B regulations, each SEA and LEA must ensure that an IEP is developed and implemented for a toddler with a disability transitioning from part C to part B of the Act by the time the toddler reaches age three. This requirement is reflected in section 612(a)(9) of the Act and 34 CFR 300.101(b) and 300.124(b) of the part B regulations. Thus, it is the Department's position that the 90-day notification timeline provides the minimum amount of time necessary for an SEA and LEA to meet their respective early childhood transition responsibilities under part B of the Act.

Finally, in reviewing § 303.209, we have determined that it is not appropriate to refer to ''other services'' under part B of the Act because this section addresses only the transition that must occur before an infant or toddler with a disability turns three years old. References to other services, such as elementary school, are now more appropriately addressed in § 303.211(b)(6) regarding the transition requirements of children who are three and older and receiving services under § 303.211.

Changes: We have revised new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)(i)) to require the lead agency to notify the SEA and the LEA for the area in which the toddler resides ''not fewer than 90 days'' before the third birthday of the toddler with a disability if that toddler may be eligible for preschool services under part B of the Act.

Comment: A few commenters recommended that we clarify that the lead agency must notify the LEA under § 303.209(b) only for those children who are potentially eligible for services under part B of the Act.

Discussion: We agree and have revised § 303.209(b) to clarify that the LEA notification requirement applies only to toddlers with disabilities who may be eligible for preschool services under part B of the Act and not to all toddlers with disabilities.

The part C lead agency establishes the State's policy regarding which children may be eligible for preschool services under part B of the Act. In establishing this policy, the lead agency should review carefully, ideally in collaboration with the SEA, the eligibility definitions under parts B and C of the Act, including the State's definitions of developmental delay under both parts B and C of the Act.

The determination of whether a toddler with a disability is ''potentially eligible'' for services under part B of the Act is critical under both parts C and B of the Act. It is the first step in ensuring a smooth transition for that toddler and family to services under part B of the Act. When the LEA receives notice from the lead agency or an EIS provider that a specific toddler with a disability who has been receiving services under part C of the Act may be eligible for services under part B of the Act, the LEA must treat this as a referral and provide parents with the procedural safeguards notice under 34 CFR 300.504(a)(1) and determine if an evaluation for eligibility must be conducted under part B of the Act.

There are several reasons for limiting LEA notification to children who may be eligible for preschool services under part B of the Act. First, the limitation is consistent with section 637(a)(9)(A)(ii)(II) of the Act, which requires that, with the approval of the family of the child, the lead agency convene a transition conference among the lead agency, the family, and the LEA representative only for those children potentially eligible for preschool services under part B of the Act.

Second, limiting LEA notification to cover only toddlers potentially eligible for preschool services under part B of the Act is critical to ensuring that the SEA and LEA where the toddler resides have adequate time to meet their respective child find and early childhood transition responsibilities under sections 612(a)(3), 612(a)(9), 612(a)(10)(A)(ii), and 614(d)(2)(B) of part B of the Act, and in particular to develop and implement an IEP by the child's third birthday as required by section 612(a)(9) of the Act and 34 CFR 300.124(b). These provisions require that children who participate in the early intervention programs under part C of the Act and children who will participate in the preschool services under part B of the Act experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act.

Third, LEA notification should not be required for toddlers with disabilities who are not potentially eligible for part B services under the Act given that the lead agency has other responsibilities for these children, which we believe are sufficient to meet their transition needs. For these children, the lead agency must: (1) Ensure that a transition plan is developed pursuant to section 637(a)(9)(C) of the Act and § 303.209(d); and (2) make reasonable efforts, pursuant to section 637(a)(9)(A)(ii)(III) of the Act and § 303.209(c)(2), to convene a transition conference with the family of the toddler and providers of other appropriate services. The transition plan for toddlers with disabilities who are not potentially eligible for part B services under the Act must identify the appropriate steps for the toddler with disabilities and his or her family to exit from the part C program, include services, such as Head Start, that the IFSP team identifies as needed by that toddler and his or her family.

Finally, we are clarifying that the LEA notification requirement in § 303.209(b)(1)(i) only applies to toddlers who may be eligible for part B services because, if the requirement applied to all toddlers who are nearing age three, it would result in the unnecessary disclosure of personally identifiable information and place an undue burden on lead agencies, without any significant benefit. Ordinarily, to meet the LEA notification requirement, the lead agency must inform the LEA where the child resides and provide the LEA with the information referenced in § 303.401(d)(1) (*i.e.,* the child's name, date of birth, and parent contact information, including the parents' names, addresses, and telephone numbers), unless the State has adopted an opt-out policy under § 303.401(e). Requiring the lead agency to disclose this personally identifiable information for limited child find purposes to the LEA or even the SEA for children who are not potentially eligible for part B would be unnecessary and burdensome.

Changes: We have revised new § 303.209(b) (proposed § 303.209(b)(2)(i)

and (b)(2)(ii)) to clarify that a lead agency must notify the LEA under § 303.209(b) only for those children who may be eligible for services under part B of the Act.

Comment: Some commenters recommended that the LEA notification requirement in new § 303.209(b)(1)(i) (proposed § 303.209(b)(2)) apply to both the SEA and the LEA where the child resides.

Discussion: We have revised the LEA notification requirement in § 303.209(b)(1)(i) to require that the lead agency notify the SEA in addition to the LEA where the child resides. This change is intended to help lead agencies and SEAs coordinate to ensure a smooth and effective early childhood transition pursuant to sections 612(a)(9) and 637(a)(9)(A) of the Act. Moreover, this change will assist SEAs in carrying out their responsibilities under part B of the Act. For example, under section 612(a)(9) of the Act and 34 CFR 300.101(b) and 300.124(b) of the part B regulations, an SEA must ensure that FAPE is made available to an eligible child with a disability no later than that child's third birthday for all toddlers with disabilities who were referred for part B services by the lead agency and are eligible for services under part B of the Act. Also, an SEA must report annually in its SPP/APR on the percent of children referred by the part C program prior to the age of three who are found eligible for part B services and have an IEP developed and implemented by the third birthday. Requiring lead agencies to notify SEAs when a child may be eligible for part C services will help SEAs fulfill this obligation. Providing this information to SEAs will add very little burden to lead agencies because they are already required to provide the information to LEAs.

Changes: We have revised new § 303.209(b)(1)(i) through (b)(1)(iii) (proposed § 303.209(b)(1) and (b)(2)) to specify that the lead agency must notify the SEA and the LEA where the child resides in the case of a toddler who may be eligible for preschool services under part B of the Act.

Comment: A few commenters requested clarification in § 303.209 of the lead agency's transition responsibilities when a child is referred ''late'' to the part C program (*i.e.,* less than 45 or 90 days prior to the child's third birthday). A few commenters expressed concern that the reference to a child's ''third birthday'' in the LEA notification provision in proposed § 303.209(b)(2)(i) may interfere with State-established transition policies and may disrupt many existing options that have been carefully crafted by States and local communities to ensure seamless transitions from the part C program to the part B program.

Discussion: We agree that it is important to clarify the transition requirements that apply when a child is referred to or determined eligible for the part C program fewer than 90 days before the child's third birthday. Given the 45-day timeline requirement in new § 303.310, we have added paragraphs (b)(1)(i) and (b)(1)(ii) to new § 303.209 to address the commenters' concerns.

Specifically, new § 303.209(b)(1)(ii) clarifies that if a child is referred and determined eligible for services under part C of the Act between 90 and 45 days before the child's third birthday, LEA notification must occur as soon as possible after the child is determined eligible for early intervention services under part C of the Act. For these children, although the lead agency is not able to conduct a transition conference and develop a transition plan within the timelines in § 303.209(b)(1)(i) and (d)(2), we encourage States to discuss transition at the child's initial IFSP meeting.

New § 303.209(b)(1)(iii) clarifies that if a child is referred to the lead agency fewer than 45 days before that child's third birthday, the lead agency is not required to conduct an evaluation, assessment or an initial IFSP meeting. We believe that the referral of a child fewer than 45 days before a child's third birthday would not allow a lead agency sufficient time to conduct the evaluation, assessment and initial IFSP meeting. Additionally, a lead agency would not have sufficient time to conduct a transition conference to discuss steps and services. Thus, we have clarified in new § 303.209(b)(1)(iii) that, for a child who is referred to the lead agency fewer than 45 days before the child's third birthday, if the lead agency has received information in its referral that the child may be eligible for preschool services or other services under part B of the Act, the lead agency, with the parental consent required under § 303.414, must refer the toddler to the SEA and the LEA for the area in which the toddler resides.

Concerning commenters' requests not to use the child's ''third birthday'' in calculating timelines for LEA notification, the third birthday is significant under part C of the Act because eligibility for services for the toddler with a disability ends once that toddler turns three, with two exceptions. A lead agency may provide services to a child who has turned three years old if a State elects either to (a) offer services under the option to make part C services available beyond age three pursuant to § 303.211 and the parent consents to services under that section, or (b) provide services to a child who is eligible under part B of the Act from that child's third birthday to the beginning of the following school year under section 638(3) of the Act and § 303.501(c)(1), provided that those services constitute FAPE for that child. In both circumstances, the child, upon turning age three, must be eligible as a child with a disability under section 619 of the Act. With the exception of these two circumstances, part C services end at the child's third birthday; therefore, the Department's position is that the use of the phrase ''third birthday'' with regard to the LEA notification provision is appropriate.

Changes: We have added new § 303.209(b)(1)(ii) to clarify that if the lead agency determines, between 90 and 45 days prior to a child's third birthday that the child is eligible for early intervention services under part C of the Act, the lead agency must notify the SEA and the LEA for the area in which the toddler resides as soon as possible after the eligibility determination, that the toddler on his or her third birthday will reach the age of eligibility for services under part B of the Act, as determined in accordance with State law. Additionally, we have added paragraph (b)(3) to § 303.209 to provide that if a toddler is referred to the lead agency fewer than 45 days before that toddler's third birthday, the lead agency is not required to conduct an evaluation, assessment or an initial IFSP meeting, and if that toddler may be eligible for preschool services or other services under part B of the Act, the lead agency, with parental consent required under § 303.414, must refer the toddler to the SEA and the LEA for the area in which the toddler resides.

Conference To Discuss Services (§ 303.209(c))

Comment: A few commenters recommended clarifying the required attendees, timelines, and procedures for the transition conference required in § 303.209(c). One commenter asked why a child's service coordinator is not included in the list of required attendees for the transition conference. Other commenters requested that the regulations specifically require an LEA or SEA representative to participate in the transition conference; these commenters argued that this requirement would make the part C regulations consistent with 34 CFR 300.124(c) of the part B regulations.

Discussion: We agree that it would be helpful to clarify the required attendees

for a transition conference. For this reason, we have added a new paragraph (e) to § 303.209, which references § 303.343(a) and the required members of the IFSP Team, to ensure that the attendees required for periodic IFSP review meetings under § 303.343(b), including the service coordinator, also are required to attend the transition conference required under § 303.209(c) and the meeting to develop the transition plan pursuant to § 303.209(d).

It is the Department's position that requiring participation by an LEA representative under this part is not appropriate but we note that, as part of its responsibilities under section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c)(1) of these regulations, the lead agency must invite the LEA representative to the transition conference. Under 34 CFR 300.124(c) of the part B regulations, each LEA must participate in the transition conference arranged by the lead agency under section 637(a)(9)(A)(ii)(II) of the Act and § 303.209(c). Thus, the requirements under parts B and C of the Act provide adequately for the participation of the LEA in the transition conference.

Changes: We have added a new § 303.209(e) to require that the transition conference conducted under paragraph (c) of this section or the meeting to develop the transition plan under paragraph (d) of this section (which conference and meeting may be combined into one meeting) must meet the IFSP meeting and participant requirements in §§ 303.342(d) and (e) and 303.343(a).

Program Options and Transition Plan (§ 303.209(d))

Comment: One commenter recommended that the regulations clarify that a child transitioning from part C services to part B services must not have a gap in services during the summer months.

Discussion: Once a toddler with a disability who received services under part C of the Act turns three and is eligible for part B preschool services under section 619 of the Act, that toddler may receive services that are provided as either: (1) Part C services by the lead agency under § 303.211 (if the State has elected to offer early intervention services to children after age three, and the toddler's parent consents to receipt of services under this option), or (2) services that constitute FAPE either under section 619 of the Act (if the IEP Team determines such services are needed) or under section 638(3) of the Act (if the lead agency elects to offer such services). A State may provide services under sections 619, 635(c) or 638(3) of the Act regardless of whether the child turns age three during the summer months. However, if the child with a disability receives services under section 619 of the Act, any summer services (*i.e.,* extended school year (ESY) services pursuant to 34 CFR 300.106 of the part B regulations) must be provided, through an appropriate IEP, if the child's IEP Team determines that those ESY services are necessary for FAPE to be provided to that child.

Changes: None.

Comment: One commenter expressed concern that limiting transition planning to no more than nine months prior to the child's third birthday does not offer enough time to ensure a seamless transition for all children. The commenter recommended that the standard ''not fewer than 90 days'' be adopted if a timeline must be established at all.

Discussion: Section 303.209(d) requires that a transition plan be established in a child's IFSP not fewer than 90 days (and at the discretion of all parties, not more than 9 months) before a toddler's third birthday. The ''not fewer than 90 days'' component of this requirement aligns the timeline for transition planning with the timeline for the SEA and LEA notification requirements in § 303.209(b) and with the timeline for the transition conference for toddlers with disabilities potentially eligible for part B services in § 303.209(c), pursuant to section 637(a)(9)(A)(ii)(II) of the Act.

The outer limit of this timeline (*i.e.,* ''not more than 9 months'' before the toddler's third birthday) is intended to protect toddlers, whose needs change frequently at this age. The Department's position is that if transition planning occurs more than nine months prior to a toddler's third birthday, this planning may not accurately reflect the needs of the child at the time of transition. For this reason, the regulations only allow the parties to establish a transition plan for a child not earlier than nine months prior to the child's third birthday.

Changes: None.

Comment: One commenter recommended deleting ''as appropriate'' from § 303.209(d)(3), which requires, consistent with § 303.344(h), that the transition plan in the IFSP include, as appropriate, steps for the toddler with a disability and his or her family to exit from the program. The commenter stated that IFSP Teams should not have the discretion to determine which elements of a transition plan are appropriate.

Discussion: The phrase ''as appropriate'' is included in section 637(a)(9)(C) of the Act, the statutory authority for § 303.209(d)(3). Section 303.209(d)(3)(i) requires the transition plan to include certain steps for the toddler with a disability and his or her family to exit from the part C program. Section 636(a)(3) of the Act, regarding IFSP content requirements, was modified in 2004 to require that the IFSP identify the appropriate transition services for an infant or toddler. Section 303.209(d)(3) clarifies that the requirements in that section must be read in conjunction with § 303.344(h), which requires the IFSP to include steps to support the transition to one of the following: Preschool services under part B of the Act; elementary school or preschool services for children participating under a State's option in § 303.211 to provide early intervention services to children ages three and older; early education, Head Start, and Early Head Start or child care programs; or other appropriate services. The transition steps appropriate for a toddler with a disability will differ depending upon which program listed in § 303.344(h) the IFSP Team selects. The transition plan is part of the IFSP and must meet the content requirements in § 303.344. The IFSP Team must identify in the IFSP appropriate steps for the toddler and his or her family to exit the program and any transition services. Therefore, the phrase ''as appropriate'' gives the IFSP Team the flexibility to make an individualized determination as to what (not whether) transition steps and services are appropriate for each toddler with a disability.

Changes: None.

Comment: None.

Discussion: Based on further review of § 303.209(d)(2), we have determined that it is appropriate to clarify that a transition plan referred to in this section is actually a part of an IFSP and not a separate document. Consistent with section 636(a) of the Act, the IFSP must include a description of the appropriate transition services for the infant or toddler.

Changes: We have added the phrase ''in the IFSP'' following the words ''transition plan'' in § 303.209(d)(2). We also have added section 636(a)(3) of the Act (20 U.S.C. 1436(a)(3)) to the authority citation for this section.

Comment: A few commenters requested that the term ''transition services,'' as used in § 303.209(d)(3)(ii), be defined in the regulations.

Discussion: Transition services are those services that assist a toddler with a disability and his or her family to experience a smooth and effective transition from an early intervention program under part C of the Act to the

child's next program or other appropriate services, including services that may be identified for a child who is no longer eligible to receive part C or part B services. The IFSP Team, which includes the parent, determines the appropriate transition services for each toddler exiting the part C program. Given that transition services are based on the unique needs of the child and the family, States require flexibility to provide appropriate and individualized transition services for each child. Therefore, it is the Department's position that to further define the term transition services is not appropriate.

Changes: None.

Comment: Some commenters requested that a rule of construction be added to § 303.209 to indicate that part C programs would not be held responsible for ensuring that required transition timelines are met if referral for part C services occurs less than 45 days prior to the date that the transition conference must occur.

Discussion: It is the Department's position that adding a rule of construction to the regulations is not necessary because a State can use its inter or intra-agency agreements, or other methods, to clarify transition procedures and develop a process for unique circumstances, such as the referral of a child less than 45 days prior to the date that the transition conference must occur. The lead agency may not be able to meet the transition conference and transition plan timelines in § 303.209(c)(1) and (d) if the lead agency receives a referral for that child less than 45 days prior to the date that the transition conference must occur (*i.e.,* more than 90 days but less than 135 days (that is, 45 days plus 90 days) prior to the child's third birthday). However, we encourage States in these instances to discuss transition at the initial IFSP meeting for a toddler with a disability who is referred within 135 days of that toddler's third birthday.

Additionally, the lead agency remains responsible under § 303.310 for meeting the 45-day timeline for conducting the initial evaluation, assessments and IFSP meeting and, under §§ 303.342(e) and 303.344(f)(1), for implementing the IFSP services that are consented to by the parent as soon as possible. While we recognize that the lead agency may not be able to meet the transition conference and transition plan timelines in § 303.209(c) and (d) for children referred 135 days prior to their third birthday, pursuant to § 303.209(b)(1)(ii), the lead agency must still refer the toddler with a disability, as soon as possible, to the SEA and the LEA where the toddler resides if that toddler is potentially eligible for preschool services under part B of the Act.

Changes: None.

Comment: One commenter requested clarification as to whether the IFSP meeting requirements, including accessibility of meetings, apply to transition conferences in § 303.209.

Discussion: In response to this comment, we have added new § 303.209(e) to clarify that transition conferences conducted under § 303.209(c) must meet the accessibility and parental consent requirements in § 303.342(d) and (e) and the meeting participant requirements in § 303.343(a). Additionally, because the meeting to develop the transition plan under § 303.209(d) can, but may not, occur at the time of the annual or periodic IFSP review, we also have clarified that the meeting to develop the transition plan under § 303.209(d) must meet the accessibility and parental consent requirements in § 303.342(d) and (e) and the meeting participant requirements in § 303.343(a).

States may choose, but are not required, to combine the transition conference with the meeting to develop the transition plan. It may make sense in many States to combine the transition conference and IFSP transition plan meeting, particularly for children potentially eligible for services under part B of the Act, given that: (1) The LEA representative must attend the transition conference (under section 612(a)(9) of the Act and 34 CFR 300.124(c) of the part B regulations); and (2) the SEA and LEA must ensure that an IEP is developed and implemented by age three for children with disabilities transitioning from part C to part B of the Act (under section 612(a)(9) of the Act and 34 CFR 300.101(b) and 300.124(b) of the part B regulations). We do not require that the transition conference and meeting to develop the transition plan be combined because transition practices vary both between States and within States and it may not be appropriate for children not potentially eligible for services under part B of the Act.

Changes: We have added new § 303.209(e) to clarify that any conference conducted under paragraph (c) of this section or the meeting to develop the transition plan under paragraph (d) of this section must meet the requirements in §§ 303.342(d) and (e) and 303.343(a). We also have included a parenthetical in this new section confirming that this conference and meeting may be combined into one meeting.

Comment: A few commenters sought guidance on how the transition requirements in § 303.209 apply, including how to implement the transition timeline requirements in §§ 303.209(c)(1) and 303.209(d)(2) for children served under § 303.211.

Discussion: We have added new § 303.209(f) to clarify that the transition requirements under § 303.209 apply to all toddlers with disabilities before they turn three years old and to identify the separate, additional transition requirements that apply to toddlers with disabilities in a State that offers services under § 303.211. Thus, new § 303.209(f)(1) sets forth the requirement that the lead agency must ensure the transition requirements in § 303.209 apply to all toddlers with disabilities (including toddlers with disabilities in a State that offers services under § 303.211) before they turn three years old.

For toddlers with disabilities in a State that offers services under § 303.211, we also have clarified in new § 303.209(f)(2) the additional requirements that apply at the transition conference. Under new § 303.209(f)(2), at the transition conference, the parents of a toddler with a disability must receive: (1) An explanation, consistent with § 303.211(b)(1)(ii), of the toddler's options to continue to receive early intervention services under this part or preschool services under section 619 of the Act; and (2) the initial annual notice referenced in § 303.211(b)(1). We have added these requirements in § 303.209(f)(2) to ensure that the initial annual notice required in § 303.211(b)(1) is provided at the transition conference when the IFSP Team, which includes the parent of a toddler with a disability, is required to consider transition options, steps and services. The annual notice requirement in § 303.209(f)(2) is not new as it is required under § 303.211(b)(1). Requiring the initial annual notice to be provided at the transition conference is critical because the annual notice must contain an explanation of the differences between services provided under § 303.211 and preschool services under section 619 of the Act.

In new § 303.209(f)(3), we clarify that the transition requirements in new § 303.211(b)(6)(ii), which relate to transition from services under § 303.211 to preschool, kindergarten or elementary school, apply to children age three and older when those children are receiving services under § 303.211. We also discuss these transition requirements further in the discussion relating to new § 303.211(b)(6) later in this *Analysis of Comments and Changes* section of the preamble.

Changes: We removed from new § 303.209(a)(1) (proposed § 303.209(a)(1)(i)) references to children receiving services under § 303.211. We have added new paragraphs (f)(1), (f)(2), and (f)(3) to § 303.209 to clarify the applicability of transition requirements under § 303.209. New § 303.209(f)(1) provides that the transition requirements in paragraphs (b)(1) and (b)(2), (c)(1), and (d) of this section apply to all toddlers with disabilities receiving services under this part before those toddlers turn age three. New § 303.209(f)(2) states that ''In a State that offers services under § 303.211, for toddlers with disabilities identified in paragraph (b)(1) of this section, the parent must be provided at the transition conference conducted under paragraph (c)(1) of this section: (i) An explanation, consistent with § 303.211(b)(1)(ii), of the toddler's options to continue to receive early intervention services under this part or preschool services under section 619 of the Act and (ii) The initial annual notice referenced in § 303.211(b)(1).'' Finally, in new § 303.209(f)(3), we clarify that the transition requirements for children with disabilities age three and older receiving services under § 303.211 are set forth in § 303.211(b)(6)(ii).

Coordination With Head Start and Early Head Start, Early Education, and Child Care Programs (§ 303.210)

Comment: One commenter stated that § 303.210 is redundant because Head Start and Early Head Start are required members of the State Interagency Coordinating Council (Council) under § 303.601(a)(8).

Discussion: We do not agree that the inclusion of Head Start and Early Head Start in § 303.210 repeats the requirement in § 303.601(a)(8), which requires at least one member of the Council to be from a Head Start or Early Head Start agency or program in the State. Section 303.210 implements section 637(a)(10) of the Act, which requires each State application to contain a description of State efforts to promote collaboration among Early Head Start programs under section 645A of the Head Start Act, early education and child care programs, and services under part C of the Act. This is different from the requirement in section 641(b)(1)(H) of the Act, and implemented through § 303.601(a)(8), which specifies that at least one member of the Council must be from a Head Start or Early Head Start agency or program in the State.

Changes: None.

Comment: None.

Discussion: As discussed under § 303.118, section 642B of the Head Start Act of 2007 now requires the Governor of each State to designate or establish a council to serve as the State Advisory Council on Early Childhood Education and Care (referred to as State Advisory Councils). 42 U.S.C. 9837b(b)(1)(A)(i). Section 642B(b)(1)(C)(viii) of the Head Start Act states that the members of the State Advisory Council shall include, to the maximum extent possible a representative of the State agency responsible for programs under section 619 or part C of the IDEA. Because this requirement regarding State Advisory Councils was established after the proposed part C regulations were published, in final § 303.210 we have added that the State lead agency must participate as a representative on the State Advisory Council, if applicable. This provision mirrors the provision in the Head Start Act and will increase coordination among early childhood programs in the State.

Changes: Proposed § 303.210 has been redesignated as § 303.210(a) and we have added new § 303.210(b) to require that the State lead agency participate as a representative, under section 642B(b)(1)(C)(viii) of the Head Start Act, on the State Advisory Council on Early Childhood Education and Care established under the Head Start Act, if applicable.

State Option To Make Services Under This Part Available to Children Ages Three and Older (§ 303.211)

Comment: A significant number of commenters opposed including a State option to make services under this part available to children ages three and older. Several commenters reported that States will not make part C services available to children ages three and older pursuant to this section. Most commenters stated that States do not have adequate funding to implement this option. Another commenter expressed concern that this option creates an additional program with its own regulations, but no additional funding.

Discussion: Section 303.211 reflects the language from section 635(c) of the Act, which provides States with the option to make early intervention services available to children beginning at three years of age until the children enter, or are eligible under State law to enter, kindergarten or elementary school. If a State elects to offer this option, children who are eligible for services under part B of the Act and who previously received early intervention services under part C of the Act would continue to receive early intervention services if their parents choose to continue the services under this option. The Department has no authority to eliminate this provision because it is statutory.

Providing part C services to children who (a) are three years of age and older, (b) are eligible for services under section 619 of the Act, and (c) previously received early intervention services is an option each State can consider. If a State chooses to offer part C services to this group of children, it is ultimately the parent's decision as to whether his or her eligible child, upon turning three years of age, will continue to receive early intervention services rather than part B services. Nothing in § 303.211 or in section 635(c) of the Act requires a State to provide this option or parents to elect to receive part C services for their child if their State makes this option available.

Concerning the comments about funding for this option, it is the Congress that decides whether to appropriate funds for this program.

Changes: None.

Comment: A few commenters stated that implementing the provisions in § 303.211 would be confusing for parents and LEAs given that early intervention services are an entitlement while services under part B of the Act are a mandate. These same commenters stated that simply extending an entitlement via flexibility provisions could jeopardize services to children with disabilities at a critical time in their development.

Discussion: The Department recognizes the difference between parts B and C of the Act; part B of the Act authorizes a program that requires States to provide FAPE, defined as special education and related services designed to meet the unique needs of a child with a disability, and part C of the Act authorizes States to offer early intervention services that are designed to meet the developmental needs of infants and toddlers with disabilities at no cost to parents, except where Federal or State law provides for a system of payments, including a schedule of sliding fees. We do not agree with the commenters that the implementation of the provisions in § 303.211 would jeopardize services to children with disabilities. Section 303.211 incorporates the language from section 635(c) of the Act, regarding the flexibility to serve children three years of age until entrance, or eligibility for entrance, into kindergarten or elementary school. States that choose to implement the option in § 303.211 to provide part C services to children three

years of age and older must provide, pursuant to § 303.211(b)(2), the parents of children with disabilities who are eligible for services under section 619 of the Act and previously received early intervention services with an annual notice that includes the following: a description of the rights of the parents to elect to receive early intervention services under part C of the Act or preschool services under part B of the Act; an explanation of the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act, including the types of services and the locations that the services are provided; the procedural safeguards that apply; and possible costs, if any, to parents of infants or toddlers with disabilities receiving early intervention services. This annual notice will help to ensure that parents of a child eligible for services under § 303.211 understand that they have the right to choose between early intervention services under part C of the Act and preschool services under part B of the Act and that they are fully informed of the differences between these two options.

Moreover, with regard to the commenter's concern that the provisions in § 303.211 could jeopardize services to children with disabilities at a critical time in their development, § 303.211(b)(3) requires that States offering this option have a policy in place that ensures that any child served pursuant to § 303.211 has the right to receive, at any time, FAPE under part B of the Act instead of early intervention services under part C of the Act.

Changes: None.

Comment: One commenter recommended that each State have the flexibility to provide the § 303.211 option to a subset of eligible children based on age range and consistent with State-established policies and procedures.

Discussion: Section 303.211, consistent with section 635(c) of the Act, allows each State to develop and implement a policy under which parents of children who are receiving early intervention services and who are eligible to receive services under section 619 of the Act can choose for these children to continue receiving early intervention services under part C of the Act. Section 635(c) of the Act expressly identifies (and limits) the age range through which these services may be provided; that is, early intervention services could be available to these children until they enter, or are eligible under State law to enter, kindergarten. Section 303.211(a)(2) is specifically intended to provide flexibility to a State that chooses to allow for the continuation of early intervention services pursuant to § 303.211 to provide services under the option to one of three subsets of eligible children within this age range (*i.e.,* eligible children from age three until the beginning of the school year following the child's third birthday, eligible children from age three until the beginning of the school year following the child's fourth birthday and eligible children from age three until the beginning of the school year following the child's fifth birthday).

Changes: We have revised paragraph (a)(2) of § 303.211 to clarify the subsets of age ranges States can select to provide services under the option in § 303.211. We also have added new (a)(3) to highlight the statutory requirement from section 635(c)(1) of the Act that a State may provide services under § 303.211 only until the child enters, or is eligible under State law to enter, kindergarten or elementary school in the State.

Requirements (§ 303.211(b))

Annual Notice Requirements (§ 303.211(b)(1))

Comment: A few commenters recommended that the Department clarify what it means to give parents adequate information concerning the differences between the part C and part B procedural safeguards as required in § 303.211(b)(1)(ii)(B).

Discussion: We agree clarification is needed regarding when, under § 303.211(b)(1), parents whose children are receiving services under § 303.211 must be provided an annual notice of procedural safeguards. As discussed in the *Analysis of Comments and Changes* section for new § 303.209(f)(2), we have clarified that the first annual notice must be provided at the transition conference when the parent is presented the initial option for the child to receive services under § 303.211 or under section 619 of the Act.

Additionally, for consistency, we have revised reference to children being served under § 303.211 to children who are eligible for services under section 619 of the Act and who previously received early intervention services because when the first annual notice is provided, children generally would not yet be served under § 303.211.

Regarding what information must be included in the annual notice, States choosing to offer early intervention services under § 303.211 must provide parents of these children with disabilities with an annual notice that includes, among other things, an explanation of the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act. Section 303.211(b)(1)(ii)(B) requires the explanation to include a description of the differences in procedural safeguards that apply to parents who decide to continue receiving early intervention services under part C of the Act compared with the procedural safeguards that apply to parents who decide their child should receive preschool services under part B of the Act. The notice required under § 303.211(b)(1) must identify procedural safeguards that apply, which identification requirement can be met by including the content requirements from § 303.421(b)(3) and 34 CFR 300.504(c) and an explanation of the major differences between the procedural safeguards available under the separate programs.

Changes: We have deleted in § 303.211(b)(1) ''served pursuant to this section'' and added the phrase ''eligible for services under section 619 of the Act and who previously received early intervention services under this part will be'' before ''provided annual notice.''

Educational Component (§ 303.211(b)(2))

Comment: One commenter recommended including the words ''social and health'' in § 303.211(b)(2) to reinforce that the part C program promotes education, social, and health therapies.

Discussion: It is not necessary to include the words ''social and health'' in § 303.211(b)(2) because the part C requirements apply to children receiving services under § 303.211 in the same manner as they do to all other children receiving services under part C of the Act, which may require, depending on an individual child's needs, providing health services and social or emotional services under § 303.13.

Changes: None.

FAPE (§ 303.211(b)(3))

Comment: One commenter expressed concern regarding the potential loss of FAPE for children age three and older who continue to receive early intervention services pursuant to § 303.211. One commenter recommended amending § 303.211(b)(3) to clarify that parents whose child is receiving services under part C of the Act past the age of three pursuant to § 303.211 have the right, at any time, to opt out of these early intervention services and, instead, to obtain FAPE,

which includes preschool services, under part B of the Act.

Discussion: We agree with the commenter that parents must retain the right to opt out at any time after choosing part C services past the age of three. Therefore, we have added the phrase ''at any time'' to § 303.211(b)(3) to clarify that parents whose child is receiving services under part C of the Act past the age of three pursuant to § 303.211 retain the right, at any time, to opt out of these early intervention services pursuant to § 303.211 and, instead, to obtain FAPE under part B of the Act for their child.

Changes: We have revised § 303.211(b)(3) to require that the part C statewide system ensures that any child served under § 303.211 has the right, at any time, to receive FAPE under part B of the Act instead of early intervention services under part C of the Act.

Services During Eligibility Determination (§ 303.211(b)(4))

Comment: Some commenters stated that the language in proposed § 303.430(e)(3) relates not to pendency, but to the requirement in section 635(c)(2)(D) of the Act and § 303.211(b)(4), that IFSP services continue to be provided to a toddler with a disability until a part B eligibility determination is made for that child in a State that elects to make part C services available beyond age three under § 303.211. A few commenters suggested clarifying that this requirement only applies in a State that has opted to make early intervention services available to children ages three and older.

Another commenter opposed the requirement in § 303.211(b)(4) and proposed § 303.430(e)(3) stating that it could create disincentives for LEAs to make timely part B eligibility determinations, impede a child's timely access to FAPE, and require a lead agency to provide part C services to a child who is not eligible under part B of the Act for a significant period beyond the child's third birthday.

A few commenters indicated that proposed § 303.430(e)(3) conflicts with sections 607(a) and (b) and 615(j) of the Act and the Third Circuit decision in *Pardini* v. *Allegheny Intermediate Unit,* 420 F.3d 181 (3d Cir. 2005), *cert. denied,* 126 S.Ct. 1646 (2006). One commenter recommended referencing part B eligibility as well as ineligibility in proposed § 303.430(e)(3)(ii).

Discussion: We agree with commenters who noted that the requirement in proposed § 303.430(e)(3) applies only to States that elect to offer services under § 303.211 and is not a pendency provision and, thus, we have moved the substance of proposed § 303.430(e)(3) to § 303.211(b)(4). For clarification, we have added that it is the lead agency that must continue to provide all early intervention services identified in the toddler with a disability's IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler's initial eligibility under part B of the Act is determined under 34 CFR 300.306.

Regarding commenters' concerns about delaying part B eligibility determinations and potentially requiring a lead agency to provide services for an unlimited time period, we have clarified that this provision does not apply if the LEA has requested parental consent for the initial evaluation under 34 CFR 300.300(a) and the parent has not provided that consent.

We disagree with commenters' suggestion that this requirement in § 303.211(b)(4) creates disincentives for LEAs to make a timely part B eligibility determination for a toddler with a disability who is not yet age three and is transitioning from the part C program at age three to either the part B preschool program under section 619 of the Act or to the part C extension option under section 635(c) of the Act and § 303.211. In order for the toddler with a disability to be eligible either for part B preschool services or for services under § 303.211, the child must be determined to be eligible under section 619 of the Act and the LEA is required to make this eligibility determination.

Under § 303.209(c) and 34 CFR 300.124(c), a lead agency representative and an LEA representative must attend the transition conference under part C of the Act for a child potentially eligible for part B services (with approval of the family) and this conference must occur at least 90 days (and at the discretion of all parties not more than 9 months) prior to the child's third birthday. It is at this conference that the LEA and lead agency must coordinate the determination of eligibility of a child for services under section 619 of the Act and offering the parent any services under the part C extension option under § 303.211.

The parent must consent to an evaluation to determine eligibility under section 619 of the Act. Once a parent consents to the initial evaluation under part B of the Act, the LEA must conduct the evaluation under 34 CFR 300.301(b) of the part B regulations within 60 days or a State-determined timeline. Additionally, under section 612(a)(9) of the Act and 34 CFR 300.124(b) of the part B regulations, the SEA and LEA must ensure that an IEP has been developed and is being implemented by age three for a toddler with a disability who transitions from part C of the Act to part B of the Act regardless of whether the State has established a timeline different from the 60-day evaluation timeline in 34 CFR 300.301(c)(1) of the part B regulations.

Thus, the eligibility determination must be made by the LEA in sufficient time to enable the LEA to offer FAPE to that child who is transitioning from the part C program by age three (if that child is eligible as a child with a disability under part B of the Act), as required by section 612(a)(9) of the Act and 34 CFR 300.124(b) of the part B regulations.

In response to commenters' reference to section 615(j) of the Act and the Third Circuit decision in *Pardini,* the part B pendency provisions in section 615 of the Act and 34 CFR 300.518(c) do not otherwise require public agencies under part B of the Act to provide part B services when a child transitions from part C to part B of the Act. Additionally, unless the State elects to offer services under § 303.211, the lead agency or EIS provider under part C of the Act is not required to provide part C services once the child turns three.

Changes: We have revised § 303.211(b)(4) to clarify that the lead agency must continue to provide all early intervention services identified in the toddler with a disability's IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler's initial eligibility determination under part B of the Act is made under 34 CFR § 300.306. This requirement does not apply if the LEA has requested parental consent for the initial evaluation under § 300.300(a) and the parent has not provided that consent.

Informed Consent (§ 303.211(b)(5))

Comment: One commenter recommended deleting the words ''where practicable'' in § 303.211(b)(5), which relates to the requirement that the lead agency obtain informed consent from parents before the child reaches three years of age. The commenter also recommended adding language to § 303.211(b)(5) to require lead agencies to obtain verification from parents that they fully understand the benefits of both the program implemented under part B of the Act and the program implemented under part C of the Act before allowing the parents to decide whether to place their child in a part B or part C program at age three pursuant to § 303.211.

Discussion: Section 303.211(b)(5) requires States to ensure that informed consent is obtained from the parent of any child to be served under § 303.211. The phrase ''where practicable'' was not intended to mean that parental consent was optional. To be clear, the lead agency must obtain informed consent for all children served under § 303.211. The ''where practicable'' language was intended to modify the requirement that lead agencies obtain consent before—rather than after—the child turns three years of age. We included the ''where practicable'' language because we recognize that it may not always be possible or practicable for lead agencies to obtain consent before the child's third birthday, for example, when a child is ill or there is a family emergency. We have revised § 303.211(b)(5) to clarify our intended meaning for this provision.

Requiring in § 303.211(b)(5) that lead agencies verify that parents fully understand the benefits of both the part B and part C programs is not necessary for two reasons. First, § 303.211(b)(1) requires that States provide an annual notice that includes an explanation of the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act to parents of children with disabilities who are eligible under section 619 of the Act and who previously received early intervention services. Second, § 303.211(b)(5) further provides that informed consent must be obtained from parents for the continuation of early intervention services pursuant to § 303.211 for their child.

Consent, as defined in § 303.7, means the parent has been fully informed of all information relevant to the activity for which consent is sought in the parent's native language or other mode of communication. This definition of *consent* in § 303.7 also requires that the parent understand and agree in writing to the activity for which the parent's consent is sought.

Thus, §§ 303.211(b)(1) and 303.211(b)(5), when read together, make clear that States are required to obtain written consent from parents of children with disabilities eligible under section 619 of the Act who previously received early intervention services and that this written consent must state that the parents fully understand the differences between early intervention services provided under part C of the Act and preschool services provided under part B of the Act. Repeating this requirement, as recommended by the commenter, is not necessary.

Changes: We have modified § 303.211(b)(5) by separating the language into two sentences. The first sentence clarifies that a statewide system of a State offering the option under § 303.211 must ensure that the lead agency obtain informed consent from the parents of any child to be served under this section for the continuation of early intervention services pursuant to § 303.211. We have moved the phrase ''where practicable'' to the end of a new second sentence to clarify that it modifies the requirement that consent be obtained before the child reaches three years of age.

Applicability of Transition Timelines (§ 303.211(b)(6))

Comment: One commenter recommended revising § 303.211(b)(6) to provide States with explicit guidance on how to implement the transition timeline requirements in §§ 303.209(c)(1) and 303.209(d)(2).

Discussion: We agree that the transition timelines for children served under § 303.211 were not clear in proposed §§ 303.209 and 303.211. Thus, we have revised § 303.211(b)(6) to identify the transition requirements (*i.e.,* requirements relating to the transition from receiving services under § 303.211 to preschool, kindergarten or elementary school) that apply to children age three and older who are receiving services under § 303.211. Specifically, we have added new § 303.211(b)(6)(i), (b)(6)(ii), and (b)(6)(iii) to clarify that the lead agency must notify the SEA and appropriate LEA, conduct a transition conference, and develop a transition plan in the IFSP not fewer than 90 days before the child will no longer be eligible under § 303.211(a)(2) to receive or will no longer receive early intervention services under § 303.211. These transition requirements, which parallel the requirements in § 303.209(b)(1)(i), (c)(1), and (d), are intended to occur after the child is receiving, but soon to exit from, services under § 303.211. These transition requirements do not affect the transition requirements under § 303.209, which apply to all infants and toddlers under the age of three, including those in a State that elects to provide services under § 303.211.

As noted earlier under new § 303.209(f) of this *Analysis of Comments and Changes* section of the preamble, we have clarified in new § 303.211(b)(6) that the transition requirements concerning SEA and LEA notification, transition conference, and transition plan in §§ 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d), respectively, apply to toddlers with disabilities under the age of three in a State that elects to offer services under § 303.211. We have clarified these requirements because ensuring a seamless transition for children receiving services under § 303.211 is important and the lead agency and LEA must coordinate transition planning (including part B eligibility determination and timely IEP development) for toddlers who may continue to receive part C services under § 303.211.

Finally, we have identified the appropriate timeline as ''not fewer than 90 days before the child will no longer be eligible to receive, or will no longer receive, early intervention services under § 303.211.'' We recognize that, in limited instances, parents may not notify the lead agency more than 90 days prior to requesting that their child no longer receive services under § 303.211 and, in those instances, it would not be possible for the lead agency to meet the requirements in § 303.211(b)(6). In these instances, we encourage lead agencies and SEAs and LEAs to coordinate, to the extent feasible, the transition of these children from early intervention services under § 303.211.

Changes: We have revised new § 303.211(b)(6) to clarify that toddlers with disabilities in a State that offers services under this section are subject to the transition requirements in § 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d). We also have revised § 303.211(b)(6) to describe the lead agency's obligations to ensure a smooth transition for children age three and older who are receiving services under § 303.211 (*i.e.,* transition from § 303.211 services to preschool, kindergarten, or elementary school). Under new § 303.211(b)(6)(ii)(A), the lead agency must notify the SEA and the LEA where the child resides not fewer than 90 days before the child will no longer be eligible to receive, or will no longer receive, early intervention services under § 303.211. In new § 303.211(b)(6)(ii)(B), the lead agency must, with the approval of the parents of the child, convene a transition conference, among the lead agency, the parents, and the LEA, not fewer than 90 days—and, at the discretion of all of the parties, not more than 9 months—before the child will no longer be eligible to receive, or will no longer receive, § 303.211 services, to discuss any services that child may receive under part B of the Act. Finally, we have added § 303.211(b)(6)(i)(C) to require lead agencies to establish a transition plan in the IFSP not fewer than 90 days—and, at the discretion of all of the parties, not more than 9 months—before the child will no longer be eligible to

receive, or no longer will receive, § 303.211 services.

Referral Based on Trauma Due to Exposure to Family Violence (§ 303.211(b)(7))

Comment: Some commenters recommended amending § 303.211(b)(7) to specifically reference infants and toddlers, not just children over the age of three, who experience trauma because the regulatory language in this section is not consistent with the explanation for the regulation provided by the Department in the preamble of the NPRM. Another commenter stated that there is no principled reason for restricting the required referral under this section to children over the age of three in States where these children remain eligible for early intervention services, while another commenter questioned whether the requirement to refer children under the age of three based on trauma due to exposure to family violence only applies to children in States implementing the birth to kindergarten option.

Discussion: It appears that the commenters may have misunderstood § 303.211(b)(7). Section 303.211(b)(7), consistent with section 635(c)(2)(G) of the Act, requires, for States that adopt policies under § 303.211, a referral for evaluation for early intervention services of a child under the age of three who experiences a substantiated case of trauma due to exposure to family violence, as defined in section 320 of the Family Violence Prevention and Services Act. This requirement only applies to children under the age of three because children age three and older are not eligible to be referred for early intervention services under any provision in part C of the Act. Children age three and older will either continue to receive early intervention services for which they were already referred or would be referred to the part B system. Referrals to the part B system are addressed under part B of the Act; it would not be appropriate to address them under this part.

Section 303.211(b)(7) clarifies that a referral for evaluation for early intervention services applies only to children under the age of three who experience a substantiated case of trauma due to exposure to family violence, and only in States implementing the State option in § 303.211 to make part C services available to children ages three and older. An example of a child who may be referred under § 303.211(b)(7) would be a child under the age of three who has experienced a substantiated case of trauma due to exposure to family violence and who is a sibling of a child already receiving early intervention services under the option described in § 303.211.

We have not amended § 303.211(b)(7) as requested by the commenters; however, we have removed the parenthetical in new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) and new § 303.303(c)(11) (proposed § 303.302(c)(11)). The parenthetical in § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) limits coordination of the child find system with programs that provide services under the Family Violence and Prevention Act to States that elect to make services available under this part to children after the age of three. The parenthetical in new § 303.303(c)(11) (proposed § 303.302(c)(11)) limits the scope of domestic violence shelters and agencies as primary referral sources to ''domestic violence shelters and agencies in States that elect to make services available under this part to children after the age of three.''

The Department's position is that domestic violence shelters and agencies should be considered primary referral sources regardless of whether the State that they are located in elects to make services available under this part to children after the age of three. It is the Department's position that it is not appropriate to limit either coordination or referrals in this manner and, thus, we have removed each parenthetical in new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) and new § 303.303(c)(11) (proposed § 303.302(c)(11)).

Changes: We have removed the parenthetical ''(for States electing to make available services under this part to children with disabilities after the age of three in accordance with section 635(c)(2)(G) of the Act and § 303.211)'' from § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(A)) and new § 303.303(c)(11) (proposed § 303.302(c)(11)).

Comment: One commenter requested that the Department clarify in § 303.211(b)(7), or elsewhere in § 303.211, the parental consent requirements for children receiving services under § 303.211. Specifically, the commenter questioned whether the definition of *parent* in § 303.27 and general consent for evaluation requirements in § 303.420(a)(2) apply to this section. The commenter also expressed concern that parental consent may be difficult to obtain for the children referenced in § 303.211(b)(7), especially for children who are under the jurisdiction of a child protective services agency.

Discussion: If a State elects to offer services under § 303.211, the lead agency must obtain parental consent as required under § 303.211(b)(5) before making those services available. The Department's position is that § 303.211(b)(5) is sufficiently clear with regard to parental consent and, thus, we have not revised § 303.211(b)(5) as requested by the commenter. The definition of *parent* under part C of the Act in § 303.27 applies to the parental consent requirement in § 303.211(b)(7). A parent, as defined in § 303.27, can be a biological or adoptive parent, foster parent (unless State law, regulation, or contractual obligation prohibits the foster parent from acting as a parent), a guardian generally authorized to act as the child's parent (or authorized to make early intervention, educational, health, or developmental decisions for the child, but not the State if the child is a ward of the State), an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent or other relative with whom the child lives), an individual legally responsible for the child's welfare, or a surrogate parent appointed in accordance with § 303.422 or section 639(a)(5) of the Act.

The lead agency's process for obtaining parental consent under § 303.211 is the same as its process for obtaining parental consent under § 303.420(a), whether parental consent is needed to conduct an evaluation under part C of the Act or to provide part C services.

While we appreciate the commenter's concern about obtaining parental consent when a child is placed with a child protective services agency, the Department's position is that the regulations in this part provide sufficient clarity and information about how to proceed in this situation. First, § 303.27 identifies who can serve as the parent under part C of the Act and whether a surrogate parent needs to be appointed. Further, § 303.27(b)(1) explains that if more than one individual meets the definition of a *parent,* the biological or adoptive parent must be presumed to be the parent unless that parent's authority is circumscribed as set forth in that section. Second, § 303.420 specifies when the lead agency must obtain consent from a parent. Parental consent must be obtained before early intervention services are provided to the child. Third, § 303.421 provides information about important aspects of the consent process, prior written notice, and procedural safeguards.

Fourth, § 303.420 sets forth the requirements and options if parental consent is not obtained. Given these other regulatory requirements, the Department's position is that the issue of obtaining parental consent for the children referenced in § 303.211(b)(7) is addressed appropriately and sufficiently.

Changes: None.

Rules of Construction (§ 303.211(e))

Comment: A few commenters expressed concern about the rules of construction provision in § 303.211(e). One commenter stated that these provisions may contradict a parent's option to select part B services if a State offers a ''Birth to Five'' program. Another commenter requested that the Department expand the rules of construction to include a provision that a lead agency will not be held responsible for meeting transition timelines when a child is referred for part C services less than 45 days prior to the time that the transition conference is due to be held.

Discussion: States are not required to implement the provisions in § 303.211. This section simply provides States with an option to make services under part C of the Act available to children ages three and older. If a State decides to offer this option, parents may choose for their children to receive early intervention services, rather than part B services, beyond the age of three. Nothing in § 303.211 or section 635(c) of the Act affects a parent's right to choose services under part B of the Act at any time once the child is eligible to receive part B services. Additionally, nothing in § 303.211 or section 635(c) of the Act requires a State to use the option described in § 303.211 in order to implement policies and procedures for transition to preschool and other programs included in § 303.209.

Finally, the commenter requested that we amend the rules of construction to state that a lead agency will not be held responsible for meeting transition timelines when a child is referred for part C services less than 45 days prior to the time that the transition conference is required to be held under § 303.209. The rules of construction in § 303.211(e) only apply to § 303.211 and thus only apply to children over the age of three who were previously eligible for and received early intervention services under part C of the Act. A child over the age of three who was previously eligible for and already received early intervention services under part C of the Act would never need to be referred for part C services and, therefore, the transition timeline requirements in § 303.209 do not apply to these children. For this reason, we decline to make the change requested by the commenter.

Changes: None.

Additional Information and Assurances (§ 303.212)

Comment: None.

Discussion: To create a freestanding document in these regulations, we have added as new § 303.212(a), regarding additional information and assurances that must be included in each State's part C application, a provision that incorporates the application content requirements under section 427(b) of GEPA. This provision of GEPA requires a State application to include a description of the steps that the State is taking to ensure equitable access to, and equitable participation in, the programs that will be conducted by the State using Federal funds (in this case, Federal funds for the part C program). This provision also requires the State to develop and describe in its application the steps the State is taking to address the special needs of program beneficiaries (in this case, infants and toddlers with disabilities and their families) in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age.

Changes: We have added a new paragraph (a) to § 303.212 to clarify that a State's part C application must include: ''A description of the steps the State is taking to ensure equitable access to, and equitable participation in, the part C statewide system as required by section 427(b) of GEPA.''

Reports and Records (§ 303.224)

Comment: A few commenters expressed concern with the requirements in § 303.224. One commenter stated that this section grants the Secretary broad authority over State recordkeeping without providing appropriate notice to States about the content they are required to maintain in the records. Another commenter expressed concern that States may not have the data to respond to requests from the Secretary and recommended that, if adopted, the requirement should be modified to indicate that data requests from the Secretary cannot be unreasonable or place an undue burden on States. One commenter requested that the Department include in § 303.224 a reference to the Single Audit Act.

Discussion: This section tracks the language from section 637(b)(4) of the Act, which requires States both to ensure that reports are in the form and contain the information that the Secretary may require to carry out the functions under part C of the Act and to keep such reports and afford such access to the reports as the Secretary may find necessary to ensure the correctness and verification of those reports and proper disbursement of Federal funds under part C of the Act. The purpose of this section is for the Secretary to have access to the proper records to ensure compliance with the part C requirements. The requirements in this section do not reflect any new requirements or an additional burden on States.

Regarding the request to add a reference to the Single Audit Act in this section, it would be redundant to identify all of the provisions in other authorities such as GEPA, Education Department General Administrative Regulations (EDGAR), and the Single Audit Act that require the lead agency to maintain fiscal accounting records. Thus, we decline to add this reference as requested by the commenter.

Changes: None.

Prohibition Against Supplanting; Indirect Costs (§ 303.225)

Comment: The Department received several comments on proposed § 303.225 in the following areas: the Single Audit Act, the phrase ''and increase'' in proposed § 303.225(b)(1)(i), and whether States must certify and verify that they have maintained fiscal effort from year to year.

Discussion: Since the publication of the NPRM in May 2007, the Department has received many informal inquiries requesting guidance on MOE requirements (which implement the supplement not supplant requirements under part C of the Act). States also have expressed concern about their ability to meet the MOE requirements and their continued participation in the part C program. So that we can seek further input on the MOE requirements, the Department intends to issue an NPRM on the MOE requirements. Therefore, we are not finalizing proposed § 303.225 and instead are incorporating into § 303.225(a) the provisions in section 637(b)(5) of the Act, which prohibit the commingling of Federal funds with State funds and supplanting State and local funds with Federal funds. We also are incorporating into § 303.225(b) the MOE requirements in current § 303.124 and are retaining the indirect cost provisions in proposed § 303.225(c).

Changes: We have revised proposed § 303.225(a) to include language from section 637(b)(5) of the Act and replaced

proposed § 303.225(b) with current § 303.124.

Traditionally Underserved Groups (§ 303.227)

Comment: A few commenters supported the requirement in § 303.227 that ensures policies and practices be adopted so that traditionally underserved groups, including minority low-income, homeless, rural families, and children with disabilities who are wards of the State are meaningfully involved in the planning and implementation of services. However, the commenters suggested that all families, not just those identified in this section, should have access to culturally competent services. Another commenter recommended including explicit language requiring a State to ensure that its service providers have an understanding of the communication norms and family customs of traditionally underserved groups as a part of the cultural competence mentioned in § 303.227(b).

Discussion: Early intervention services, as defined in § 303.13, must be designed to meet the needs of an infant or toddler with a disability, and as requested by the family, the needs of the family to assist appropriately in the infant's or toddler's development. Thus, all families of an infant or toddler with a disability must be provided with access to culturally competent services when those services are necessary to meet the needs of their child. Section 303.227(b) does not limit this requirement in any way; it simply focuses on the access of traditionally underserved groups to culturally competent services, consistent with the provisions in current § 303.128 and section 637(b)(7) of the Act, which require a State to provide, in its application, policies and procedures that ensure meaningful involvement of underserved groups in the planning and implementation of all the requirements of this part. Thus, the Department's position is that the regulations in this part adequately address the commenter's concern about families' access to culturally competent services.

We do not define the term cultural competence in these regulations because it is the Department's position that States are in the best position to determine the parameters of ''culturally competent services'' to meet the unique needs of their populations.

Changes: None.

Comment: A few commenters requested that § 303.227 require States to identify and address barriers faced by homeless children and other traditionally underserved populations when attempting to participate in part C programs.

Discussion: We appreciate the commenter's concerns regarding barriers faced by homeless children and other traditionally underserved populations when attempting to participate in part C programs, but it is the Department's position that it is unnecessary and inappropriate to add language to these regulations to require States to identify and address those barriers. This subject is more appropriately addressed through technical assistance and guidance so that the Department can work collaboratively with States to assist each State to identify the traditionally underserved populations that are specific to the State, meet the needs of homeless children and the infants and toddlers with disabilities in the identified populations, and address the barriers to service for homeless children and infants and toddlers with disabilities in the identified populations. Additionally, the McKinney-Vento Act offers a number of protections to homeless children, including homeless infants and toddlers with disabilities, and it is the Department's position that it is not necessary to duplicate the requirements of the McKinney-Vento Act in these regulations. The Department is committed to providing technical assistance to States in order to assist States in their ability to ensure access to early intervention services by homeless children and other traditionally underserved populations.

Changes: None.

Notice and hearing before determining that a State is not eligible (§ 303.231(a)(1)(i)).

Comment: One commenter recommended that § 303.231(a)(1)(i) be amended to ensure that a State receive at least 90 days notice—not just ''reasonable notice''—prior to the Secretary making a final determination that the State is ineligible to receive its part C grant award.

Discussion: Section 637(c) of the Act provides that the Secretary may not disapprove an application for a part C grant award unless the Secretary determines, after notice and opportunity for a hearing, that the application fails to comply with the requirements under part C of the Act. Both parts B and C of the Act in current § 303.101 (which references 34 CFR 300.581 through 300.586 of the part B regulations in effect prior to October 13, 2006) and 34 CFR 300.179 of the current part B regulations require the Secretary to provide a State with reasonable notice before making a final determination that the State is ineligible to receive a grant award. Section 303.231(a)(1)(i) incorporates this long-standing reasonable notice requirement and thus provides both the Department and States with the flexibility to address circumstances on a case-by-case basis. Therefore, it is the Department's position that it is not necessary to add a 90-day timeline as requested by the commenter.

Changes: None.

Subpart D—Child Find, Evaluations and Assessments, and Individualized Family Service Plans

General (New § 303.300)

Comment: We received a number of comments concerning subpart D of these regulations; many of these comments suggested that there is some confusion in the field about the implementation of the child find, screening, evaluation, assessment, and IFSP provisions in the proposed regulations.

Discussion: Given the number of comments we received on this subpart, we have provided an overview of how subpart D is organized and how the components described in this subpart relate to one another. We have added a new § 303.300 to identify and distinguish the following required components of the part C statewide early intervention system: (a) Pre-referral (public awareness and child find) policies and procedures, (b) referral policies and procedures, and (c) post-referral policies and procedures. Accordingly, we have renumbered the public awareness program provisions as new § 303.301 and the child find provisions as new § 303.302.

In order for the part C statewide system to identify, locate, evaluate, and serve all infants and toddlers with disabilities effectively, the system must be both comprehensive and coordinated. As clarified in this subpart, this means establishing policies and procedures for (a) pre-referral activities (*i.e.,* to make the public aware of the availability of early intervention services and to coordinate with other programs to identify and locate infants and toddlers with disabilities), (b) the referral of children under the age of three to the part C program, and (c) post-referral activities (*i.e.,* the screening, if applicable, of children under the age of three who have been referred to the part C program under new § 303.320 (proposed § 303.303); the evaluation and assessment of the child and the child's family under new § 303.321 (proposed § 303.320); and the development, review, and implementation of the IFSP, under §§ 303.342 through 303.346).

Subpart D follows the general chronological order of the pre-referral, referral, and post-referral components of the part C statewide system. Specifically, this subpart begins by describing the required public awareness program (part of the pre-referral process) and ends with a requirement that public agencies and EIS providers that are directly responsible for providing early intervention services to a child make good faith efforts to assist that child in achieving the outcomes in the child's IFSP (part of the post-referral process). In this way, we intend subpart D of these regulations to provide the framework for effectively identifying, locating, and providing early intervention services to all eligible infants and toddlers with disabilities.

Changes: We have added new § 303.300 to identify and distinguish between the pre-referral, referral, and post-referral components of a statewide early intervention system. Section 303.300 states that the statewide comprehensive, coordinated, multidisciplinary interagency system to provide early intervention services for infants and toddlers with disabilities and their families required in § 303.1 must include the following components: (a) Pre-referral policies and procedures that include a public awareness program as described in new § 303.301 (proposed § 303.300) and a comprehensive child find system as described in new § 303.302 (proposed § 303.301); (b) Referral policies and procedures as described in new § 303.303 (proposed § 303.302); and (c) Post-referral policies and procedures to ensure compliance with the timeline requirements in new § 303.310 and that include screening, if applicable, as described in new § 303.320 (proposed § 303.303); evaluations and assessments as described in new § 303.321 (proposed § 303.320); and development, review, and implementation of IFSPs as described in §§ 303.342 through 303.346.

Public Awareness Program—Information for Parents (New § 303.301) (Proposed § 303.300)

Comment: A few commenters supported proposed § 303.300(a)(1)(ii), which specifically included parents with premature infants or infants with other physical risk factors associated with learning or developmental complications among those parents to whom information about early intervention services must be disseminated. These commenters requested that we add a requirement that child find activities be conducted in collaboration with parent advocacy groups or other community agencies that are available to answer questions and provide support to these families as they access services.

Discussion: The regulations track the language in section 635(a)(6) of the Act, which describes the required public awareness program. Although collaboration with parent advocacy groups or other community agencies regarding public awareness is not specifically mentioned in the Act or these regulations, there is nothing in the Act or these regulations that prevents a State from collaborating with other community resources to disseminate public awareness materials beyond primary referral sources. We do not mandate that public awareness materials be distributed to all parent advocacy groups or community agencies in these regulations because each State needs the flexibility to tailor its public awareness programs to the population of infants and toddlers with disabilities who may be eligible in that State (*e.g.,* a State that serves at-risk infants and toddlers may target specific agencies). This approach will allow States to create and implement a public awareness program that includes the appropriate and necessary components to effectively meet State-specific needs.

Changes: None.

Comment: Some commenters recommended including the notes from current § 303.320, regarding a system's public awareness program, in new § 303.301 (proposed § 303.300) because these notes provided clarity to lead agencies.

Discussion: New § 303.301 (proposed § 303.300) is consistent with section 635(a)(6) of the Act, which describes the requirements of a public awareness program. Notes 1 and 2 following current § 303.320 describe the components of an effective public awareness program and provide examples of methods for informing the general public about the provisions of this part. We do not wish to make the substance of these notes regulatory requirements because we do not want to limit State flexibility to create a public awareness program that meets State-specific needs.

While we have not incorporated the notes as requirements in the regulations, we continue to believe that an effective public awareness system is one that involves an ongoing effort that is in effect throughout a State, including rural areas; provides for the involvement of, and communication with, major organizations throughout a State that have a direct interest in this part, including public agencies at the State and local level, private providers, professional associations, parent groups, advocate associations, and other organizations; has coverage broad enough to reach the general public, including those who have disabilities; and includes a variety of methods for informing the public about the provisions of this part. Methods for informing the public continue to include the use of printed materials, television, radio, and the Internet, but may also include other appropriate methods in a particular State. For these reasons, we decline to revise new § 303.301 (proposed § 303.300) as requested by the commenter.

Changes: None.

Comment: One commenter recommended adding a reference to other family members after each mention of parents in this section.

Discussion: New § 303.301 (proposed § 303.300) tracks the language in section 635(a)(6) of the Act, regarding disseminating information about available early intervention services to parents of infants and toddlers with disabilities. While family members—other than parents—may voluntarily participate in a family assessment, may be invited by a parent to participate in IFSP meetings, and may be included when early intervention services are provided, the parent of an infant or toddler is ultimately responsible for making decisions under these regulations. The term *parent* is broad enough to encompass not just the biological or adoptive parent but other individuals who meet the definition in § 303.27. Additionally, nothing in these regulations prevents the lead agency from disseminating its public awareness materials through primary referral sources to other family members. Therefore, it is the Department's position that not extending this requirement to other family members of infants and toddlers with disabilities is appropriate.

Changes: None.

Comment: Two commenters requested clarification of new § 303.301(c) (proposed § 303.300(b)(4)), which required the lead agency to provide parents of toddlers who are nearing transition age with a description of the availability of services under section 619 of the Act. These commenters questioned when this description must be provided and whether providing it when a toddler is two years and four months of age would meet the requirement to provide information at least nine months prior to a child's third birthday in new § 303.301(c) (proposed § 303.300(b)(4)).

One commenter stated that the public awareness requirement in new § 303.301(c) (proposed § 303.300(b)(4)) should be the responsibility of public agencies responsible for implementing part B of the Act and should be a collaborative effort between the State part B and C agencies and local part B programs to ensure that all parents and families are fully informed of the availability of services under section 619 of the Act.

Discussion: We agree that, as written, proposed § 303.300(b)(4) did not provide sufficient clarification regarding when, and to whom, a description of the availability of services under section 619 of the Act must be provided. Accordingly, we have revised new § 303.301(c) (proposed § 303.300(b)(4)) to specify that each public awareness program must include a requirement that the lead agency provide for informing parents of toddlers with disabilities of the availability of preschool services under section 619 of the Act not fewer than 90 days prior to the child's third birthday. We have removed the reference to ''toddlers with disabilities nearing transition age'' and instead clarified the timeline by which the information must be provided. We have revised this timeline so that it is consistent with the timelines for LEA notification and other transition requirements in § 303.209.

In response to the specific comment asking whether providing public awareness under new § 303.301(c) (proposed § 303.300(b)(4)) to parents when their toddler reaches two years and four months of age would be in compliance with this requirement, it would be in compliance under the revised requirement because each lead agency must ensure that information about preschool services under section 619 of the Act is provided to parents of toddlers with disabilities not fewer than 90 days prior to the toddler's third birthday.

Concerning the comment that the public awareness requirement should be the responsibility of the part B State or local public agencies, section 635(a)(6) of the Act was revised in 2004 to require that the lead agency prepare and disseminate information about preschool services under section 619 of the Act. SEAs and LEAs have child find responsibilities as defined in sections 612 and 619 under part B of the Act. The requirement in new § 303.301(c) (proposed § 303.300(b)(4)) reflects the lead agency's responsibilities under sections 635(a)(6) and 637(a)(9) of the Act to ensure that information about part B preschool services is available to parents of all toddlers with disabilities exiting the part C program, not just those toddlers who have been determined by the lead agency to be potentially eligible under part B of the Act.

Concerning the commenter's request to require collaboration between the State and local part B and part C agencies, adding this requirement is unnecessary because, under new § 303.302(c) (proposed § 303.301(c)), the lead agency, with the assistance of the Council, must ensure that its child find system under part C of the Act is coordinated with the State's child find efforts under part B of the Act.

Changes: We have revised new § 303.301(c) (proposed § 303.300(b)(4)) to specify that each public awareness program must include a requirement that the lead agency provide for informing parents of toddlers with disabilities of the availability of preschool services under section 619 of the Act not fewer than 90 days prior to the child's third birthday. Additionally, because we have clarified that parents must be provided with this information not fewer than 90 days prior to their toddler's third birthday, we have deleted the parenthetical ''starting at least nine months prior to the child's third birthday.''

Comprehensive Child Find System (New § 303.302) (Proposed § 303.301)

Comment: None.

Discussion: To reflect the varied administrative structures of different part C child find systems and the revised definitions of *public agency* and *EIS provider* in §§ 303.30 and 303.12, respectively, we have replaced the reference to ''public agencies'' with ''lead agencies or EIS providers'' in new § 303.302(a)(2) (proposed § 303.301(a)(2)), regarding the child find system including a system for making referrals to lead agencies and EIS providers.

Changes: We have replaced the reference to ''public agencies,'' in new § 303.302(a)(2) (proposed § 303.301(a)(2)), with a reference to ''lead agencies or EIS providers''.

Comment: A few commenters requested that the Department define the term ''rigorous,'' as that term is used to modify ''standards for appropriately identifying infants and toddlers with disabilities under this part that will reduce the need for future services'' in new § 303.302(a)(3) (proposed § 303.301(a)(3)). These commenters asked the Department to provide specific guidance on how to define this term to avoid arbitrary and conflicting applications of the standards.

Discussion: New § 303.302(a)(3) (proposed § 303.301(a)(3)), consistent with section 635(a)(5) of the Act, requires that each State's part C child find system include rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services that reduce the need for future services. We interpret the term ''rigorous'' in this section to mean that the State has obtained public (including stakeholder) input on its child find system policies and procedures that are required in §§ 303.101(a)(2), 303.115, and 303.116. Requiring public input ensures that stakeholders who have an interest in the development of a State's child find system, including parents of infants and toddlers with disabilities, EIS providers, Council members, and other stakeholders, have adequate opportunity to comment on, and inform, the decision-making process regarding a State's child find policies and procedures.

Changes: None.

Comment: A few commenters recommended removing the phrase ''that will reduce the need for future services'' from new § 303.302(a)(3) (proposed § 303.301(a)(3)), which requires each State's child find system to include rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services that will reduce the need for future services. These commenters stated that eligible infants and toddlers should have access to necessary early intervention services regardless of whether the lead agency or EIS provider expects the early intervention services to reduce a child's need for future services.

Discussion: New § 303.302(a)(3) (proposed § 303.301(a)(3)) incorporates statutory language from section 635(a)(5) of the Act and reflects the finding in section 631(a)(2) that there is an urgent and substantial need to reduce the educational costs to our society, including our nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age. Thus, new § 303.302(a)(3) (proposed § 303.301(a)(3)) does not require a determination as to whether a specific infant or toddler with a disability will or will not require future services, but rather reflects one of the critical findings underlying part C of the Act.

Changes: None.

Comment: None.

Discussion: We have made a minor change to new § 303.302(b)(1)(i) (proposed § 303.301(b)(1)(i)) to clarify

that the coordination with tribes, tribal organizations, and consortia is for the purpose of identifying infants and toddlers with disabilities in the State based, in part, on the information provided by these entities to the lead agency under § 303.731(e)(1).

Changes: We have revised the parenthetical in new § 303.302(b)(1)(i) (proposed § 303.301(b)(1)(i)) by adding the words ''to identify infants and toddlers with disabilities in the State based, in part, on'' before the words ''the information provided.''

Comment: Many commenters supported retaining the requirement from current § 303.321(b)(2), which requires that an effective method be developed and implemented to determine which children are receiving needed early intervention services. However, these commenters strongly opposed the requirement in proposed § 303.301(b)(2) to have an effective method to determine which children are not in need of early intervention services. The commenters argued that this is not a statutory requirement and would add significant burden to lead agencies.

Discussion: We agree with the commenters that child find efforts under part C of the Act should focus on identifying infants and toddlers with disabilities who are potentially eligible for, or in need of, early intervention services and not those who are not potentially eligible for such services. Therefore, we have removed the requirement that lead agencies must determine which children are not in need of services in new § 303.302(b)(2) (proposed § 303.301(b)(2)).

Changes: We removed the phrase ''and which children are not in need of those services'' in new § 303.302(b)(2) (proposed § 303.301(b)(2)).

Comment: None.

Discussion: Proposed § 303.301(c)(1)(ii)(G) identified ''child protection programs, including programs administered by, and services provided through, the foster care agency * * *'' as one of the programs that the lead agency must ensure that it coordinates with when implementing its child find responsibilities. However, child welfare programs, such as the foster care system, and child protection programs are two different programs and in some States are not in the same system. Therefore, we have clarified in new § 303.302(c)(1)(ii)(G) (proposed § 303.301(c)(1)(ii)(G)) that lead agencies must coordinate child find activities with both child protection and child welfare programs.

Changes: We have added the words ''and child welfare'' after the words ''child protection'' in new § 303.302(c)(1)(ii)(G) (proposed § 303.301(c)(1)(ii)(G)).

Comment: None.

Discussion: As previously stated in the *Analysis of Comments and Changes* section for subpart C of these regulations, upon further review, the Department has determined that it is not appropriate to limit either coordination with, or referrals from, the programs that provide services under the Family Violence Prevention and Services Act in new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(I)) and § 303.303(c)(11) (proposed § 303.302(c)(11)). Therefore, we have removed the following language ''(for States electing to make available services under this part to children with disabilities after the age of three in accordance with section 635(c)(2)(G) of the Act and § 303.211.)'' from new § 303.302(c)(1)(ii)(A) (proposed § 303.301(c)(1)(ii)(I)) and § 303.303(c)(11) (proposed § 303.302(c)(11)).

Changes: We have removed the parenthetical referencing section 635(c)(2)(G) of the Act and § 303.211 from new § 303.302(c)(1)(ii)(A) and § 303.303(c)(11).

Comment: Several commenters recommended adding the Children's Health Insurance Program (CHIP) to the list of programs with which the lead agency must coordinate its child find activities in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)) because many children with disabilities participate in CHIP. A few commenters requested adding State Early Hearing Detection and Intervention (EHDI) systems to this list as well.

Discussion: We agree with commenters that coordinating with the CHIP programs and State Early Hearing Detection Intervention (EHDI) systems can assist the lead agency in its child find responsibilities to identify infants and toddlers with disabilities. The addition of these two programs in the child find coordination provision in new § 303.302(c)(1)(ii) does not mean that these entities are ''participating agencies'' under § 303.403 if they function as primary referral sources or funding sources, but do not otherwise meet the definition of participating agency in § 303.403.

CHIP is authorized under Title XXI of the Social Security Act and each State determines the level of income eligibility and available health benefits for children. In many States, CHIP benefits are combined with benefits under Medicaid (Title XIX of the Social Security Act). Requiring the lead agency to coordinate its child find efforts with the CHIP program ensures nonduplication of Federal and State funds and efforts to provide needed health services to eligible children.

Each State has a State EHDI program, which is responsible for creating a system of newborn hearing screening, follow-up, audiological diagnosis (for those who do not pass screening), and intervention (for those who are identified with hearing loss). Recent data indicate that 55 percent of State EHDI programs never or rarely notify the part C statewide system about infants who have failed their final hearing screening. (National Center for Hearing Assessment and Management, *The Impact of Privacy Regulations,* May 2008, available at *http://www.infanthearing.org*) By adding the State EHDI program in § 303.302(c)(1)(ii), we acknowledge that coordination between the State EHDI program and the statewide child find system can play a critical role in the referral of children from the EHDI program to the part C program to identify children potentially eligible for part C early intervention services, including infants and toddlers who are deaf or hard of hearing. Therefore, we have added CHIP and EHDI to the programs listed in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)).

Nothing precludes the State lead agency from coordinating with additional appropriate entities in the State, such as Grant-Supported Federally Qualified Health Centers (''FQHCs''), which include Community Health Centers and Healthcare for the Homeless Programs, *see* 42 U.S.C. §§ 254b(a), 1396a(a)(10)(A), 1396d(a)(2)(C); the Temporary Assistance for Needy Families (TANF) Program, *see* 42 U.S.C. §§ 601 *et seq.;* the supplemental nutrition program for Women, Infants and Children (WIC), *see* 42 U.S.C. §§ 1786 *et seq.;* and the Supplemental Nutrition Assistance Program (''SNAP'') (formerly the Federal Food Stamp program), *see* 7 U.S.C. 2011 *et seq.* Some of these programs may serve as primary referral sources. We note that some States have adopted a centralized intake center for families for many State health, social welfare, public assistance, and other programs that target the health and welfare of children and families and that the part C early intervention program may be included in such an intake center.

Changes: We have added new paragraphs (J) and (K) to new § 303.302(c)(1)(ii) to include EHDI and CHIP among the programs with which the lead agency must coordinate its child find activities.

Comment: None.

Discussion: To provide consistency between the lead agency's responsibilities to ensure non-duplication of child find efforts in new § 303.302(c)(2)(i) (proposed § 303.301(c)(2)(i)) and child find coordination in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)), we have replaced, in new § 303.302(c)(2)(i) (proposed § 303.301(c)(2)(i)), the broad reference to various agencies with a reference to the specific programs identified in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(1)(ii)), with which the lead agency must coordinate its child find efforts.

Changes: We have replaced in new § 303.302(c)(1)(ii) (proposed § 303.301(c)(2)(i)) the phrase ''various agencies involved in the State's child find system under this part'' with ''programs identified in paragraph (c)(1)(ii) of this section.''

Comment: One commenter requested clarification on why the reference to public agency was deleted from new § 303.302(c)(1)(ii) (proposed § 303.301(c)(2)(ii)), concerning the requirement that the State make use of each EIS provider in implementing child find in an effective manner. Another commenter disagreed with the language in proposed § 303.301(c)(2)(ii) because public agencies that provide services to young children are critical to the child find system and these public agencies should be expressly referenced and continue to be an active part of the child find system. Both commenters recommended that current § 303.321(c)(2)(ii) be retained.

Discussion: Current § 303.321(c)(2)(ii), regarding coordination efforts, provides that the lead agency make use of the resources available through each public agency in the State to implement child find in an effective manner. We added in new § 303.302(c)(2)(ii) (proposed § 303.301(c)(2)(ii)) a reference to EIS providers because of the revised definitions of *EIS providers* and *public agencies.* We agree with the commenters that the reference to public agencies should be reinstated and also have added that reference.

Changes: We have added the words ''each public agency'' to the reference to ''EIS provider in the State'' to new § 303.302(c)(2)(ii) (proposed § 303.301(c)(2)(ii)).

Referral Procedures (New § 303.303) (Proposed § 303.302)

Comment: None.

Discussion: We have made a technical edit to new § 303.303(a)(1) (proposed § 303.302(a)(1)) to clarify that the referral procedures that lead agencies must provide to primary referral sources are the State's procedures for referring a child under the age of three to the part C program.

Changes: We have added the word ''State's'' before the word ''procedures'' in § 303.303(a)(1) (proposed § 303.302(a)(1)).

Comment: Many commenters supported removing current § 303.321(d)(2)(ii), which required primary referral sources to refer a child to the part C program within two working days of the child's identification. The commenters stated that because the two-day timeline was not enforceable by lead agencies, they supported the language in proposed § 303.302(a)(2)(i) that requires referrals be made as soon as possible. These commenters stated that requiring primary referral sources to refer identified children as soon as possible would provide States with the flexibility to establish or maintain more stringent reporting requirements on primary referral sources, while acknowledging the difficulties associated with monitoring the adherence of thousands of primary referral sources to a Federal standard.

A significant number of commenters, however, opposed the language in proposed § 303.302(a)(2)(i) and recommended retaining the two-day timeline for referrals in current § 303.321(d)(2)(ii). These commenters expressed concern that the proposed timeline, *i.e.,* as soon as possible, threatens to introduce long delays into part C referral, evaluation, and program implementation processes. Other commenters proposed that the regulations retain the phrase ''as soon as possible,'' but qualify it with a maximum timeline. Commenters proposed a variety of maximum timelines, ranging from three business days to ten business days.

Discussion: We agree with the commenters who expressed concern that requiring primary referral sources to refer an identified child to the part C program ''as soon as possible'' could introduce undue delays into the part C referral process. Although enforcement of the timeline in current § 303.321(d)(2)(ii), which requires primary referral sources to refer a child to the part C system within two working days of the child's identification, has been a challenge for lead agencies, requiring referrals to be made ''as soon as possible'' may be more difficult to enforce than the two-day timeline. We believe it is appropriate to retain the phrase ''as soon as possible'' because it conveys a sense of urgency that referrals be made to the part C program in a timely manner. Therefore, we have retained the ''as soon as possible'' language and added a maximum timeline to new § 303.303(a)(2)(i) (proposed § 303.302(a)(2)(i)) to require that a child be referred as soon as possible, but in no case more than seven days, after the child has been identified. We realize that in some cases an earlier referral may be reasonable, but establishing a maximum timeline of seven days provides more flexibility to primary referral sources for making referrals than the timeline under current § 303.321(d)(2)(ii). Moreover, the new timeline requires primary referral sources to refer children as soon as possible.

Changes: We have revised new § 303.303(a)(2)(i) (proposed § 303.302(a)(2)(i)) to require primary referral sources to refer a child to the part C program as soon as possible, but in no case more than seven calendar days after the child has been identified.

Comment: One commenter opposed the requirement in proposed § 303.302(b) that the lead agency adopt procedures requiring the referral of specific at-risk children. The commenter stated that this provision does not reflect congressional intent to ensure that these children are screened, either by a designated primary referral source or EIS provider, to determine whether a referral for an evaluation for early intervention services under part C of the Act is warranted.

Discussion: The language in new § 303.303(b) (proposed § 303.302(b)) is based on the statutory language in section 637(a)(6) of the Act, regarding the referral of a child under the age of 3 who is involved in a substantiated case of child abuse or neglect; or is identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure.

As noted by the commenter, lead agencies may use a variety of methods to ensure the identification of specific at-risk infants and toddlers who may be infants and toddlers with disabilities eligible for services under part C of the Act. Under new § 303.320 (proposed § 303.303), the lead agency may establish screening procedures for children under the age of three, including at-risk infants and toddlers, who have been referred to the part C program. Primary referral sources also may choose to conduct screenings of at-risk infants and toddlers prior to referring a child to the part C program under new § 303.303 (proposed § 303.302). If a primary referral source conducts a screening under the supervision of the lead agency in order

to determine if a child is suspected of having a disability, such screening procedures must meet the requirements in new § 303.320 (proposed § 303.303).

The lead agency may use interagency agreements or other methods to coordinate with primary referral sources, such as the State agency that administers the Child Abuse Prevention and Treatment Act (CAPTA), to conduct child find and ensure identification of at-risk infants and toddlers who may be eligible for services under part C of the Act. The screening procedures in new § 303.320 (proposed § 303.303) are consistent with section 637(a)(6) of the Act and the policy, reflected in the legislative history cited by the commenter, that not every child referred to the part C program must be evaluated. Therefore, we decline to revise the regulations as requested by the commenter.

Changes: None.

Comment: One commenter requested clarification of the scope of the phrase ''affected by illegal substance abuse'' in new § 303.303(b) (proposed § 303.302(b)). Specifically, the commenter asked who must be referred for early intervention services under this provision.

Discussion: The language ''affected by illegal substance abuse'' in new § 303.303(b) (proposed § 303.302(b)) is from section 637(a)(6)(B) of the Act, which requires children who are ''affected by illegal substance abuse'' to be referred to the part C program. The policy for requiring the referral of children under the age of three who have been directly affected by illegal substance abuse is that there is a likelihood that these children may experience developmental delays and thus be eligible for early intervention services under part C of the Act. We have clarified the phrase ''affected by illegal substance abuse'' by adding the term ''directly'' because we agree that the statutory language is vague. This change is consistent with our addition of the term ''directly'' in § 303.211(b)(7) regarding referral of a child under the age of three who directly experiences a substantiated case of trauma due to exposure to family violence.

Changes: We have added the term ''directly'' before the words ''affected by illegal substance abuse'' in new § 303.303(b)(2) (proposed § 303.302(b)(2)).

Comment: Some commenters requested that the Department mandate that child find systems provide for the referrals of children under the age of three who have been abandoned; affected by alcohol abuse, including prenatal alcohol exposure; or exposed to family violence or dangerous levels of lead paint. At a minimum, these commenters recommended that these regulations include these children as examples of children who should be referred to the part C program.

Discussion: Section 637(a) of the Act only requires the referral for early intervention services of a child under the age of three who is involved in a substantiated case of child abuse or neglect or is identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure. While not required under the Act, a State may choose to require the referral for evaluation of the children identified by the commenter (*i.e.,* those who have been abandoned, affected by alcohol abuse, including prenatal alcohol exposure; or exposed to family violence or dangerous levels of lead paint). However, we do not wish to limit a State's flexibility to assess the unique needs in the State, and identify accordingly, other subgroups that may be determined to be at-risk and require a referral for evaluation. Thus, we decline to revise the regulations as requested by the commenter.

Changes: None.

Comment: A few commenters opposed new § 303.303(b)(1) (proposed § 303.302(b)(1)), which requires the referral of a child under the age of three who is involved in a substantiated case of child abuse or neglect. One commenter stated that this requirement is vague and inconsistent with the explanation provided in the preamble to the NPRM that, under this section and consistent with CAPTA requirements, a referral to the part C program would only be for the child who is the subject of the substantiated proceeding. The commenters requested that new § 303.303(b)(1) (proposed § 303.302(b)(1)) clarify that the referral requirements in that section would not apply, for example, to a sibling (under the age of three) of a child who had been the subject of a substantiated case of child abuse or neglect unless that sibling also had been the subject of a substantiated case of child abuse or neglect. Another commenter expressed concern that Federal funding is insufficient to address the potential increase in referrals of children under CAPTA.

Discussion: We agree with the commenters that the language ''involved in a substantiated case of child abuse or neglect'' in section 637(a)(6)(A) and new § 303.303(b) (proposed § 303.302(b)(1)) is vague. This provision is consistent with 42 U.S.C. 5106a of CAPTA, which was amended in June 2003 to require States receiving CAPTA funds to have policies regarding the referral to the part C program of children under the age of three who were the subject of a substantiated case of child abuse or neglect. The Department consulted with the U.S. Department of Health and Human Services (HHS), which administers CAPTA, and determined that our interpretation of this provision in section 637(a)(6)(A) of the Act is consistent with HHS's view that neither part C of the Act nor CAPTA requires the referral of a child other than a child who is the subject of a proceeding resulting in a substantiated case of child abuse or neglect. For this reason, we have revised the regulatory language in new § 303.303(b)(1) (proposed § 303.302(b)(1)) to refer to a child under the age of three who ''is the subject'' of a substantiated case of child abuse or neglect. Additionally, we do not interpret the statutory language or new § 303.303(b)(1) (proposed § 303.302(b)(1)) to require a sibling (under the age of three) to be referred or screened unless that sibling is a child under the age of three who also has been the subject of a substantiated case of child abuse or neglect. Given that we have narrowed the scope of children to be referred to the part C program under new § 303.303(b)(1) (proposed § 303.302(b)), the potential burden is decreased to States, which may currently receive referrals of all children (such as a sibling or step-sibling) who are involved in a substantiated case of child abuse or neglect.

Changes: The phrase ''involved in'' in new § 303.303(b)(1) (proposed § 303.302(b)(1)) has been changed to ''the subject of.''

Comment: One commenter noted, with respect to new § 303.303(b)(2) (proposed § 303.302(b)(2)), that section 106(b)(2)(A)(xxii) of CAPTA does not require referral to part C services of children under the age of three who are affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. This commenter requested that the Department clarify this fact in the preamble to these regulations.

Discussion: Section 303.303(b)(2) reflects the requirement in section 637(a)(6)(B) of the Act that each State's part C application include policies and procedures requiring the referral for early intervention services of a child under the age of three who is identified as affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. Section 106(b)(2)(A)(xxii) of CAPTA, however, requires that each State that receives CAPTA funds assure that it has policies and procedures (including appropriate

referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. Thus, while the language of CAPTA differs from the language of section 637(a)(6)(B) of the Act, § 303.303(b)(2) reflects the appropriate requirement under the Act.

Changes: None.

Comment: One commenter recommended clarifying that the list of primary referral sources in new § 303.303(c) (proposed § 303.302(c)) is not an inclusive list and that a lead agency may include other primary referral sources in its child find system. Additionally, two commenters recommended adding McKinney-Vento ''local educational agency liaisons,'' as defined in 42 U.S.C. 11432(g)(6), as primary referral sources along with LEAs and schools in new § 303.303(c)(5) (proposed § 303.302(c)(5)).

Discussion: We agree with the commenter that new § 303.303(c) (proposed § 303.302(c)) is intended to be a non-exhaustive list of primary referral sources and that a lead agency may include other primary referral sources in its child find system. The term *include,* as defined in § 303.18 and used in the introductory text in new § 303.303(c) (proposed § 303.302(c)), means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

We decline to add McKinney-Vento local educational agency liaisons, as defined in 42 U.S.C. 11432(g)(6), to new § 303.303(c)(5) (proposed § 303.302(c)(5)), as requested, because these liaisons work with LEAs and school-age children—not children under the age of three—and, therefore, coordination with these liaisons is not required for programs under part C of the Act. Nothing in the Act or these regulations would preclude a lead agency from coordinating with the McKinney-Vento local educational agency liaisons, as defined in 42 U.S.C. 11432(g)(6), if it determines such coordination is appropriate.

Changes: None.

Comment: One commenter recommended changing the reference to day care programs in new § 303.303(c)(4) (proposed § 303.302(c)(4)) to child care and early learning programs.

Discussion: We agree that day care should be changed to child care because this term reflects the current terminology of the field. We also agree that early learning programs should be included in the list of primary referral sources. While the list in new § 303.303(c) (proposed § 303.302(c)) includes schools, some early learning programs, such as Early Head Start, may not always be included in this category. To ensure all early learning programs are included as referral sources we have added early learning programs to new § 303.303(c) (proposed § 303.302(c)).

Changes: We have changed the term ''day care programs'' to ''child care programs'' and added ''early learning programs'' in new § 303.303(c)(4) (proposed § 303.302(c)(4)).

Comment: None.

Discussion: To clarify that primary referral sources may include not only public health facilities and other social service agencies, but also public health agencies that are neither public health facilities nor social service agencies, we have added a reference to public health agencies in new § 303.303(c)(7) (proposed § 303.302(c)(7)). For example, other public health or social service agencies may include the Maternal, Infant, and Early Childhood Home Visiting Program, under Title V of the Social Security Act, as amended, or the Early Hearing Detection and Intervention (EHDI) systems administered by the Centers for Disease Control.

Changes: We have added the phrase ''public health or'' before the words ''social service agencies'' in new § 303.303(c)(7) (proposed § 303.302(c)(7)).

Forty-Five Day Timelines (New § 303.310) (Proposed § 303.320(e))

Comment: We received a large number of comments, questions, and recommendations regarding the 45-day timeline requirement in proposed § 303.320(e) that lead agencies complete the initial evaluation, the initial assessments, and the initial IFSP meeting within 45 days from parental consent for the initial evaluation.

Many commenters supported proposed § 303.320(e), which stated that the evaluation, assessment, and initial IFSP meeting must be completed within 45 days from the date the lead agency obtains parental consent for the child's evaluation. These commenters preferred this timeline to the 45-day timeline in current § 303.322(e), which commences not on the date the lead agency obtains parental consent, but rather on the date it receives the referral of the child. These commenters argued that, given the complexity of the post-referral process, adding more time to the period between referral and the initial IFSP meeting was appropriate.

A few commenters recommended that, if the Department adopted proposed § 303.320(e), the Department should add a separate timeline for the time period between referral and when the lead agency must obtain parental consent and suggested timelines for this period ranging from 2 to 30 days or ''as soon as possible.''

Many other commenters opposed the 45-day timeline in proposed § 303.320(e). These commenters expressed concern that having the 45-day timeline triggered by the date the lead agency obtains parental consent, rather than the date the lead agency receives the child's referral, could result in significant delays in getting infants and toddlers with disabilities the early intervention services they need. These commenters argued that proposed § 303.320(e)(ii), which stated that lead agencies must obtain parental consent as soon as possible once a child is referred to a lead agency, would be an inadequate protection if adopted because it would allow an undetermined and unregulated period of time between the child's referral and parental consent, and could delay the completion of initial evaluations, initial assessments, and initial IFSP meetings. These commenters expressed concern that proposed § 303.320(e) would result in less accountability for lead agencies because, under that provision, the lead agencies could control—to a large extent—when they obtained parental consent for evaluation and thus when the 45-day timeline would commence.

These commenters further argued that the Department should not adopt the timeline in proposed § 303.320(e) and that it should instead retain the timeline reflected in current § 303.322(e), which requires the public agency to complete the evaluation and assessment activities and hold an IFSP meeting within 45 days from the date the public agency receives the child's referral. For these commenters, beginning the 45-day timeline from the date the public agency receives the child's referral is preferable because it promotes accountability for lead agencies; the triggering event for the timeline is something outside of a lead agency's control. Moreover, commenters argued that beginning the 45-day timeline from the date of referral will help ensure that children receive services within a shorter timeframe. Some of the commenters that supported triggering the required timeline from the date of referral recommended that the length of the timeline be changed; they suggested alternative timelines, ranging from 30 days from referral to 75 days from referral.

Finally, a few commenters recommended that these regulations not include any timeline. These

commenters argued that each State should have the flexibility to establish its own timeline to complete the post-referral activities through the initial IFSP meeting; they argued that this flexibility would be similar to the flexibility offered in the evaluation timeline under 34 CFR 300.301(c)(1)(ii) to conduct an evaluation to determine eligibility for the part B program.

Discussion: After much review and careful consideration of the many and divergent opinions on the 45-day timeline, we have determined that it is appropriate to retain in new § 303.310(a) the 45-day timeline from the date of the child's referral as reflected in current § 303.321(e), but to provide for limited exceptions when the 45-day timeline will not apply. Data from Federal fiscal year (FFY) 2006 State part C SPP/APRs indicate that many States have made significant progress toward meeting the current 45-day timeline requirement. The Department's position is that maintaining this standard in new § 303.310(a)—combined with the flexibility offered by the two exceptions incorporated in new § 303.310(b)—will help States continue to ensure timely initial evaluations, initial assessments, and initial IFSP meetings when children are referred to the part C program without unduly burdening lead agencies and EIS providers.

We believe that having the 45-day timeline in new § 303.310(a) commence on the date of referral, rather than on the date the lead agency or EIS provider obtains parental consent for the initial evaluation, ensures accountability, consistency, and predictability, and it is easier for States and parents to implement and track. More importantly, we are persuaded that this timeline will result in fewer delays in infants and toddlers with disabilities receiving early intervention services as quickly as possible after being referred. For these reasons, we have incorporated the 45-day timeline, commencing from referral, in new § 303.310. For clarity, we have revised the language in this section to ensure that the timeline applies to both lead agencies and EIS providers because EIS providers as well as lead agencies implement these requirements and conduct initial evaluations, initial assessments, and initial IFSP meetings.

As we noted in the NPRM, however, we fully appreciate that a lead agency or EIS provider may not be able to comply with the 45-day timeline because of exceptional family circumstances that are beyond its control. For example, as we noted in the NPRM, a lead agency or EIS provider cannot meet the 45-day timeline from the date of referral without parental consent for initial evaluations and initial assessments. Moreover, delays in obtaining parental consent may drastically reduce the time available for the lead agency or EIS provider to perform the initial evaluation and initial assessments and prepare for the initial IFSP meeting. Rather than attempting to address these concerns by commencing the 45-day timeline from the date the lead agency or EIS provider obtains parental consent, it is more appropriate to address these concerns by providing for limited exceptions in new § 303.310(b) to clarify when the 45-day timeline in new § 303.310(a) would not apply.

We have described in new § 303.310(b) two specific circumstances when the 45-day timeline would not apply. First, as noted in new § 303.310(b)(1), there may be periods of time when the child or parent is unavailable to complete the screening, if applicable; the initial evaluation; the initial assessment of the child; the initial assessment of the family; or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records. To clarify that it is only the unavailability of the child or parent (and not other family members) that determines the availability of this exception, we have added new § 303.310(d) to ensure that the family assessment is completed within the 45-day timeline, if the parent concurs, as long as the parent is available.

The second exception to the 45-day timeline is set forth in new § 303.310(b)(2), which provides that if the parent has not provided consent for the screening (if the State has adopted a policy to conduct screenings and elects to conduct a screening of that child), initial evaluation, or initial assessment of the child despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent, then the 45-day timeline would not apply. We have not included the family assessment or the initial IFSP meeting in this second exception because, while the family assessment is voluntary on the part of any family member who participates in it and the initial IFSP meeting must be scheduled at a time convenient to the family, there are no express written consent requirements for conducting the family assessment and initial IFSP meeting.

To ensure that these exceptions are not absolute, we have added a new requirement in § 303.310(c) to clarify that the lead agency or EIS provider must complete the screening, if applicable; initial evaluation; initial assessments; and initial IFSP meeting as soon as possible after the circumstances described in new § 303.310(b) no longer exist or parental consent is obtained. We believe that the availability of the two limited exceptions to the 45-day timeline in new § 303.310(b) creates flexibility and reduces burdens for lead agencies and EIS providers. Coupling these exceptions with a 45-day timeline commencing on the date of the child's referral to the part C program in new § 303.310(a) creates a clear and enforceable timeline that ensures accountability for timely identification, evaluations, assessments, and IFSP meetings for infants and toddlers with disabilities.

Additionally, to further protect children affected by circumstances described in new § 303.310(b)(1) and (b)(2), we have added new § 303.310(c)(3) to clarify that the lead agency must have procedures to ensure that the lead agency or EIS provider develop and implement an interim IFSP to the extent appropriate and consistent with § 303.345 in the event of the circumstances described in § 303.310(b).

With regard to the comments recommending that we lengthen or remove the 45-day timeline in new § 303.310(a) (proposed § 303.320(e)), we decline to do so because lengthening or removing the timeline would not create the same level of accountability for ensuring timely evaluations and assessments and IFSP development for infants and toddlers with disabilities. Given the rapid developmental changes in this age group of children, it is essential that lead agencies and EIS providers evaluate, assess, and provide early intervention services to those in need as soon as possible. We also decline to shorten the 45-day timeline, as requested by some commenters, because we are not convinced that a shortened timeline would be feasible for lead agencies and EIS providers to carry out their obligations under subpart D of these regulations.

Finally, regarding the request to incorporate in these regulations a timeline within which a lead agency or EIS provider must obtain parental consent following a child's referral to the part C program, establishing this separate timeline is unnecessary because the Department has adopted a 45-day timeline that runs from the date of referral, not the date parental consent is obtained.

Changes: We have redesignated proposed § 303.320(e) as new § 303.310(a) and revised it to require that, within 45 days after the lead agency or EIS provider receives a referral, the screening (if the State has adopted a policy and elects, and the

parent consents, to conduct a screening of a child), initial evaluation, initial assessments, and initial IFSP meeting must be conducted. We have deleted the language from proposed § 303.320(e)(1)(ii) regarding the lead agency obtaining parental consent as soon as possible after receiving the child's referral.

We have clarified in § 303.310(a) that the 45-day timeline applies to the screening conducted under new § 303.320, if applicable; initial evaluation (described in new § 303.321(a)(2)(i) as the child's evaluation to determine his or her initial eligibility under this part), initial assessments of the child and family under § 303.321(a)(2)(ii); and initial IFSP meeting under § 303.342.

We also have added new § 303.310(b) to identify two limited exceptions to the 45-day timeline. These exceptions cover periods of time when (i) the child or parent is unavailable to complete the screening, if applicable; the initial evaluation; the initial assessments of the child and family; or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records; or (ii) the parent has not provided consent for the screening, if applicable, the initial evaluation, or the initial assessment of the child, despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent.

We have added new § 303.310(c) to clarify that the lead agency must have procedures to ensure that the lead agency or EIS provider: (1) Documents the exceptional circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent, (2) completes the screening, if applicable, the initial evaluation, the initial assessments of the child and family, and the initial IFSP meeting as soon as possible after the documented exceptional family circumstances no longer exist or parental consent is obtained for the screening, if applicable, initial evaluation, and initial assessment of the child, and (3) develop and implement an interim IFSP to the extent appropriate and consistent with § 303.345.

Finally, we have added new § 303.310(d) to ensure that the family assessment is completed within the 45-day timeline, if the parent concurs, as long as the parent is available.

Comment: Two commenters recommended that, rather than changing the triggering event for the 45-day timeline from referral to parental consent, the Department should use its authority under section 618 of the Act to collect information related to the reasons for, and the scope of problems related to, a lead agency's failure to meet the 45-day timeline requirement. A few commenters recommended that new § 303.310 (proposed § 303.320(e)) require States to report on the timelines in new § 303.310 (proposed § 303.320(e)) as part of the State's application.

Discussion: As previously discussed, we have retained the current 45-day timeline from the date of a child's referral to the part C program for lead agencies and EIS providers to complete the child's initial evaluation, initial assessment, and initial IFSP meeting. Concerning commenters' requests that this timeline be reported in each State's application, States already report to the Department data on implementing the 45-day timeline and reasons for any delay in meeting this timeline. One of the indicators that each State is required to report on in its SPP/APR is compliance with this 45-day timeline. Each State reports these data annually to the Department. Pursuant to sections 616(d) and 642 of the Act, the Department uses these and other data to determine whether the State is meeting the requirements of part C of the Act and these regulations. Given that the Department already collects these data, it is not necessary to incorporate an additional data collection requirement in the application or elsewhere in these regulations.

Changes: None.

Comment: Some commenters recommended that a specific provision be added to new § 303.310(b) (proposed § 303.320(e)) to permit a lead agency to waive the 45-day timeline requirement if the lead agency or EIS provider made good faith efforts to conduct the initial evaluation, initial assessments, and initial IFSP meeting but the child or family member was unavailable (*e.g.,* due to child or parent illness, work or family vacation scheduling conflicts, or other parent-requested considerations) or the lead agency or EIS provider made good faith efforts to obtain parental consent for the initial evaluation and initial assessment but was unable to do so within the 45-day timeline.

Discussion: As discussed earlier in this preamble, we agree that exceptional family circumstances may make it difficult or impossible for the lead agency or EIS provider to meet the 45-day timeline in new § 303.310 (proposed § 303.320(e)). However, we do not believe an absolute waiver of the timeline is appropriate. Instead, to provide flexibility and ensure accountability, we have adopted, in new § 303.310(b), two limited exceptions to the 45-day timeline, one of which directly addresses the commenters' concern about exceptional family circumstances.

Specifically, new § 303.310(b) states that the 45-day timeline does not apply when: (1) The child or parent is unavailable to complete the screening, if applicable; the initial evaluation; the initial assessments of the child and family; or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records; or (2) the parent has not provided consent for the screening, if the State has adopted a policy to conduct screenings and elects to conduct a screening of that child; initial evaluation; or initial assessment of the child despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent.

To ensure that these exceptions are used appropriately, new § 303.310(c) requires the lead agency to develop procedures to ensure that exceptional family circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent are documented in the child's early intervention records.

Moreover, to ensure that these exceptions do not result in absolute waivers of the 45-day timeline, new § 303.310(c)(2) and (c)(3) require that the lead agency or EIS provider complete the activities as soon as possible after the basis for the exceptions cease to exist, and develop and implement an interim IFSP to the extent appropriate and consistent with § 303.345.

These two limited exceptions provide States needed flexibility while ensuring that, once parental consent is provided for the screening, if applicable; initial evaluation; and initial assessment of the child; or the exceptional family circumstances no longer exist, the lead agency or EIS provider conduct the screening, if applicable; initial evaluation; initial assessments; and initial IFSP meeting as soon as possible to ensure the timely identification and evaluation of infants and toddlers with disabilities.

Changes: As noted earlier in this preamble, we have added new § 303.310(b) to identify two exceptions to the 45-day timeline and added § 303.310(c) to clarify that the lead agency must have procedures to ensure that the lead agency or EIS provider: (i) Documents exceptional circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent, (ii) completes the screening, if applicable; the initial evaluation; initial assessments; and the initial IFSP

meeting as soon as possible after the documented exceptional family circumstances no longer exist or parental consent is obtained, and (iii) develop and implement an interim IFSP if appropriate, consistent with § 303.345.

Screening Procedures (Optional) New § 303.320 (Proposed § 303.303)

Comment: None.

Discussion: Based on further review of § 303.320(a)(1) (proposed § 303.303(a)(1)), regarding screening procedures, we have determined that the words ''when appropriate'' are unnecessary and potentially confusing. Lead agencies always can adopt policies for screening. If a State elects to adopt screening policies and procedures, those policies and procedures must specify when screening of a particular child is appropriate.

Changes: We have removed the words ''when appropriate'' from § 303.320(a)(1) (proposed § 303.303(a)(1)).

Comment: A significant number of commenters requested additional clarification regarding the screening procedures in proposed § 303.303. Some commenters opposed including screening in these regulations stating that they were concerned that children for whom part C eligibility is not readily or easily apparent may be denied an evaluation and services if screening is conducted.

Other commenters recommended that proposed § 303.303(a)(3) be amended to require that if the lead agency determines, based on screening and other available information, that the child is not suspected of having a disability, the lead agency must ensure that notice is provided to the parent under § 303.421, including notice of the right to request and receive an evaluation at any time. Additionally, the commenters requested that this notice include a description of the difference between a ''screening,'' conducted pursuant to proposed § 303.303, and an ''evaluation,'' as required in proposed § 303.320.

Other commenters suggested that if the lead agency decides the child is not suspected of having a disability, the lead agency should be required to present this decision and the reasons for the decision to a parent in writing, but should not be required to provide this information through prior written notice under § 303.421. These commenters further recommended that the lead agency be required to offer an evaluation only after that decision is conveyed to the parent, and the parent disagrees with that determination and requests an evaluation.

One commenter stated that if a parent disagrees with a decision regarding a referral for evaluation, the parent should be entitled to appeal that decision using the due process procedures in subpart E of these regulations, but the lead agency should not be required to evaluate the child.

A few commenters requested that parents be informed verbally and in writing, in their native language or preferred method of communication, of their right to request a full evaluation of their child, including their right to bypass screening and go straight to an evaluation.

Discussion: New § 303.320 (proposed § 303.303) has been restructured, and a few provisions have been added, to address the commenters' concerns regarding screenings and a parent's right to request an evaluation. We have added new § 303.320(a)(1)(i) and (a)(1)(ii), stating that if the lead agency or EIS provider proposes to screen a child, it must provide the parent notice under § 303.421 of its intent to screen the child to determine whether the child is suspected of having a disability and obtain parental consent as required in § 303.420(a)(1) before administering the screening. That notice must explain the parent's right to request an evaluation under new § 303.321 (proposed § 303.320) at any time during the screening process.

We also have revised new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) to specify that when the lead agency provides notice to a parent under § 303.421 that, based on the screening or other available information, a child is not suspected of having a disability, the notice must describe the parent's right to request an evaluation.

Additionally, in new § 303.320(a)(3), we have retained the provision in proposed § 303.303(a)(4) to allow parents to request and consent to an evaluation when the lead agency or EIS provider determines that the child is not suspected of having a disability. We have revised this section to specify that parents may request, and consent to, an evaluation at any time during the screening process. This ensures that an evaluation may still be requested by the parent of a child for whom part C eligibility is not readily or easily apparent.

With regard to the comment that the notice provided to parents when the child is not suspected of having a disability should include an explanation of the differences between screening and evaluation, it is not necessary to add that language to new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) because this section requires that prior written notice pursuant to § 303.421 be provided to a parent when a child is not suspected of having a disability, and § 303.421(b) mandates that prior written notice be in sufficient detail to inform the parents about the action that is being proposed or refused. Therefore, we expect that the procedures involved in screening and evaluation will be explained to the parents through the prior written notice.

It is the Department's position that presenting a parent with a written decision that the child is not suspected of having a disability and the reasons for the decision in a manner that meets the prior written notice requirements in § 303.421(b) would ensure that parents are fully informed of their rights. We believe fully informing parents of their rights is a critical aspect of enhancing the capacity of families to meet the special needs of their infants and toddlers with disabilities, pursuant to section 631 of the Act and, thus, we have required lead agencies to ensure that parents are provided with prior written notice of any determination that their child is not suspected of having a disability.

A parent has the right to request an evaluation if the screening or other available information indicates that the child is not suspected of having a disability, instead of having to utilize the due process procedures in subpart E of these regulations to appeal that decision. The Department's experience indicates that parents often can identify or suspect developmental delays in their children that may not be identified through a screening. For this reason, parents should be able to request and receive an evaluation without the potential delay and expense of a due process hearing. We believe this approach facilitates a comprehensive child find system tasked with identifying all infants and toddlers with disabilities. Additionally, because a child is only eligible for part C services for a short period of time and providing services earlier rather than later can enhance the development of infants and toddlers with disabilities, time is of the essence with regard to identifying a child as an infant or toddler with a disability. Thus, it is important that parents retain the right to request an evaluation at any time during the screening process.

With regard to the comment that notice of the right to request an evaluation should be provided to the parent verbally and in writing, in the parent's native language or preferred method of communication, parental

notice of the right to request an evaluation must meet all of the requirements in § 303.421, including the native language requirement. The requirements in § 303.421 are discussed further in the *Analysis of Comments and Changes* section for subpart E of these regulations. We believe that the requirements in § 303.421 are comprehensive and sufficient to provide parents with an understanding of their rights, specifically with regard to their right to request an evaluation.

Changes: We have restructured this section and added language to new § 303.320(a) (proposed § 303.303(a)) to clarify that parents have an ongoing right to request an evaluation before, during, or after their child is screened. Specifically, we have added a new § 303.320(a)(1)(i) and (a)(1)(ii), stating that if the lead agency or EIS provider proposes to screen a child, it must (i) provide the parent notice under § 303.421 of its intent to screen the child to identify whether the child is suspected of having a disability (and include in the notice a description of the parent's right to request an evaluation under § 303.321 at any time during the screening process) and (ii) obtain parental consent as required in § 303.420(a)(1) before administering the screening. We also have revised new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) to specify that when the lead agency provides notice to a parent under § 303.421 that, based on the screening or other available information, a child is not suspected of having a disability, the notice must describe the parent's right to request an evaluation.

We have added to new § 303.320(a)(3) (proposed § 303.303(a)(4)) a provision clarifying that parents may request an evaluation at any time during the screening process.

Comment: A few commenters expressed concern that the amount of time used for screening could increase the time between referral and the initiation of services. The commenters requested that a timeline be imposed so that eligibility determinations would not be delayed. Some commenters requested clarifying that the 45-day timeline in new § 303.310 (proposed § 303.320(e)) starts prior to the screening, not after. Additional commenters expressed concern that while comprehensive statewide screening efforts could enhance the early identification of eligible children, the regulations do not adequately emphasize that screening efforts should not be used to deny or delay an eligibility determination from the lead agency.

Discussion: The timeline outlined in new § 303.310(a) (proposed § 303.320(e)) requires that any screening under § 303.320, if applicable, be completed within 45 days from the date the lead agency or EIS provider receives the referral of the child. Because screening by the lead agency is optional and is included in the 45-day timeline, the use of screening is not expected to cause a delay in determining a child's eligibility for services under part C of the Act, but rather to assist the lead agency and parent in determining whether a child is suspected of having a disability. With regard to the commenters' concern that the regulations in this part do not adequately emphasize that screening efforts should not be used to deny an eligibility determination, a parent has the right, under new § 303.320(a)(3) (proposed § 303.303), to request and receive an evaluation at any time during the screening process and must be notified of this right, under new § 303.320(a)(1)(i), at the beginning of the screening process. Therefore, the regulations protect parents with regard to eligibility determinations and sufficiently address the commenters' concern.

Changes: As previously discussed in response to comments on new § 303.310 (proposed § 303.320(e)), we have added a reference to screening as an activity that is subject to the 45-day timeline in § 303.310 (proposed § 303.320(e)).

Comment: A few commenters expressed concern that, under new § 303.320 (proposed § 303.303), lead agencies may use the results of screening procedures to determine eligibility for early intervention services and requested that these regulations explicitly require a full evaluation be conducted in order to determine eligibility for services under part C of the Act.

Discussion: New § 303.320 makes clear that the purpose of screening is to determine if a child is suspected of having a disability. If eligibility is to be determined, new § 303.321 requires that an evaluation (not screening) be used to determine eligibility. We believe these regulations are clear in their scope and purpose and decline to make the change requested by the commenters.

Changes: None.

Comment: A significant number of commenters requested additional clarification regarding the procedures that should be used to screen infants and toddlers. These commenters recommended that States should be required to ensure that professionals conducting the screening meet the requirements that apply to EIS providers. Some commenters requested that the regulations set a standard for personnel conducting the screening. Other commenters requested that States be required to use one standardized screening tool across the State in order to eliminate differences in screening procedures across jurisdictions.

Discussion: Proposed § 303.303(b)(2) provided that screening procedures include the administration of appropriate instruments by qualified personnel, who can assist in making the identification outlined in new § 303.320(a). We have revised that language, in new § 303.320(b)(2), to indicate that personnel who conduct screening of a child must be trained to administer appropriate screening instruments. We made this revision to ensure that personnel, such as paraprofessionals or other individuals who are trained to administer a specific screening instrument, may conduct screenings.

Concerning the request that we require a State to use one standardized screening tool across the State, it is the Department's position that requiring or recommending the use of specific measurement tools, including requiring that a State use only one measurement tool throughout the State, is not appropriate because individual child differences should be taken into account when selecting appropriate instruments.

Changes: We have deleted the reference to ''qualified personnel'' in new § 303.320(b)(2) (proposed § 303.303(b)(2)), and added a reference to ''personnel trained to administer those instruments.''

Comment: A few commenters requested that language be included in proposed § 303.303 to stipulate that screening is not required for infants and toddlers with established physical or mental conditions.

Discussion: Screening is intended to be a tool to assist the lead agency and EIS providers determine whether an infant or toddler is suspected of having a disability and is in need of an evaluation. If a child has a diagnosed physical or mental condition, an evaluation or screening may not be needed to determine eligibility. We specifically provide in new § 303.321(a)(3)(i) that a child's medical and other records may be used to establish eligibility (without conducting an evaluation of the child) under this part if those records indicate that the child is an infant or toddler with a disability in § 303.21, which includes children with diagnosed conditions, developmental delays, and, at the State's option, at-risk children. For children with established diagnosed

conditions, screening is not needed because records establish that the child is not only suspected of having a disability, but in fact has a disability.

Changes: None.

Comment: A few commenters requested that proposed § 303.303(a)(2) be amended to provide that parents be offered the option of an evaluation in cases where the results of their child's screening indicate that the child is suspected of having a disability as opposed to requiring the lead agency to evaluate the child.

Discussion: We understand the commenters' concerns and did not intend this provision to require evaluations in all cases where the results of a screening indicate that a child may have a disability. To clarify our intent, we have added language to new § 303.320(a)(2) (proposed § 303.303(a)(2)) stating that if a parent consents to screening and the screening or other available information indicates that the child is suspected of having a disability, after notice is provided under § 303.421 and once parental consent is obtained as required in § 303.420, an evaluation and assessment of the child must be conducted under new § 303.321 (proposed § 303.320).

Changes: New § 303.320(a)(2) (proposed § 303.303(a)(2)) has been restructured to clarify that, after screening, notice under § 303.421 and parental consent are required before an infant or toddler can be evaluated.

Comment: A few commenters recommended adding language to new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) to require notification by the lead agency to the caregivers of infants and toddlers and the agencies assigned to care for them when the lead agency knows that the infant or toddler is in foster care or is a ward of the State. The commenters noted that, in these situations, it is to the child's advantage to have relevant information given to the caregiver and the agency responsible for the child.

Discussion: The definition of *parent* in § 303.27 includes a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make early intervention, educational, health, or developmental decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with § 303.422 or section 639(a)(5) of the Act.

For a child in foster care who has a foster parent that meets the definition of a *parent* in § 303.27, the child's foster parent must be notified, pursuant to § 303.421 and new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)), if the child is screened and not suspected of having a disability.

For a child who is a ward of the State (which includes a foster child who does not have a foster parent that meets the definition of a *parent* in § 303.27), protections under § 303.422, regarding surrogate parents, apply. Specifically, each lead agency must ensure that the rights of a child are protected when the child is a ward of the State. The lead agency must determine whether a child needs a surrogate parent and if so, assign a surrogate parent to the child. If a ward of the State has a surrogate parent, this parent must be notified, pursuant to § 303.421 and new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)), if the child is screened and not suspected of having a disability. Therefore, it is the Department's position that further clarification is unnecessary because the commenters' concerns about notification for infants and toddlers who are in foster care or wards of the State are adequately provided for under this part.

Changes: None.

Comment: A few commenters stated that the requirements in new § 303.320(a)(3) (proposed § 303.303(a)(4)), which allow a parent to request an evaluation even after the lead agency determines, using its screening procedures, that the child is not suspected of having a disability, would diminish the cost effectiveness of screening.

Discussion: Screening under new § 303.320 (proposed § 303.303) is not required under the Act; rather, it is an option that a State may choose to include as a part of its comprehensive child find system. An evaluation under new § 303.321 (proposed § 303.320) entails more extensive requirements than the screening under § 303.320 (proposed § 303.303) and, thus, could yield more information about whether a child is an infant or toddler with a disability than a screening may. In light of this and the fact that section 635(a)(5) of the Act requires that each State's child find system ensures rigorous standards for appropriately identifying infants and toddlers with disabilities, it is important that parents have the right to request an evaluation if screening does not result in their child being suspected of having a disability.

Changes: None.

Comment: Several commenters recommended that the regulations require re-screening every six months until the age of three if, through the screening process under new § 303.320 (proposed § 303.303), a child is not suspected of having a disability. The commenters noted that children grow and change dramatically in their first three years of life and that developmental delays are often difficult to recognize at a specific point in time.

Discussion: New § 303.302 (proposed § 303.301) provides that each State must have a comprehensive child find system that ensures that all infants and toddlers with disabilities in the State who are eligible for early intervention services under this part (including children who have been screened in the past and those who have never been screened) are identified, located, and evaluated. This section includes specific requirements to facilitate identification, location, and evaluation of all of these children.

For children who are screened and not suspected of having a disability, all of the general child find requirements in new § 303.302 (proposed § 303.301) apply and, in addition, the lead agency or EIS provider must ensure that the parent is provided notice under § 303.421, and that, pursuant to new § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)), the notice describes the parent's right to request an evaluation. These provisions provide sufficient protection for children who are screened and not suspected of having a disability.

Further, a lead agency may adopt specific screening procedures, consistent with the requirements in new § 303.320 (proposed § 303.303). As part of these procedures, a State could mandate re-screening or other protections for children who have been screened but are not suspected of having a disability. It is important for a lead agency to have some flexibility in determining how best to implement screening in its State and, therefore, it is the Department's position that mandating re-screening is not appropriate.

Changes: None.

Comment: Two commenters requested clarification as to why the phrase ''except for parents'' was included in new § 303.320(b)(1) (proposed § 303.303(b)(1)), given that parents are a vital source of information in identifying whether a child is suspected of having a disability.

Discussion: We agree that parents are a valuable source of information in determining whether a child is suspected of having a disability. Therefore, we have removed the parenthetical in new § 303.320(b)(1) (proposed § 303.303(b)(1)).

Changes: The phrase ''except for parents'' has been removed from new § 303.320(b)(1) (proposed § 303.303(b)(1)).

Comment: None.

Discussion: To clarify that screening may be conducted by the lead agency or EIS provider, we have decided to use the terms ''lead agency'' or ''EIS provider'' in lieu of the reference to ''public agency, early intervention service provider, and designated primary source'' in new § 303.320(b)(1) (proposed § 303.303(b)(1)).

Changes: We have removed the words ''public agency, early intervention service provider, or designated primary source'' from new § 303.320(b)(1) (proposed § 303.303(b)(1)) and replaced them with the words ''lead agency or EIS provider.''

Comment: A commenter recommended strengthening the language under new § 303.320(b)(2) (proposed § 303.303(b)(2)) to clarify the meaning of ''appropriate instruments.'' The commenter recommended that the screening instruments administered must have established validity and reliability to use with children under the age of three. A few commenters requested that new § 303.320(b) (proposed § 303.303(b)) require screening instruments to be peer-reviewed and research-based. One commenter recommended including reliable and valid parent-report instruments as examples of screening instruments in new § 303.320(b)(2) (proposed § 303.303(b)(2)).

Discussion: New § 303.320(b)(2) (proposed § 303.303(b)(2)) requires the administration of appropriate instruments by personnel trained to administer those instruments. Given that screening instruments vary by State—and often even within a State—and the selection of screening instruments is based on a variety of factors, it is the Department's position that it is inappropriate for these regulations to further specify the screening instruments to be used. States need the flexibility to identify which screening instruments are used. Screening instruments for children under the age of three rely heavily on parent reports. Thus, we do not believe that it is necessary to clarify, or appropriate to limit, the types of screening instruments a lead agency may use.

Changes: None.

Evaluation of the Child and Assessment of the Child and Family (New § 303.321) (Proposed § 303.320)

Comment: Several commenters noted that there were significant changes in proposed § 303.320 that did not appear to have a basis in the Act. Commenters stated that changing the definitions of evaluation and assessment procedures at this point would have major implications for State rules, policies, procedures, professional development, parent training, data systems, and State monitoring systems.

Discussion: The definitions of *evaluation* and *assessment* in proposed § 303.320(a), (b), and (c) were not substantively different from current § 303.322(b)(1) through (b)(2); instead, the changes made in proposed § 303.320 were intended to clarify the current requirements. However, because of the concerns raised by some of the commenters, we have revised the definitions in new § 303.321(a)(2) (proposed § 303.320(a), (b), and (c)) to provide further clarification. Specifically, we have clarified that evaluation means the procedures used by qualified personnel to determine a child's initial and continuing eligibility under this part, consistent with the definition of *infant or toddler with a disability* in § 303.21. Also, we have clarified that assessment means the ongoing procedures used by qualified personnel to identify a child's unique strengths and needs and the early intervention services appropriate to meet those needs throughout the period of a child's eligibility under this part and includes the assessment of the child, consistent with new § 303.321(c)(1) (proposed § 303.320(b)) and the assessment of the child's family, consistent with new § 303.321(c)(2) (proposed § 303.320(c)).

We have further clarified the definition of assessments in new § 303.321(a)(1)(ii) to incorporate the language from section 636(a)(1) and (a)(2) of the Act, which requires each statewide system to provide for each eligible child: (1) A multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet those needs; and (2) A family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler.

In making these revisions to the definitions of *evaluation* and *assessment,* we determined it was also appropriate to clarify what is meant by the terms ''initial evaluation'' and ''initial assessment.'' Other sections of these regulations, particularly in the context of the 45-day timeline reflected in new § 303.310 (proposed § 303.320(e)), often refer to the initial evaluation and the initial assessment. For this reason, we have clarified in new § 303.321(a)(2)(i) that the term ''initial evaluation'' refers to the child's evaluation to determine his or her initial eligibility under this part. We have clarified in new § 303.321(a)(2)(ii) that the term ''initial assessment'' refers to assessments of the child and the family conducted prior to the child's initial IFSP meeting, both of which must be conducted within the 45-day timeline described in new § 303.310 (proposed § 303.320(e)), even if family members other than the parent agree to participate but are unavailable to complete the family assessment. We do not believe that these definitions are new concepts under the part C program; rather, we view them as clarifying the terminology used so that the field can more easily distinguish between evaluations and assessments that occur throughout a child's time in the part C program and the initial evaluation and initial assessment that must be completed, along with the initial IFSP meeting, within 45 days after the child is referred to the part C program.

Changes: The definitions of *evaluation* and *assessment* in new § 303.321(a)(2) (proposed § 303.320(a), (b), and (c)) have been clarified to reflect the language in section 636(a)(1) and (a)(2) of the Act. We also have added definitions of the terms *initial evaluation* and *initial assessment* to this section.

Comment: A few commenters requested clarification on the distinction between an assessment and an evaluation, as used in new § 303.321(a) (proposed § 303.320(a), (b), and (c)).

Discussion: We agree with the commenters regarding the need for clarification and, therefore, have revised new § 303.321 (proposed § 303.320). An *evaluation,* as defined in new § 303.321(a)(2)(i) (proposed § 303.320(a)(2)(i)), means the procedures used by qualified personnel to determine a child's initial and continuing eligibility under this part, and can include, pursuant to new § 303.321(b) (proposed § 303.320(a)(2)), activities such as administering an evaluation instrument; taking the child's history (including interviewing the parent); identifying the child's level of functioning in each of the

developmental areas in § 303.21(a)(1); gathering information from other sources such as family members, other care-givers, medical providers, social workers, and educators, if necessary, to understand the full scope of the child's unique strengths and needs; and reviewing medical, educational, or other records.

We recognize that the three separate references to assessments in proposed § 303.320(a) (assessment of the child, assessment of the family, and assessment of service needs) may have caused confusion. To facilitate understanding, we have defined the term *assessment,* in new § 303.321(a)(2)(ii), to mean the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs throughout the period of a child's eligibility under this part and to include the assessment of the child and the assessment of the child's family.

We also have removed all general references to assessment of service needs as used in the proposed regulations. These changes are further discussed in the *Analysis of Comments and Changes* section addressing comments received on proposed § 303.320(d).

Changes: We have reorganized and revised new § 303.321(a) (proposed § 303.320(a), (b), and (c)) to set out clear definitions of the terms *evaluation* and *assessment.*

Comment: One commenter requested that the final regulations clarify that the assessment in new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii)) is a ''developmental'' assessment of the child.

Discussion: The assessment of the child includes the identification of the child's needs in each of the developmental areas in § 303.21(a)(1), the definition of an *infant or toddler with a disability;* however, the assessment also includes identifying the unique strengths and needs of the child and the early intervention services appropriate to meet those needs; reviewing the results of an evaluation; and conducting personal observations of the child. Therefore, it is the Department's position that limiting the assessment of the child to a developmental assessment is not appropriate.

Changes: None.

Comment: Some commenters expressed concern about the language in new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(iii)), regarding the assessment of the family. One commenter stated that the requirement to conduct a family assessment before determining an infant or toddler's eligibility presents an undue and unnecessary burden on State part C programs. The commenter recommended that language be added to the regulations to ensure that family assessments do not have to be conducted unless an infant or toddler is determined to be eligible for early intervention services. Two commenters requested that we revise this section to clarify the assessments that must be conducted as part of an initial evaluation of a child referred under this part.

Discussion: An assessment of a child and family as defined in new § 303.321(a)(1), (a)(2)(ii), (a)(3), (a)(4), and (c) (proposed § 303.320(a)(1), (a)(2)(iii), (a)(3)(b), and (c)) is only required if the child is determined to be eligible to receive services under this part. We have added language to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)) to make this clear.

Changes: We have revised the introduction to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)) to read ''If the child is determined eligible as an infant or toddler with a disability as defined in § 303.21.''

Comment: Several commenters expressed concern that proposed § 303.320(a)(1)(iv) may be inconsistent with section 636(a) and (d)(4) of the Act with regard to when service needs are identified. These commenters were concerned that determining service needs prior to the IFSP meeting could preempt important decisions that need to be made as part of the IFSP process. One commenter recommended that the language in current § 303.322(c)(3)(iii), which requires the ''assessment of the unique needs of the child * * * including the identification of services appropriate to meet those needs'' be retained instead. Several commenters recommended that we replace the term ''service needs'' in proposed § 303.320(a)(1)(iv) with the phrase ''unique needs in each of the developmental areas,'' which is used in current § 303.322(c)(3)(iii). Other commenters did not support the assessment of service needs as part of the evaluation process, because this assessment typically is part of the IFSP process, completed after the IFSP Team has determined child and family outcomes.

Discussion: Based on commenters' requests for clarification regarding what must be included in an assessment, we have revised new § 303.321(a)(2)(ii) and (c)(1) (proposed § 303.320(b), (c), and (d)) to provide that an assessment means the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs. We also have clarified that an assessment of the child must include a review of the results of the evaluation conducted under new § 303.321(b) (proposed § 303.320(a)(2)), personal observations of the child, and the identification of the child's needs in each of the developmental areas in § 303.21(a)(1). Because we have revised new § 303.321(a)(2)(ii) and (c)(1) (proposed § 303.320(b), (c), and (d)) to state that the assessment of the child must include identification of the child's unique strengths and needs and the early intervention services appropriate to meet those needs, we have removed the language requiring an assessment of service needs from new § 303.321(a)(1) (proposed § 303.320(a)(iv)) and have removed proposed § 303.320(d) from the final regulations. The results of the assessment of the child, together with the results of the assessment of the family, are the basis for the IFSP Team's determination of which early intervention services would be appropriate to meet the needs of the infant or toddler with a disability and his or her family.

Regarding commenters' concern that using assessments to identify the early intervention services appropriate for a child prior to an IFSP meeting is inconsistent with the Act, section 636(a) of the Act, provides that a statewide system must include a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs. Section 636 of the Act states that the IFSP shall contain a statement of specific early intervention services and §§ 303.343 and 303.344 require the IFSP Team (which includes the parent) to identify the early intervention services appropriate to meet the child's needs at the IFSP Team meeting. This requirement is not replaced by the assessment; rather, the assessment serves to inform the IFSP Team process by identifying the developmental strengths and needs of the child. We believe that this facilitates rather than preempts important decisions that need to be made through the IFSP process.

Changes: The procedures for assessment of the child have been changed in new § 303.321(a)(1)(ii) and (c)(1) (proposed § 303.320(b), (c), and (d)) to include the identification of the child's unique strengths and needs and the early intervention services

appropriate to meet those needs. Further, new § 303.321(c)(1) (proposed § 303.320(b), (c), and (d)) has been revised to clarify that an assessment of the child must include a review of the results of the evaluation conducted under new § 303.321(b) (proposed § 303.320(a)(2)), personal observations of the child, and the identification of the child's needs in each of the developmental areas in § 303.21(a)(1).

Comment: A few commenters requested that new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)) be clarified to require that a child, prior to the IFSP meeting, receive an assessment in accordance with new § 303.321(c) (proposed § 303.320(b) and (c)) even when medical records and other information are adequate to determine eligibility without an evaluation in order to inform IFSP members of the child's unique strengths and needs.

Discussion: We agree that clarification is needed because we inadvertently referred in the proposed section to ''assessment'' instead of ''evaluation'' in the parenthetical ''(without conducting an assessment of the child and the family).'' Additionally, regardless of whether a child's eligibility is determined through medical records or an evaluation, once a child is determined to be eligible to receive services under part C of the Act, initial assessments of the child and family must be completed.

Activities that are the basis of the initial assessment of the child may occur with the initial evaluation of the child. We have added the phrase ''if the child is determined eligible as an infant or toddler with a disability as defined in § 303.21'' to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)) to clarify that an assessment is required once a child is determined eligible, regardless of how eligibility is determined. We also have added a sentence to new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)) to further explain that, if a child's part C eligibility is established through a review of his or her medical or other records, the lead agency or EIS provider must conduct assessments, including the family assessment, pursuant to new § 303.321(c) (proposed § 303.320).

Changes: As noted elsewhere, we have added the phrase ''if the child is determined eligible as an infant or toddler with a disability as defined in § 303.21'' to new § 303.321(a)(1)(ii) (proposed § 303.320(a)(1)(ii) and (a)(1)(iii)). We also have added a sentence to new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)) to further explain that, if a child's part C eligibility is established under that paragraph, the lead agency or EIS provider must conduct assessments, including the family assessment, pursuant to new § 303.321(c) (proposed § 303.320).

Comment: One commenter expressed concern about proposed § 303.320(a)(3), which required that evaluations and assessments of the child and family be conducted in the child's or family's native language, as appropriate. The commenter stated that the phrase ''as appropriate'' weakens the requirement. Another commenter requested that the regulations restore the phrase ''unless it is clearly not feasible to do so'' from current § 303.323(a) and, further, that these regulations use the phrase consistently when referencing native language. Two commenters requested that we add ''or other mode of communication'' after ''native language'' in proposed § 303.320(a)(3) to ensure that the native language requirement is not narrowly interpreted to exclude sign language.

One commenter requested that, because of the family-centered nature of the part C program, the assessment should be conducted in the family's native language, regardless of whether the child has or uses a different native language.

Discussion: For clarity and in response to the comments about removing the phrase ''as appropriate'' and adding the phrases ''unless clearly not feasible to do so'' and ''other mode of communication'' to proposed § 303.320(a)(3), regarding conducting evaluations and assessments of the child, we have deleted the phrase ''in the child's or family's native language (as appropriate)'' from new § 303.321(a)(4) (proposed § 303.320(a)(3)), and added new provisions in §§ 303.321(a)(5) and (a)(6).

We specify in new § 303.321(a)(5) that, unless clearly not feasible to do so, all evaluations and assessments of a child must be conducted in the native language of the child, in accordance with the definition of *native language* in § 303.25. We also specify in new § 303.321(a)(6) that, unless clearly not feasible to do so, family assessments must be conducted in the native language of the family members being assessed, in accordance with the definition of *native language* in § 303.25. The ''unless clearly not feasible to do so'' standard acknowledges that there may be instances when conducting evaluations or assessments in the native language of the child, parent, or family member is not possible because, for example, interpreters for a particular language cannot be located, despite best efforts. If on-site interpreters cannot be located for a particular language despite best efforts, other methods of communication in the native language, such as using telephonic interpreters, should also be explored when an interpreter is needed and appropriate, for the evaluation and assessment.

We do not agree with the commenter that evaluations and assessments of the child should only be conducted in the parent's or family's native language, regardless of whether the child has or uses a different language. Section 303.321(a)(5), together with § 303.25(a)(2), recognize that while it sometimes may be appropriate to conduct an evaluation or assessment of an infant or toddler in the language normally used by the child's parents, in other cases it may be determined to be developmentally appropriate to evaluate or assess the child in the language normally used by the child if that language differs from his or her parents. For example, evaluations or assessments of infants are often conducted in the native language of the parent because the parents are present and infants are pre-verbal both in their expressive and receptive language abilities. In contrast, many evaluations and assessments of toddlers (*i.e.,* children who are between the ages of one and three) are conducted in the toddler's native language, rather than the native language of the parent. We believe that ultimately the qualified personnel conducting the evaluation or assessment is in the best position to determine which language is developmentally appropriate—-that of the child or the parent.

Changes: We have removed the phrase ''in the child's or family's native language (as appropriate)'' from new § 303.321(a)(4) (proposed § 303.320(a)(3)), and added new provisions in §§ 303.321(a)(5) and (a)(6). We specify in new § 303.321(a)(5) that, unless clearly not feasible to do so, all evaluations and assessments of a child must be conducted in the native language of the child, in accordance with the definition of *native language* in § 303.25.

We also specify in new § 303.321(a)(6) that, unless clearly not feasible to do so, family assessments must be conducted in the native language of the family members being assessed, in accordance with the definition of *native language* in § 303.25.

Comment: A few commenters recommended that subpart D include provisions that clearly specify that multidisciplinary evaluations include the participation of qualified personnel with knowledge of the disability that may be indicated, particularly given the inclusion of informed clinical opinion

in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(1) and (b)(2)). The commenters stated that for clinical opinion to be valid, personnel must have knowledge and experience in the disability presented by the child. For infants and toddlers with a known disability (*e.g.,* visual impairment), the inclusion of personnel with knowledge and training in that area of disability increases the accurate interpretation of results and is consistent both with the Act and the part B regulations.

Discussion: The term *evaluation* is defined in new § 303.321(a)(2)(i) as procedures used by qualified personnel to determine a child's initial and continuing eligibility under part C of the Act, consistent with the definition of infant or toddler with a disability in § 303.21. The definition of *qualified personnel* in § 303.31 requires that personnel meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are conducting evaluations or assessments or providing early intervention services. We believe that new § 303.321(a)(2)(i), in conjunction with the definition of *qualified personnel* in subpart A of these regulations, adequately address the commenters' concerns and, therefore, repeating the definition in this section is not necessary.

Please note, regarding the commenters' concern about clinical opinion, for an infant or toddler with a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay (*i.e.,* known disability), clinical opinion may not be necessary to determine eligibility because, under new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)), the child's medical or other records may be sufficient to establish eligibility. For a child without a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay, clinical opinion may be used in evaluating a child to establish eligibility but it may not be used to negate eligibility established through the use of other appropriate evaluation instruments.

Changes: None.

Procedures for Assessment of the Child and Family (New § 303.321(c)) (Proposed § 303.320(b) and (c))

Comment: Two commenters recommended adding language to new § 303.321(c) (proposed § 303.320(b) and (c)) to require the qualified personnel who perform the assessment of a child to be from disciplines that relate to the concerns and needs for which the child was referred for part C services.

Discussion: As defined in § 303.321(a)(2)(ii), the term *assessment* means the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet these needs throughout the period of the child's eligibility under this part. These qualified personnel must review the results of the evaluation conducted under new § 303.321(b) (proposed § 303.320(a)(2)); observe the child; and identify the child's needs in each of the developmental areas in § 303.21(a)(1). *Qualified personnel,* as defined in § 303.31, means personnel who have met State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are conducting evaluations or assessments, or providing early intervention services. Given that the term assessment encompasses the assessment of the areas of concern and need for which a child was referred to part C services, and that personnel must be qualified, under § 303.31, in the areas in which they are providing an assessment, the regulations sufficiently address the commenters' concern. For this reason, we have not made the requested change.

Changes: None.

Comment: One commenter requested clarification as to whether informed clinical opinion in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)) was an objective criterion or an assessment strategy separate from other objective criteria. Some commenters suggested that a more detailed description of informed clinical opinion than the one used in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)) is needed. These commenters recommended that the Department adopt the definition of informed clinical opinion used by the National Early Childhood Technical Assistance Center (NECTAC). NECTAC describes informed clinical opinion as the fusion of the assessment team's knowledge and experience with all the information collected during an assessment, including informal measures, such as interviews with parents or observation of the child, and standardized measures such as test scores. Another commenter recommended that States be allowed to define informed clinical opinion based on the definition of developmental delay for the State.

Lastly, a few commenters requested clarification of the last phrase of new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)), which states that informed clinical opinion may not negate the results of assessment instruments used to establish eligibility.

Discussion: As set forth in new § 303.321(a)(3)(ii), qualified personnel must use their informed clinical opinion when conducting an evaluation or an assessment of a child. The use of informed clinical opinion by qualified personnel is neither an objective criterion nor a separate assessment strategy. Rather, informed clinical opinion is the way in which qualified personnel utilize their cumulative knowledge and experience in evaluating and assessing a child and in interpreting the results of evaluation and assessment instruments.

With regard to allowing States to define informed clinical opinion based on that State's definition of developmental delay, we note that all States must allow qualified personnel, when conducting evaluations, to use their informed clinical opinion to determine whether the child meets the State's definition of developmental delay. Given the Department's monitoring experience in States where qualified personnel are not permitted to use their informed clinical opinion as a separate basis to establish eligibility, we have set forth in new § 303.321(a)(3)(ii) that such personnel must be able to use informed clinical opinion as an alternate basis for establishing eligibility. Permitting informed clinical opinion to serve as a separate basis to establish a child's eligibility under part C of the Act is important given that standardized instruments may not capture the extent of a child's delay. The purpose of new § 303.321(a)(3)(ii) is to alleviate the confusion and to expressly permit qualified personnel to use their informed clinical opinion to establish a child's eligibility for early intervention services under part C of the Act, even when other instruments fail to identify or confirm the level of developmental delay to establish part C eligibility.

Finally, we agree with the commenter that clarification is needed regarding the last phrase of new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)), which states that informed clinical opinion may not negate the results of assessment instruments used to establish eligibility. We inadvertently referred to ''assessment'' instruments instead of ''evaluation'' instruments in proposed § 303.320(b)(2)). We have corrected this in new § 303.321(a)(3)(ii) to state that in no case may informed clinical opinion be used to negate the results of

evaluation instruments used to establish eligibility.

Changes: We have clarified in new § 303.321(a)(3)(ii) (proposed § 303.320(b)(2)) that qualified personnel must use their informed clinical opinion when conducting an evaluation or assessment of the child and replaced the phrase ''assessment instruments'' with the phrase ''evaluation instruments.''

Comment: One commenter recommended that it should remain a State option to determine when a low test score for a child, in a domain such as adaptive behavior, is due to cultural preferences rather than a true delay.

Discussion: All evaluations and assessments of a child and family under new § 303.321(a)(4) must be selected and administered so as not to be racially or culturally discriminatory. In conducting an evaluation and assessment, the lead agency must ensure that they are not culturally discriminatory and must permit qualified personnel to use informed clinical opinion in interpreting the results of evaluation and assessment instruments.

Changes: None.

Procedures for Assessment of the Family (New § 303.321(c)) (Proposed § 303.320(c))

Comment: A number of commenters stated that the language in proposed § 303.320(c) regarding voluntary family assessments appeared to be something that is done ''to'' families and not ''with'' families. The commenters encouraged the Department to consider the term ''family-directed assessment'' in the regulations when referring to a family assessment in order to make it clear that the family is a primary partner in the process.

One commenter suggested that the family assessment in new § 303.321(c)(2) (proposed § 303.320(c)) be based on information obtained through the use of assessment tools, voluntary personal interviews, or other appropriate methods. Another commenter recommended that language be added to new § 303.321(c)(2)) (proposed § 303.320(c)) to ensure culturally competent services, including an awareness and respect of cultural differences in family values and child rearing practices.

Discussion: We have restructured new § 303.321(c)(2) (proposed § 303.320(c)) to identify both the purpose and the requirements of the family assessment, which requirements are set forth in new § 303.321(c)(2)(i) through (c)(2)(iii). We agree with commenters and have added the term ''family-directed assessment'' from section 636(a)(2) of the Act to new § 303.321(c)(2) to ensure that the identification of a family's resources, priorities, and concerns are family-directed.

Concerning the commenter's request to add ''other appropriate methods,'' new § 303.321(c)(2)(ii) (proposed § 303.320(c)) requires family assessments to be based on information obtained through an assessment tool and also on information provided by the family through a personal interview. Nothing in this provision would preclude the use of additional appropriate methods provided that the family assessment includes the use of an assessment tool and personal interview pursuant to new § 303.321(c)(2)(ii) (proposed § 303.320(c)). We do not believe it is appropriate to require all family assessments to use ''other appropriate methods.''

Concerning the comment on culturally competent services, the requirements in § 303.321(c)(2)(i) through (c)(2)(iii) ensure that each family is involved and has the opportunity to meet with a lead agency or EIS provider to identify their priorities and concerns regarding the development of the child (*i.e.,* by participating in the assessment, by providing information in response to the assessment tool and personal interview, and by providing a description of its resources, priorities, and concerns related to enhancing the child's development). We believe family involvement can help ensure that services that are identified in the IFSP are relevant and culturally competent.

Changes: We have restructured new § 303.321(c)(2)(i) through (c)(2)(iii) (proposed § 303.320(c)) to list the requirements of a family assessment as follows: (1) Be voluntary on the part of each family member participating in the assessment; (2) Be based on information obtained through an assessment tool and also through an interview with those family members who elect to participate in the assessment; and (3) Include the family's description of its resources, priorities, and concerns related to enhancing the child's development.

Comment: Two commenters requested that we emphasize the important role of siblings by including them in new § 303.321(c)(2) (proposed § 303.320(c)). Other commenters agreed and, in addition to siblings, requested that new § 303.321(c)(2) (proposed § 303.320(c)) include a reference to grandparents, other family members, and others who take on roles, responsibilities, or functions traditionally taken on by family members.

Discussion: New § 303.321(c)(2) (proposed § 303.320(c)) is based on section 636(a)(2) of the Act, which requires a family-directed assessment of the resources, priorities, and concerns of the family. Including a reference to siblings or other individuals who take on the roles, responsibilities, or functions traditionally performed by family members is not necessary. The term ''family'' is not exclusive and, therefore, this term, as it is used in new § 303.321(c)(2) (proposed § 303.320(c)), would cover any of the individuals mentioned by the commenters, such as siblings. Not defining this term will allow individual families to define the term in a manner that best meets the unique needs of the child involved.

Changes: None.

Determination That a Child Is Not Eligible (New § 303.322)

Comment: None.

Discussion: New § 303.320(a)(2)(ii) (proposed § 303.303(a)(3)) outlines the process a lead agency must follow if, through screening, the lead agency determines that a child is not suspected of having a disability under this part. The proposed regulations did not specify the procedures a lead agency must follow if it determines, through an evaluation, that a child is *not* a child with a disability. We have added a new § 303.322 to clarify the procedures a lead agency must follow if, after an evaluation is conducted under new § 303.321 (proposed § 303.320), it determines that a child is not eligible for services under this part. Specifically, a lead agency must provide the parent with prior written notice required by § 303.421, and include in the notice information about the parent's right to dispute the eligibility determination through dispute resolution mechanisms, such as requesting a due process hearing or mediation or filing a State complaint.

Changes: New § 303.322 has been added to identify the procedures the lead agency must follow if, after conducting an evaluation, it determines that a child is not eligible for services under this part.

Individualized Family Service Plans—General (§ 303.340)

Comment: Many commenters expressed concern about the definition of *multidisciplinary* in proposed § 303.24 because they believed this definition, used in the context of multidisciplinary IFSP Teams, could result in an IFSP Team being comprised of only one member other than the parent. These commenters argued that such a result is neither consistent with best practices nor the requirements in

section 636(a)(3) of the Act regarding a multidisciplinary team developing the IFSP.

Discussion: As noted in the *Analysis of Comments and Changes* section for § 303.24, we agree with commenters regarding the definition of multidisciplinary as it applies to IFSP Teams and have added in § 303.340, concerning the development, review, and implementation of an IFSP, a reference to the ''multidisciplinary team, which includes the parents'' to reflect the requirements in section 636(a)(3) of the Act. The IFSP participant requirements in § 303.343, together with §§ 303.24(b) and 303.340, clarify that the multidisciplinary IFSP Team requires the involvement of the parent and two or more individuals from separate disciplines or professions, one of whom must be the service coordinator.

Changes: We have added after the reference to ''IFSP'' in § 303.340 the following phrase ''developed by a multidisciplinary team, which includes the parents'' from section 636(a)(3) of the Act.

Procedures for IFSP Development, Review, and Evaluation (§ 303.342)

Comment: None.

Discussion: Based upon further review of § 303.342(a), we have determined that it is not entirely accurate to refer to children who have ''been evaluated for the first time and determined to be eligible under this part'' in the lead-in to this section because, as stated in new § 303.321(a)(3)(i) (proposed § 303.320(a)(2)(iii)), a child's part C eligibility can be established through a review of his or her medical or other records, without the child being evaluated.

Changes: We have deleted the phrase ''for a child who has been evaluated for the first time and determined to be eligible under this part'' from § 303.342(a) and have inserted, in its place, ''for a child referred to the part C program and determined to be eligible under this part as an infant or toddler with a disability.''

Comment: Some commenters recommended that § 303.342 be revised to require IFSP Teams, in developing the IFSP of an infant or toddler with a disability, to consider the same special factors that IEP Teams must consider under 34 CFR 300.324(a)(2) of the part B regulations. These commenters suggested requiring every IFSP Team to consider strategies to address the following: (1) Specific behaviors of an infant or toddler with a disability whose behavior impedes his or her development or the development of other infants or toddlers with disabilities; (2) the language needs of an infant or toddler with a disability who has limited English proficiency; (3) the need for instruction in braille for an infant or toddler who is blind or visually impaired; (4) the communication needs of an infant or toddler who is deaf or hard of hearing, including instruction in his or her language and communication mode; and (5) whether the infant or toddler with a disability needs assistive technology devices and services to ensure that infants and toddlers with disabilities in these groups receive appropriate services to meet their language, literacy, and other needs.

Discussion: The commenters referenced the special factors in 34 CFR 300.324(a)(2) of the part B regulations, which are from 614(d)(3)(B) of the Act. Part C of the Act does not contain similar specific language regarding special factors that must be considered by the IFSP Team. However, it is the Department's position that the regulations, as written, adequately address the commenters' concerns. Section 303.344(d)(1) requires that each IFSP include a statement of the specific early intervention services that are necessary to meet the unique needs of the child and the family to achieve the results or outcomes identified in the IFSP. Therefore, each IFSP Team must explore any factor (including, as applicable and appropriate, the factors included in 34 CFR 300.342(a)(2)) that are relevant to an infant or toddler with a disability achieving the results or outcomes identified in his or her IFSP.

Changes: None.

Comment: None.

Discussion: For clarification, we have added the words ''results or'' before ''outcomes'' and added ''identified in the IFSP'' after the reference to ''outcomes'' and ''services'' in § 303.342(b)(1)(i) and (b)(1)(ii).

Changes: We have added the words ''identified in the IFSP'' after the word ''outcomes'' and the word ''services,'' in § 303.342(b)(1)(i) and (b)(1)(ii), respectively.

Comment: One commenter recommended that the regulations retain Note 2 following current § 303.344. This note recognizes the importance of the variety of roles that family members play in enhancing a child's development throughout the IFSP process, the importance of addressing the needs of the family in the IFSP process in a collaborative manner, and the parents' retention of the ultimate decision in determining whether they, their child, or other family members will accept or decline services under this part.

Discussion: Including Note 2 from current § 303.344 is not necessary because part of the note (regarding a parent's right to accept or decline services) is reflected in § 303.342(e) and the remainder of the note does not reflect regulatory requirements but, instead, is explanatory. As reflected in § 303.342(e), parents make the ultimate decision as to whether they, their child, or other family members will accept or decline services under this part.

Removal of the note does not in any way change the policy of the Department. We continue to believe that best practice dictates that throughout the process of developing and implementing IFSPs for an infant or toddler with a disability, the lead agency, service coordinators, and EIS providers need to recognize the variety of roles that family members play in enhancing a child's development. Additionally, addressing the needs of the family in the IFSP process is crucial and should be determined in a collaborative manner with the full agreement and participation of the parent of the infant or toddler.

Changes: None.

Comment: Several commenters expressed opposition to replacing the term ''ongoing assessment of child and family'' in current § 303.342(c) with the term ''assessment of service needs'' in proposed § 303.342(c) and requested clarification of the meaning of the term ''service needs'' in this section.

Discussion: The term ''service needs'' was included in the proposed regulations to be consistent with the use of that term in new § 303.321 (proposed § 303.320). However, as discussed earlier in this preamble in the *Analysis of Comments and Changes* section in response to comments on the use of the term ''service needs'' in proposed § 303.320, we no longer use the term in new § 303.321 (proposed § 303.320) or any other section of these regulations. We, therefore, have removed the phrase from § 303.342(c) and replaced it with the phrase ''the child and family'' to be consistent with new § 303.321 (proposed § 303.320).

Changes: The phrase ''service needs'' has been removed from § 303.342(c) and replaced with the words ''the child and family.''

Comment: One commenter recommended amending § 303.342(d)(1)(ii) to require a lead agency to exhaust all possible options for conducting IFSP meetings in the native language of the family because part C of the Act makes clear that involvement of the family in the IFSP

process is critical. The commenter was concerned that the current regulatory language allows too much room for a lead agency to claim that it is ''not feasible'' to conduct the IFSP meeting in a family's native language. The commenter stated that, given the availability of resources such as bilingual staff, interpreters, and telephonic interpreter service, it should be feasible to ensure that IFSP meetings are conducted in the family's native language.

Discussion: Section 303.342(d)(1)(ii) requires that IFSP meetings be conducted in the native language of the family or other mode of communication used by the family unless it is clearly not feasible to do so. Thus, lead agencies should consider the availability of native language resources, such as those listed by the commenter, when determining whether it is feasible to conduct the IFSP meeting in the native language of the family. However, given that the U.S. Census Bureau recognizes over 300 languages used in the United States (not including dialects), it may not be feasible, in every instance, to provide interpreter services with respect to a particular native language because an interpreter of that language may not be available.

Changes: None.

Comment: One commenter suggested that the lead agency should be allowed to provide notice to the child's family and other participants of the IFSP Team meeting under § 303.342(d)(2) by electronic mail (e-mail) or documentation of a phone call arranging the meeting, and not only by providing written notice. The commenter further stated that parents should be given the option to waive receiving written notification of the meeting in favor of another method of notification.

Discussion: The IFSP written notice requirement in § 303.342(d)(2) is substantively unchanged from current § 303.342(d)(2). Nothing in the regulations prohibits States from providing additional notice of the IFSP meeting by, for example, electronic mail or phone call, but, at a minimum, it must provide written notice to the family and other participants to ensure that they can attend the IFSP meetings.

Changes: None.

Comment: Two commenters suggested that the requirements in § 303.342(e), regarding informed parental consent for services, are similar to those in § 303.420(d), regarding parental consent and the ability to decline services, and stated that the two sections should be merged or cross-referenced. Another commenter requested that the term ''parental consent'' as used in § 303.342(e) should be further defined. Specifically, the commenter expressed concern that § 303.342(e) requires the lead agency only to obtain informed consent prior to the provision of early intervention services, and not informed written consent as required by the Act.

Discussion: Section 303.342(e) is consistent with § 303.420(a)(3) and (d) regarding parental consent. The term ''parental consent'' in § 303.342(e) is consistent with the statutory language in section 636(e) of the Act (which refers both to ''parental consent'' and ''informed written consent from the parents'') and the definition of *consent* in § 303.7. The term parental consent, as used in § 303.342(e), must meet the definition of *consent* in § 303.7. (In this case, the word ''parental'' modifies the term ''consent,'' which has a specific definition in these regulations under § 303.7.) To further clarify, we have added cross-references to § 303.7, which requires that the parent understand and agree in writing when giving consent, and § 303.420(a)(3), which requires the lead agency to ensure that parental consent is obtained prior to providing early intervention services to a child. Also, in the interest of clarity and tracking statutory language, we have added the word ''written'' to the phrase ''informed consent.''

Changes: We have added in § 303.342(e) cross-references to §§ 303.7 and 303.420(a)(3) and revised the phrase ''informed consent'' to include the word ''written.''

Comment: In response to the 45-day timeline in new § 303.310 (proposed § 303.320(e)) and the language in § 303.344(f)(1), regarding the timeline by which services identified in a child's IFSP must be initiated, a few commenters requested that the regulations identify a timeline for the provision of services.

Discussion: We have clarified in §§ 303.342(e) and 303.344(f)(1) that early intervention services must be provided as soon as possible after obtaining parental consent. We believe that it is important for the timeline to run from the date of parental consent and not from the initiation date identified at the IFSP meeting, as is provided for in current § 303.344(f)(1). A State may only provide a service identified in the IFSP if a parent provides consent under § 303.420. In some instances, even if the IFSP is developed with a service initiation date, a parent may not have provided consent to the service and, therefore, the service may not be provided. Thus, we have revised the time period to commence from the date of parental consent.

Currently, most States have adopted a 30-day timeline that commences from the date of parental consent to the date the services in the IFSP are provided with some States adopting a shorter timeline and only a few States adopting a slightly longer timeline (*e.g.,* 45 days), which timeline also commences from the date of parental consent to the date the services in the IFSP are provided. We do not believe it is appropriate to adopt a time period more specific than ''as soon as possible'' for the provision of *all* early intervention services identified in an IFSP. While each State must ensure that services in an IFSP are provided as soon as possible after receiving parental consent, we believe that ''as soon as possible'' may vary depending on a number of factors, such as the availability of qualified personnel in a State, the number of children to be served, and the location of those children. While we give States some flexibility in implementing this provision, we also monitor, through the SPP/APR, data on when each State initiates services for each child. Thus, we decline to adopt in §§ 303.342(e) and 303.344(f)(1) a timeline more specific than ''as soon as possible.''

Changes: We have clarified in §§ 303.342(e) and 303.344(f)(1) that early intervention services must be provided as soon as possible after parental consent is obtained.

IFSP Team Meetings and Periodic Reviews (§ 303.343)

Comment: A few commenters recommended amending § 303.343(a)(1)(v) to require that the individual or individuals directly involved in conducting the evaluations and assessments in new § 303.321 (proposed § 303.320) must have knowledge and training related to the infant's or toddler's disability.

Discussion: The requested change is not necessary because, as we explained in the *Analysis of Comments and Changes* in response to comments received on new § 303.321(a), the individuals responsible for conducting evaluations and assessments under new § 303.321(a)(2)(i) and (a)(2)(ii) (proposed § 303.320(a)(3)) must be qualified personnel.

Qualified personnel, under § 303.31, are individuals who meet State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the developmental area in which the individuals are conducting an evaluation or assessments or providing early intervention services. Given the definition of *qualified personnel* in § 303.31, it is unnecessary to amend

§ 303.343(a)(1)(v) as requested by the commenter.

Changes: None.

Comment: Some commenters expressed concern that the required participants for the periodic review of the IFSP in § 303.343(b) do not include the individuals (such as the individuals who conducted the evaluations and assessments, unless conditions warrant) who are required to participate in the initial and annual IFSP review under § 303.343(a). Specifically, the commenters stated that the regulations limit the ability of parents under § 303.343(a)(1)(i) and (ii) to include participants of their choosing in the periodic review of the IFSP.

Discussion: Section 303.343(b) makes clear that individuals: (1) Who are directly involved in conducting evaluations and assessments or (2) who provide early intervention services are not required to be invited or attend the IFSP periodic review meeting unless ''conditions warrant.'' An example of a condition under § 303.342(b) that may warrant the attendance of the qualified personnel who conducted an evaluation at the IFSP periodic review meeting is if that individual conducted a reevaluation of an infant or toddler with a disability and the results of that evaluation will be discussed at the periodic review. Additionally, reviewing the child's progress in a particular developmental area may require the participation of the EIS provider(s) in those areas. In such instances, the lead agency must ensure the participation of those individuals.

However, while the issues at an IFSP periodic review meeting vary, the periodic reviews are usually limited to reviewing the child's progress towards the measurable results or outcomes. The periodic review is less formal than the initial or annual IFSP meeting and may be done through a teleconference, a face-to-face meeting or other means acceptable to the parents and other participants. Requiring the attendance of individuals referenced in § 303.343(a)(1)(v) and (a)(1)(vi) at every IFSP periodic review meeting would be burdensome and unnecessary and thus we refrain from making the change requested by the commenter.

The commenter correctly notes that a parent may invite advocates or individuals outside of the family to periodic reviews under § 303.343(a)(1)(ii). However, that provision may not be used to override the lead agency's determination of when conditions warrant the attendance of individuals directly involved in conducting evaluations and assessments or who are EIS providers.

Changes: None.

Content of an IFSP (§ 303.344)

Results or Outcomes (§ 303.344(c))

Comment: A few commenters requested that the parenthetical phrase referencing the inclusion of pre-literacy and language skills as developmentally appropriate for the child be deleted from § 303.344(c). One commenter stated that adding this parenthetical phrase to this section, which requires that a child's IFSP include a statement of the measurable results or measurable outcomes expected to be achieved by the child, creates confusion between part C and part B responsibilities. The commenter recommended replacing the proposed language in the parenthetical with ''communication or social and emotional developmental goals.''

Discussion: Under § 303.344(c), the IFSP must include, among other things, a statement of the measurable results or measurable outcomes expected to be achieved for the child (including pre-literacy and language skills, as developmentally appropriate for the child) and family. The phrase ''including pre-literacy and language skills as developmentally appropriate for the child'' is from section 636(d)(3) of the Act. Thus, it would not be appropriate to delete this language and replace it with other language. Concerning the confusion between part C and part B responsibility, pre-literacy and language skills emerge during infancy and, therefore, should be a measurable result or measurable outcome that is developmentally appropriate for a child served under the part C program.

Changes: None.

Comment: A few commenters requested that we provide definitions for the terms ''measurable results'' and ''measurable outcomes,'' as those terms are used in § 303.344(c). These commenters also questioned whether it was necessary for this section to include both terms.

Discussion: Section 303.344(c) incorporates language from section 636(d)(3) of the Act, which requires that the IFSP contain a statement of the ''measurable results or outcomes expected to be achieved for the infant or toddler and the family.'' The Department interprets the word ''measurable'' in this section of the Act to modify both the words ''results'' and ''outcomes.'' For this reason, it is appropriate to clarify, in § 303.344(c), that the IFSP must contain measurable results or measurable outcomes. Further clarification is not necessary given that there is little material difference, for IFSP content purposes, between the meaning of the terms ''results'' and ''outcomes'' and we use these terms in the regulation because they are both referenced in the section 636 of the Act.

Changes: None.

Comment: Two commenters recommended that the word ''functional'' be inserted before every use of the word ''outcomes'' in these regulations. Two other commenters requested that, for clarity, the word ''expected'' be inserted before the words ''results, outcomes, or early intervention services'' in § 303.344(c)(2).

Discussion: We agree with the commenters who recommended we add the term ''expected'' before the words ''results, outcomes, or early intervention services are necessary'' in § 303.344(c)(2). Therefore, we have made the requested change.

We decline to add the adjective ''functional'' every time the word ''outcomes'' is used in these regulations because not all outcomes are functional; for example, for children receiving services under § 303.211, outcomes may be educational.

Changes: We have added the term ''expected'' before the words ''results, outcomes, or early intervention services are necessary'' in § 303.344(c)(2).

Early Intervention Services (§ 303.344(d))

Comment: Some commenters requested that the term ''peer-reviewed research'' in § 303.344(d)(1) be defined or removed. Most of the commenters recommended that we use a definition that is consistent with the National Research Council's use of the term. Two commenters were concerned about a potential conflict between the use of the term ''peer-reviewed research'' in this section and the use of ''scientifically based research'' in § 303.112, regarding the availability of early intervention services. Another commenter stated that the term ''peer-reviewed'' is not used in the Act, and argued that because the term ''scientifically based research'' is used in the Act it should be used in this section, rather than the term ''peer-reviewed.''

Discussion: In the *Analysis of Comments and Changes* section for § 303.112, we discuss the definition of the term ''peer-reviewed research.'' We also address in that section the differences in meaning between the term ''scientifically based research,'' as used in section 635(a)(2) of the Act and § 303.112 of these regulations, and ''peer reviewed research,'' as used in section 636(d)(4) of the Act and § 303.344(d) of these regulations. We disagree with the commenter who stated that the term

''peer-reviewed research'' is not used in the Act; as noted elsewhere in this discussion, section 636(d)(4) of the Act, which is the statutory basis for § 303.344(d), refers to peer-reviewed research, not scientifically based research.

Changes: None.

Comment: One commenter requested that the regulations define the phrase ''to the extent practicable'' as used in § 303.344(d)(1).

Discussion: As noted in § 303.112 of the *Analysis of Comments and Change,* defining the phrase ''to the extent practicable'' is not needed. In the context of these regulations, the term has its plain meaning (*i.e.,* feasible or possible). As it is used to modify the extent to which early intervention services in a child's IFSP are based on peer-reviewed research in § 303.344(d)(1), we note that this phrase is from section 636(d)(4) of the Act. As used in this context, the phrase generally means that specific early intervention services should be based on peer-reviewed research to the extent that it is feasible or possible, given the availability of peer-reviewed research on the early intervention services determined to be most appropriate to respond to the child's needs and strengths identified pursuant to information from the child's evaluations and assessments under § 303.321.

Changes: None.

Comment: A few commenters requested that § 303.344(d)(1) be amended to require IFSP Teams to consider the same special factors that IEP Teams must consider under 34 CFR 300.324(a)(2) of the part B regulations.

Discussion: These comments are addressed in the *Analysis of Comments and Changes* for subpart D in response to the comments on § 303.342.

Changes: None.

Comment: Some commenters expressed concern that the terms ''frequency,'' ''intensity,'' ''method,'' ''length,'' and ''duration'' in § 303.344(d)(1)(i) do not reflect the language in the Act and would require significant revisions to forms and training for staff. The commenters requested that the terms and their definitions be removed from the regulations.

Discussion: All of the terms mentioned by the commenters are taken directly from the Act. Section 636(d)(4) of the Act requires the IFSP to include a statement of the specific early intervention services based on peer-reviewed research, to the extent practicable, necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering those services. Additionally, section 636(d)(6) of the Act requires the IFSP to include the anticipated length, duration, and frequency of the early intervention services identified in the IFSP.

Changes: None.

Comment: One commenter recommended expanding the requirements in § 303.344(d)(1)(ii)(B) to require that, in the case of an infant or toddler who is deaf or hard of hearing, the IFSP Team must: (a) Consider home, community, and program settings that provide full support for language and communication development for the child and family; (b) base recommendations for the appropriate setting for providing services on a comprehensive assessment of the child and the family's priorities, resources, and concerns; (c) provide families with comprehensive information about all programs and providers; (d) encourage families to visit all programs providing services to young children; (e) support families in selecting the programs, providers, settings, and services that best meet the needs of the child and family; and (f) recommend programs and services that employ qualified providers who are fluent users of the language(s) and modes of communication of the child.

Discussion: An IFSP Team may conclude that it is appropriate to address the factors presented by the commenter, as well as any other factors that the IFSP Team, which includes the child's parent, considers relevant to a determination concerning the appropriate setting for the provision of an early intervention service that meets the child's unique strengths and needs, including those of infants or toddlers who are deaf or hard of hearing. Thus, it would be impracticable to identify all potential factors concerning service settings because such factors are guided by the measurable outcomes or measurable results expected to be achieved for the infant or toddler with a disability.

Changes: None.

Comment: Some commenters requested clarification of the phrase ''if applicable'' in § 303.344(d)(1)(ii)(A) regarding the justification needed if a service is not provided in the natural environment. The commenters expressed concern that some individuals may interpret the language to mean that a justification is not always required for services that are not provided in the natural environment and may prompt lead agencies and EIS programs to provide services in settings other than the natural environment even though that setting may not necessarily be appropriate.

Discussion: Pursuant to section 636(d)(5) of the Act, justification is required when the IFSP Team (not the lead agency or EIS program) determines that early intervention services will be provided in a setting other than the natural environment. We did not intend for the phrase ''if applicable'' to modify this requirement. Thus, we have removed the phrase ''if applicable'' to alleviate potential confusion.

Additionally, we have revised § 303.344(d)(1)(ii)(A) to require that the IFSP include a statement that each early intervention service is provided in the natural environment to the maximum extent appropriate or, a justification as to why an early intervention service will not be provided in the natural environment. We believe that these changes make clear that a justification is always required when early intervention services are not provided in the natural environment for the child or service.

Changes: We have removed the phrase ''if applicable'' from § 303.344(d)(1)(ii)(A). Additionally, we have revised § 303.344(d)(1)(ii)(A) to require the IFSP to include (i) a statement that each early intervention service is provided in the natural environment for that child or service to the maximum extent appropriate, consistent with §§ 303.13(a)(8), 303.26 and 303.126, or, subject to § 303.344(d)(1)(ii)(B), and (ii) a justification as to why an early intervention service will not be provided in the natural environment.

Comment: Many commenters requested clarification on when early intervention services may be provided in the natural environment and when it is appropriate to provide a service in a setting that is not considered the natural environment. A few commenters recommended that § 303.126 be amended to allow parents to unilaterally decide where their infant or toddler with a disability will receive early intervention services. Another commenter recommended that § 303.126 allow other family members to be involved in determining the natural environments in which early intervention services will be provided. Two commenters recommended clarifying that an infant or toddler with a disability may receive services in a setting that is not the natural environment when the IFSP Team, which includes the parent, agrees that services should not be delivered in the natural environment. One commenter requested that the Department emphasize that selection of the natural environment for a particular infant or

toddler with a disability must be an individualized decision and that the State must monitor EIS providers to ensure that all natural environment decisions are individualized for each child by the child's IFSP Team.

Discussion: Section 303.344(d)(1)(ii), when read together with § 303.126, regarding early intervention services in natural environments, clarifies that the selection of the early intervention service setting for an infant or toddler with a disability is an individualized decision. Additionally, § 303.700(a)(1), regarding State monitoring and enforcement, clarifies that the lead agency must monitor the implementation of this part. Early intervention in the natural environment has been the subject of the Department's focused monitoring. We do not believe that any additional emphasis is necessary.

Nevertheless, we recognize that it may not always be practicable or appropriate for an infant or toddler with a disability to receive an early intervention service in the natural environment based either on the nature of the service or the child's specific outcomes. For example, the IFSP Team may determine that an eligible child needs to receive speech services in a clinical setting that serves only children with disabilities in order to meet a specific IFSP outcome. When the natural environment is not chosen with regard to an early intervention service, the IFSP Team must provide, in the IFSP, an appropriate justification for that decision.

Consistent with section 635(a)(16)(B) of the Act and under § 303.344(d)(ii)(B), the setting for the provision of early intervention services under part C of the Act is made by the IFSP Team. It is the responsibility of the IFSP Team (which includes the parent and may include other family members who are invited by the parent under § 303.343) to determine the most appropriate setting where each early intervention service will be provided for an infant or toddler with a disability based on the child's unique needs and outcomes.

Under § 303.343(a), family members may attend an IFSP meeting if requested by the parent, and if feasible to do so. Thus, we decline to revise § 303.126 to include family members, as suggested by one of the commenters, because a parent—not the lead agency—determines whether to invite additional family members to IFSP meetings.

Concerning the commenter who suggested that early intervention services could not be provided in a setting other than the natural environment and the commenters who conversely requested that the regulations clarify that early intervention services may be provided in a setting other than the natural environment, sections 635(a)(16)(B) and 636(d)(5) of the Act recognize that there may be situations in which an early intervention service cannot be provided in the natural environment. Section 303.344(d)(1)(ii), consistent with section 636(d)(5) of the Act, requires that the IFSP include a justification of the extent, if any, that an early intervention service will not be provided in the natural environment. In these instances, the IFSP Team (which includes the child's parents and other family members, at the parent's request) must identify whether the service can be provided in the natural environment and if it cannot, then the IFSP Team must document in the IFSP the justification for why that service is not provided in the natural environment (*i.e.,* why the alternative service setting is needed for the child to meet the developmental outcomes identified for the child in his or her IFSP).

Changes: None.

Comment: One commenter requested that the word ''functional'' be included to define outcomes as used in § 303.344(d)(1)(ii)(B)(3).

Discussion: We address this comment in the *Analysis of Comments and Changes* section on § 303.344(c).

Changes: None.

Comment: Some commenters recommended that natural environment settings be determined based on a child's needs rather than on outcomes, as required by § 303.344(d)(1)(ii)(B)(3).

Discussion: We believe that the commenters' concerns are addressed because when developing outcomes for the IFSP, the IFSP Team must consider the needs of the child based on the results of the evaluation and assessments of the child and the family pursuant to § 303.344(a) and (b). Once the outcomes are developed, the IFSP Team, including the parent, determines which early intervention services are necessary to achieve the expected outcomes and the setting(s) in which those services will be provided.

Changes: None.

Comment: Two commenters expressed concern that § 303.344(d)(2)(iv) would require an IFSP Team to project when a given service will no longer be provided. The commenters stated that some infants and toddlers with disabilities may require a particular early intervention service for the duration of their participation in the part C program and it would be inappropriate for an IFSP Team to project that far into the future.

Discussion: The purpose of the language in § 303.344(d)(2)(iv) is to help ensure accountability by requiring IFSP Teams to consider and periodically review the duration of a given service during the period in which a child is eligible to receive early intervention services and to anticipate when the child is expected to achieve certain results or outcomes associated with the receipt of the service. The duration of a service must be discussed and, if necessary, amended annually at the IFSP meeting.

We appreciate that the IFSP Team will not always know how long a particular service will be needed to achieve the measurable outcomes or results in the child's IFSP. What is critical is that the IFSP Team evaluates and re-evaluates whether the expected outcomes are being achieved at the appropriate pace. If the IFSP Team miscalculates how long a particular service will be provided, it can amend the IFSP during a periodic review. Due to the rapidly changing needs of infants and toddlers and the need for accountability in making sure the appropriate services are provided, it is important for families to participate in periodic and annual reviews in order to help make decisions about modifications to the IFSP based on the child's present level of development.

Changes: None.

Comment: A few commenters expressed concern about the requirement in § 303.344(d)(4) that the IFSP include an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children who are at least three years of age. The commenters stated that this requirement seemed to apply to any preschooler that has an IFSP and stated that the requirement was inconsistent with several provisions in the part B regulations in 34 CFR part 300. Specifically, the commenters stated that § 303.344(d)(4) was inconsistent with 34 CFR 300.323(b), regarding when an IFSP may serve as the IEP for children with disabilities aged three through five. Additionally, the commenters stated that § 300.320 does not explicitly require that the IEPs of children with disabilities in preschool include these IFSP content components. Another commenter stated that requiring an educational component in every IFSP of a child aged three through five is inappropriate because IFSP Teams must determine the individual needs of a child with a disability. One commenter requested that the Department clarify that the requirements in § 303.344(d)(4) only

apply to States that elect to serve children past age three.

Discussion: The requirement in § 303.344(d)(4) that IFSPs include, for children who are at least three years of age, an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills is directly from section 632(5)(B)(ii) of the Act. Section 303.344(d)(4) is consistent with 34 CFR 300.323(b) of the part B regulations. It is not necessary under part B of the Act to require an educational component for children with disabilities who receive preschool services under IEPs because the definition of an IEP in 34 CFR 300.112 of the part B regulations identifies by cross-reference the many educational components of the IEP.

Section 303.344(d)(4) and 34 CFR 300.323(b) of the part B regulations both require all IFSPs for children age three and older to include an educational component that promotes school readiness, and to incorporate pre-literacy, language, and numeracy skills. Children age three and older who have IFSPs under part C of the Act would be those children receiving services in States that have elected to serve children under the option in §§ 303.211 and 303.501(d) or under the option to provide services to children beyond age three until the beginning of the school year in § 303.501(c)(1). Both the Act and these regulations are clear and need no further clarification.

Changes: None.

Other Services (§ 303.344(e))

Comment: Some commenters requested that this paragraph be amended to explicitly include childcare as an ''other service.''

Discussion: Section 303.344(e) states that the IFSP must, to the extent appropriate, identify medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under this part. While childcare is not specifically included in paragraph (e) of this section, an IFSP Team may decide, when appropriate, to identify childcare as an ''other service'' that is not required under part C of the Act. We decline to revise the regulations as requested by the commenter because listing every service that may be considered as an ''other service'' would be impractical.

Changes: None.

Comment: Some commenters agreed with removing the requirement in current § 303.344(e)(1)(ii) that the IFSP identify funding sources for the medical and other services not required by part C of the Act, stating that the requirement was both beyond the scope of part C services and an additional burden on lead agencies. However, other commenters disagreed, arguing that, absent such information in the IFSP, children might not receive the additional services that they need, which would defeat the purposes of the Act to ensure that early intervention services are provided in order to reduce the need for services as the child matures.

Discussion: Section 303.344(e)(2) requires that, if a child or family needs medical and other services and these services are not currently being provided, the IFSP must include a description of the steps the service coordinator or family may take to assist the child and family in securing those services. The regulations no longer require the IFSP Team to identify, and service coordinators to coordinate, funding sources for these services (those not required under part C). We believe that § 303.344(e)(2), with this change, will help families receive additional services, without unduly burdening IFSP Teams and service coordinators who may have limited knowledge about funding for services provided by other programs.

Changes: None.

Dates and Duration of Service (§ 303.344(f))

Comment: None.

Discussion: We have made technical edits to § 303.344(f)(1) to cross-reference the consent provisions applicable to this section—that is, paragraph (e) of § 303.342 (parental consent) and § 303.420(a)(3) (consent for early intervention services). For clarity and consistency with these regulations, we also have inserted the words ''early intervention'' before the word ''service.'' As noted in the *Analysis of Comments and Changes* section discussing § 303.342(e), we have revised, in § 303.344(f)(1), the timeline that services begin ''as soon as possible'' after parental consent (instead of ''as soon as possible'' after the initiation date identified in the IFSP in current § 303.344(f)(1)).

Changes: We have replaced, in § 303.344(f)(1), after the words ''as soon as possible'' the phrase ''after the IFSP meetings described in § 303.342'' with the words ''after the parent consents to the service, as required.'' We also have added references to § 303.342(e) and § 303.420(a)(3). Additionally, we have inserted the words ''early intervention'' before the word ''service.''

Service Coordinator (§ 303.344(g))

Comment: One commenter requested that the regulations require service coordinators to be responsible for facilitating the full implementation of the IFSP. The commenter also requested that the regulations stipulate that the service coordinator for a particular infant or toddler with a disability may not be an EIS provider providing early intervention services to that particular infant or toddler with a disability.

Discussion: Section 303.344(g), when read together with § 303.33, the definition of *service coordination services* (case management), clarifies that the service coordinator is responsible for implementing the early intervention services identified in a child's IFSP. We do not agree with the commenter that the service coordinator for a particular infant or toddler with a disability cannot be an EIS provider for that particular infant or toddler with a disability, because the model of service coordination can vary from one State to another as well as among local communities because of such distinguishing factors as population size and economic, social, or cultural differences. Regardless of the model chosen by a State, we expect service coordination services to remain family centered.

Changes: None.

Transition From Part C Services (§ 303.344(h))

Comment: None.

Discussion: For consistency with section 636(a)(3) of the Act and § 303.344(h)(2)(iv), we have clarified that the IFSP must include not only transition steps but transition services needed to support the smooth transition of a child who is exiting the part C program.

Changes: We have added the phrase ''and services'' after the word ''steps'' to § 303.344(h)(1).

Comment: One commenter supported the requirement in § 303.344(h)(2)(iii) to obtain parental consent before transmitting additional information about a child to the LEA and requested clarification of the basic information that must be provided to the LEA representative at the transition conference or IFSP meeting to develop the transition plan. Another commenter noted that careful documentation will be needed to ensure that parental consent is obtained.

Discussion: To clarify the relationship between §§ 303.344(h) and 303.209 regarding transition, we have added the words ''smooth'' and ''from part C services'' in § 303.344(h)(1). We also have revised § 303.344(h)(2)(iii) to clarify that the transition steps and services in the IFSP must include confirmation that child find information

was transmitted to the LEA or other relevant agency.

With regard to the comments regarding parental consent in § 303.344(h)(2)(iii), we have clarified that parental consent must be obtained if personally identifiable information is disclosed as required under § 303.414. Given that personally identifiable information is discussed at the IFSP meeting to develop a transition plan, if the LEA representative is from an LEA that is not a participating agency under § 303.403(c) or if attendance is required of other individuals who are not employees or representatives of participating agencies, parental consent is required under § 303.414 for the lead agency to be able to disclose personally identifiable information to these individuals at the meeting.

We also have clarified that the additional information to be provided to the LEA to ensure continuity of services includes a copy of the most recent evaluation and assessments of the child and family and the most recent IFSP.

Changes: We have added the words ''smooth'' and ''from part C services'' in § 303.344(h)(1). We also have added the words ''confirmation that'' to precede the words ''child find information'' and ''if required under § 303.414'' to follow the phrase ''parental consent'' in § 303.344(h)(2)(iii). We also have clarified that the additional information in § 303.344(h)(2)(iii) includes a copy of the most recent evaluation and assessments of the child and family and the most recent IFSP.

Comment: One commenter stated that the requirement in proposed § 303.344(h)(1)(iii) that an IFSP include the steps that must be taken to support the transition of the child to early education, Head Start and Early Head Start, or child care programs is inappropriate because it is not required in the Act. This commenter requested that the requirement be removed from the regulations.

Discussion: We agree with the commenter that requiring transition to specific educational or child care programs may not be appropriate for every child and the phrase ''other appropriate services'' covers such programs. The programs identified in proposed § 303.344(h)(1)(iii) were intended to be examples of programs into which children may transition from part C services. However, early education, Head Start, Early Head Start, or child care programs are covered through the reference to other appropriate services in proposed § 303.344(h)(1)(iv), which stated that the IFSP must include the steps to be taken to support the transition of the child, in accordance with § 303.209, from part C services to other appropriate services. Therefore, to eliminate duplication, we have removed proposed § 303.344(h)(1)(iii). We also note that the reference in § 303.344(h)(1)(i) to elementary school or preschool was incorrect and are revising § 303.344(h)(1)(ii) to refer to ''part C services under § 303.211.''

Changes: We have removed proposed § 303.344(h)(1)(iii) and redesignated proposed § 303.344(h)(1)(iv) as § 303.344(h)(1)(iii). We have revised § 303.344(h)(1)(ii) to refer to ''part C services under § 303.211.''

Interim IFSPs—Provision of Services Before Evaluations and Assessments Are Completed (§ 303.345)

Comment: None.

Discussion: To improve clarity, we have added ''interim IFSPs'' to the title of this section.

Changes: We have added ''Interim IFSPs'' to the title of § 303.345.

Responsibility and Accountability (§ 303.346)

Comment: None.

Discussion: For consistency throughout the regulations, we have clarified that the agency referenced in § 303.346 is the public agency (defined in § 303.30) and the person referenced in this section is an EIS provider (defined in § 303.12).

Changes: We have revised § 303.346 so that it refers to a public agency and an EIS provider, rather than an agency and person.

Subpart E—Procedural Safeguards

General

Confidentiality and Opportunity To Examine Records (§ 303.401)

Comment: A few commenters recommended retaining as much of current § 303.402, concerning the opportunity to examine records, and § 303.460, concerning confidentiality of information, as is consistent with the Act.

Discussion: The confidentiality rights and protections contained in current §§ 303.402 and 303.460 have been retained in § 303.401(b) and have been explicitly referenced in both §§ 303.401(b) and 303.402 of these regulations, consistent with sections 617(c), 639(a)(2), and 642 of the Act. Provisions concerning parents' rights to inspect and review their children's records in current § 303.402 are incorporated in § 303.401(b)(2). The substance of the note following current § 303.460, which concerns the applicable confidentiality rights and protections afforded under sections 617(c) and 642 of the Act, is now in §§ 303.401(b) and 303.402.

We have added language in § 303.401(b) clarifying that, as required under sections 617(c) and 642 of the Act, the regulations in §§ 303.401 through 303.417 ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained pursuant to this part by the Secretary and by participating agencies, including the State lead agency and EIS providers, in accordance with the Family Educational Rights and Privacy Act (FERPA) in 20 U.S.C. 1232g and 34 CFR part 99.

Changes: We have deleted in § 303.401(b) the parenthetical ''(which contain confidentiality provisions under FERPA in 20 U.S.C. 1232g and its regulations in 34 CFR part 99)'' and added in §§ 303.401(b) and 303.402 language regarding the implementation of the regulations in §§ 303.401 through 303.417 under sections 617(c) and 642 of the Act to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained pursuant to this part, in accordance with FERPA in 20 U.S.C. 1232g and 34 CFR part 99.

Comment: A few commenters recommended that the rights and protections afforded to parents concerning confidentiality and access to records be extended to foster families and agencies responsible for infants and toddlers who reside in out-of-home care.

Discussion: The confidentiality rights and protections in §§ 303.401 through 303.417 are available to an individual who meets the definition of a *parent* in § 303.27, which expressly includes foster parents, and any individual appointed as a surrogate parent under § 303.422. However, § 303.422(d)(2) excludes from serving as a surrogate parent for a child, an employee of the lead agency or any other public agency or EIS provider that provides any services to the child or a family member of that child. Thus, the confidentiality rights and protections available to parents under §§ 303.401 through 303.417 would not be available to agencies responsible for the care of infants and toddlers not residing at home or to the employees of such agencies.

Changes: None.

Comment: One commenter requested that we clarify the word ''broader'' as used in proposed § 303.401(b)(1), regarding confidentiality procedures.

Discussion: Proposed § 303.401(b)(1) stated that the part C confidentiality

procedures are consistent with, but broader than, those under FERPA. In some instances the part C confidentiality procedures differ from the requirements under FERPA (for example, part C uses the term ''participating agency'' and permits States to adopt an opt-out policy in § 303.401(e)). We agree that the phrase ''that are consistent with, but broader than those under'' is not clear; therefore, we have removed the phrase. Additionally, we have removed the last phrase of the parenthetical ''and include additional part C requirements'' because it is redundant.

Changes: The phrase ''that are consistent with, but broader than those under'' and the last phrase of the parenthetical ''and include additional part C requirements'' have been removed.

Comment: One commenter requested that the Department clarify whether it violates part C confidentiality regulations to accept a referral without parental consent.

Discussion: Section 303.401(c)(2) provides that the part C confidentiality procedures apply from the point in time when the child is referred for early intervention services, and thus, do not apply prior to a referral. Under § 303.401(c)(2), the confidentiality provisions under part C of the Act do not apply to primary referral sources. Thus, part C does not prohibit the lead agency or an EIS provider from accepting a referral of a child to the State part C system from a primary referral source. However, the primary referral source may be required to obtain parental consent prior to making a referral under other applicable laws (such as HIPAA, CAPTA, or State laws).

Changes: None.

Comment: None.

Discussion: Given that we reference ''participating agencies'' in §§ 303.405 through 303.417, we have changed the reference in § 303.401(c)(2) from ''lead agency and EIS provider'' to ''participating agency.'' We also have clarified that the confidentiality procedures apply until the later of when the participating agency is no longer required to maintain or no longer maintains, under applicable Federal and State laws, the personally identifiable information of a child and the child's family that is contained in early intervention records collected, used, or maintained under this part by the lead agency.

Changes: We have replaced the phrase ''lead agency or EIS provider'' with the phrase ''participating agency'' in § 303.401(c)(2). We also have replaced the phrase ''required to maintain or maintains'' with the phrase ''required to maintain or no longer maintains'' in § 303.401(c)(2).

Disclosure of Information (§ 303.401(d))

Comment: One commenter stated that it is unnecessary for the lead agency to disclose the information identified in § 303.401(d) to the LEA where the child resides or to the SEA and that such disclosure may potentially breach the right to confidentiality of personally identifiable information.

Discussion: Section 637(a)(9)(A)(ii)(I) of the Act, concerning preschool transition, requires the lead agency to notify the LEA where the toddler resides that the toddler will shortly reach the age of eligibility for preschool services under part B of the Act. We believe that notifying the LEA where the child resides and the SEA of the toddler's name, date of birth, and the parent contact information (including parents' names, addresses, and telephone numbers) is necessary to implement the requirements in section 637(a)(9)(A)(ii)(I) of the Act and to ensure that children exiting part C services experience a smooth and seamless transition to part B services.

Changes: None.

Comment: One commenter stated that the terms ''State Lead Agency (SLA)'' and ''Local Lead Agency (LLA)'' should be used in the regulations instead of the terms ''SEA'' and ''LEA'' because SEAs and LEAs are only two of the many types of lead agencies. The commenter also stated that using the terms ''SEA'' and ''LEA'' in the part C regulations is confusing.

Discussion: Part C of the Act uses the term ''lead agency'' to refer to the State agency designated by the State's Governor under section 635(a)(10) of the Act to administer the Federal part C funds the State receives under section 643 of the Act and to be responsible for implementing the statewide early intervention system. We recognize that while a few States have part C statewide systems that refer to EIS providers as ''local lead agencies'' this is not the general practice among most States. Additionally, many EIS providers are not public agencies and, therefore, we decline to revise these regulations to include that term and have continued to use the term ''EIS provider'' when referring to entities other than the lead agency who are responsible for assisting the State in implementing the part C statewide early intervention system.

Regarding use of the terms *participating agency, LEA,* and *SEA* in these regulations, these terms are defined in §§ 303.404(c), 303.23, and 303.36, respectively, and are terms used throughout these regulations and specifically in § 303.401(b) through (d)(1). Thus, we decline to make the change requested by the commenter.

Changes: None.

Comment: Several commenters supported § 303.401(e) while many other commenters opposed it stating that it diminishes a family's right to confidentiality and decision-making about their child. These commenters urged the Department to require a lead agency to obtain parental consent prior to disclosing to an LEA or SEA the information identified in § 303.401(d)(1) as it is personally identifiable information. Similarly, one commenter requested that the opt-out requirement in § 303.401(e) be changed to an ''opt-in'' policy.

Discussion: Section 303.401(e) permits a lead agency to adopt an opt-out policy under section 637(a)(9) of the Act and § 303.209(b)(1)(ii). An opt-out policy requires the lead agency and EIS providers, prior to disclosing the limited information identified in § 303.401(d)(1) to the LEA where the child resides or to the SEA, to inform the child's parent about the impending disclosure and provide the parent with a specific time period in which the parent may confirm his or her decision to decline, or opt-out of, the disclosure of such information about his or her child.

Permitting States to adopt an opt-out policy, rather than opt-in policy, which would require the lead agency to obtain affirmative parental consent before disclosure of the limited information identified in § 303.401(d)(1) to the LEA or SEA, allows States the flexibility to balance the privacy interests of parents of children receiving part C services and the lead agency's, SEA's, and LEA's respective responsibilities to identify children potentially eligible for services under part B of the Act, and to ensure a smooth transition from the State's part C program to its part B program. Parents, as well as other stakeholders and members of the public have an opportunity to provide input when the State circulates its LEA notification policies for public participation as required in § 303.208(b).

Changes: None.

Definitions (§ 303.403)

Comment: Two commenters requested that the term *education records* be changed to the term *early intervention records* because use of the term ''education'' is not consistent with part C of the Act and could be interpreted incorrectly by insurance companies and Medicaid concerning payment for services. One commenter also expressed concern that the term *education records*

is used inconsistently throughout the regulations (see §§ 303.405(a) and (b), 303.406, 303.407, 303.408, 303.410, and 303.411).

Discussion: We agree that the term *early intervention records* should replace the term *education records* in § 303.403 and have revised references to *education records* to read *early intervention records* in these regulations.

Changes: We have revised § 303.403(b) to define *early intervention records* instead of *education records* and clarified that the term includes all records regarding a child that are required to be collected, maintained, or used under part C of the Act and the regulations in this part.

Comment: One commenter expressed concerns that the definitions in § 303.403, while applicable to programs under part B of the Act, may not be appropriate for programs under part C of the Act.

Discussion: We agree that the definitions of *education records* and *participating agency* in § 303.403 could be amended to more appropriately apply to part C of the Act. As noted previously, we have removed the term *education records* in § 303.403(b) and replaced it with the term *early intervention records.*

Additionally, we have amended the definition of *participating agency* in § 303.403(c) to mean any individual, agency, entity, or institution that collects, maintains, or uses personally identifiable information to implement the requirements in part C of the Act and the regulations in this part with respect to a particular child.

Participating agency specifically includes the lead agency and EIS providers that provide any part C services, including service coordination, evaluations and assessments, and other part C services. We are adding this provision to distinguish between those primary referral sources that perform primarily a child find function and those entities that serve as funding sources only. We have clarified that this term does not include primary referral sources (unless they are also EIS providers), or public agencies (such as the State Medicaid or CHIP program), or private entities (such as private insurance companies) that act solely as funding sources for part C services.

Changes: We have revised the definition of *participating agency* in § 303.403(c) to provide that this term also includes an entity that collects, maintains, or uses personally identifiable information and that this information is collected, maintained, or used ''to implement the requirements in part C of the Act and the regulations in this part.'' We have added a provision that an EIS provider includes a provider of part C services, including service coordination, evaluations, and assessments, and other part C services. Additionally, we have added a provision specifically stating that primary referral sources, or public agencies (such as the State Medicaid or CHIP program) or private entities (such as private insurance companies) that act solely as funding sources for part C services are not considered a participating agency.

Notice to Parents (§ 303.404)

Comment: Some commenters requested that the confidentiality requirements in these regulations reflect the parallel requirements in the part B regulations, where appropriate. One commenter requested clarification as to when the general notice and confidentiality requirements under part C of the Act apply. One commenter recommended adding a requirement that the notice to parents in § 303.404 be provided in the native language of the parent.

Discussion: We agree that it would be helpful for lead agencies under part C of the Act to know when the general notice requirement applies. Requiring the lead agency to provide parents with notice of its general confidentiality policies and procedures, including document retention and destruction procedures, when a child is referred under part C of the Act ensures that parents are aware of the nature and scope of their rights under these policies and procedures. States may choose to provide this general notice at additional appropriate times, such as annual IFSP meetings, but we have not required that it be provided at each such meeting because of the burden this would place on the State and because the prior written notice requirements in § 303.421 already require a summary of each of the procedural safeguards.

Additionally, the content of the notice should include a description of the extent that the notice is available in the native languages of the various population groups in a State. We have added language to § 303.404 that reflects that requirement, which is also in 34 CFR 300.612 of the part B regulations. The prior written notice and procedural safeguards notice requirements in § 303.421(c)(1)(ii) require that the child-specific notice be in the parent's native language or other mode of communication used by the parent, unless it is clearly not feasible to do so, and that the notice include a description of the procedural safeguards, including confidentiality requirements under subpart C of this part.

Changes: We have added the phrase ''when a child is referred under part C of the Act'' in the introductory text in § 303.404. We also have added a new paragraph (d) to § 303.404 requiring that the notice to parents include a description of the extent that the notice is given in the native languages of the various population groups in the State.

Comment: A few commenters recommended revising § 303.404(a) to require the notice to parents, concerning the confidentiality provisions under the Act, to be more applicable to part C of the Act.

Discussion: Section 303.404(a) provides that the notice include a description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from which the information is gathered), and the uses to be made of the information. For example, children on whom personally identifiable information is maintained include children with developmental delays or diagnosed conditions, or, if applicable, children at risk for developmental delays. The types of information sought include developmental, medical, educational, and other information. The specific sources from which information is gathered would include primary referral sources in the State, and the uses to be made of the information would include the identification, evaluation, and provision of early intervention services to infants and toddlers with disabilities. Thus, § 303.404(a) sufficiently relates to the personally identifiable information maintained, collected, and used under part C of the Act.

Changes: None.

Access Rights (§ 303.405)

Comment: Commenters from several lead agencies recommended requiring lead agencies to respond to parents' requests to inspect and review their child's early intervention records within 10 calendar days of the request, instead of 20 days, because it is important for parents to have these records available in the event there is a pending due process hearing (that must be resolved within a 30-day timeline as required in § 303.430(d)(1)).

Discussion: We agree that a 10-day deadline would be more appropriate to ensure access to early intervention records when parents have filed a request for a due process hearing. We have changed the timeline for agency compliance with a parent's request to

inspect and review records to 10 calendar days after the parent makes the request. (The term *day* is defined as ''calendar day unless otherwise indicated'' in § 303.9.)

Changes: We have changed § 303.405(a) to reflect that an agency must comply with a parent's request to inspect and review records in no case more than 10 days after the request has been made.

Comment: One commenter recommended that the ''shall presume'' language in § 303.405(c) be revised to align with the analogous part B requirement in 34 CFR 300.613(c), which provides that an agency ''may presume'' that a parent has the authority to inspect and review his or her child's records.

Discussion: We agree with the commenter and have changed § 303.405(c) to be consistent with 34 CFR 300.613(c) in the part B regulations.

Changes: The word ''shall'' has been removed and replaced with the word ''may'' in § 303.405(c).

Fees for Records (§ 303.409)

Comment: One commenter recommended including in § 303.409 a provision to allow parents to receive a copy of their child's records upon request, thereby facilitating the role of parents as full and equal participants in the IFSP process. Another commenter expressed concern about the length of time that may lapse between a child's IFSP meeting and the time that the parent actually receives a copy of the child's IFSP. This commenter requested that the regulations require that the parent be given a copy of his or her child's IFSP at the conclusion of every IFSP meeting.

Discussion: We agree with commenters that in order to help parents to be full and equal participants in the IFSP process parents must receive a copy of their child's evaluation, assessments, and IFSP. Thus, we have added in new § 303.409(c) that each evaluation, assessment, and IFSP must be provided to the parent.

Additionally, under § 303.521(b), the lead agency must ensure that specific activities, including conducting evaluations and assessments, developing and reviewing IFSPs, and implementing procedural safeguards, are provided at no cost to parents. Thus, we have added in new § 303.409(c) the requirement that these records be provided to parents at no cost. Requiring States to provide a copy of evaluations, assessments, and IFSPs to parents, from the child's early intervention record, should not be a burden to States. As a standard practice, most States already provide these documents at no cost to parents. The requirement in new § 303.409(c) is comparable to the evaluation and IEP documents that must be provided to parents at no cost under the provisions in 34 CFR 300.306(a)(2) and 300.322(f) of the part B regulations.

Concerning the request that the IFSP be provided at the conclusion of the IFSP meeting, we decline to add this specific timeline but agree that it is important to specify when these documents must be provided. Thus, we also have added in new § 303.409(c) that a copy of each evaluation, assessment of the child, family assessment, and IFSP must be provided to the parent as soon as possible after each IFSP meeting.

Changes: We have added new § 303.409(c), which requires that a participating agency must provide at no cost to the parent, a copy of each evaluation and assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting. We also have revised the heading of § 303.409 to add ''for records'' after ''Fees'', and added a clause to § 303.409(a) explaining that the right to charge fees does not apply to documents that must be provided and are mentioned in § 303.409(c).

Amendment of Early Intervention Records Under §§ 303.410, 303.411, and 303.412

Comment: One commenter recommended adding references to the family, in addition to the child, in §§ 303.410 and 303.412(a), regarding a parent's right to amend information in a child's early intervention record if it is inaccurate, misleading, or violates the privacy or other rights of the child.

Discussion: We agree that the protections in §§ 303.410(a) and 303.412(a) and (b) should apply to information about the parent as well as the child, but do not agree that the right to amend a record extends to information about other family members. This is because the definition of *personally identifiable information* in § 303.29(d) includes a list of personal characteristics or other information that would make the child's or parent's identity easily traceable. Therefore, we have added the reference to the parent, but not to the family. For the same reasons, we have added this reference to the parent in § 303.411.

Changes: We have added a reference to the parent in §§ 303.410(a), 303.411, and 303.412(a) and (b).

Opportunity for a Hearing (§ 303.411)

Comment: A few commenters stated that the requirements in § 303.411 are inconsistent with both the hearing procedures in § 303.413 and the relevant part B requirements in 34 CFR 300.619, which require a hearing to challenge information in a child's record to be conducted in accordance with the procedures under FERPA.

Discussion: We have clarified § 303.411 by providing that the parent may request a due process hearing if a State has adopted the part C due process hearing procedures that are referenced in § 303.430(d)(1), provided that such procedures meet the requirements of the hearing procedures in § 303.413 that comply with the FERPA regulations in 34 CFR 99.22. Thus, as suggested by the commenter, the procedural options available to parents would be consistent with 34 CFR 300.619 of the part B regulations. We believe permitting this option to parents provides parents with the benefits of the 30-day timeline if the State has adopted part C due process hearings under § 303.430(d) without imposing an additional burden on States that already have such procedures in place.

Changes: We have added to § 303.411 a reference to § 303.413 and a parenthetical regarding the hearing requirements under the FERPA regulations in 34 CFR 99.22.

Consent Prior to Disclosure or Use (§ 303.414)

Comment: A few commenters recommended retaining as much of current § 303.460, regarding confidentiality of information, as is consistent with the Act.

Discussion: Current § 303.460 references the confidentiality provisions in the part B regulations that were in effect prior to the publication of the amended part B regulations published in August 14, 2006; the Note following current § 303.460 indicates that because the part B regulations incorporate the FERPA regulations, FERPA also applies to the part C regulations. Consistent with the commenters' requests, we have removed the general citation to the part B regulations and FERPA and added in § 303.414(b)(2) the exceptions to the FERPA consent requirement in 34 CFR 99.31(a) as specific exceptions (where applicable to part C) to the parental consent requirement in these part C regulations. We have also added a provision requiring compliance with the additional pertinent conditions in 34 CFR 99.32 through 99.39.

Changes: We have incorporated as specific exceptions to the parental consent requirement in § 303.414(b)(2) of these part C regulations the specific exceptions to the written parental consent requirement in 34 CFR 99.31(a)

of the FERPA regulations (where applicable to part C), reference to the pertinent conditions in 34 CFR 99.32 through 99.39, and added appropriate modification provisions in § 303.414(b)(2)(i) through (b)(2)(vii).

Comment: One commenter expressed concern that sometimes service providers do not disclose information that parents have given consent to disclose, and suggested that service providers should be required to disclose documents or information when parents have consented to the disclosure.

Discussion: It is unclear what types of documents or information the commenter is referencing or the circumstances under which an EIS provider might not disclose the information for which a parent has given consent. However, there may be circumstances when the lead agency or an EIS provider may not have the authority to provide documents in the child's early intervention record to a third party, even after receiving parental consent for disclosure of personally identifiable information. For example, a lead agency or EIS provider may not have the authority to disclose third-party medical records. In these cases, the lead agency or EIS provider would instruct the parent to make such a request to the third party for the document or information.

Changes: None.

Comment: A few commenters recommended that the regulations clarify the exception that applies to Protection and Advocacy (P&A) agencies seeking access to information pursuant to their authority under the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. 10801, *et seq.*). Other commenters opposed disclosing information to P&A agencies and questioned why only this requirement is included in these regulations when other statutory authorities also may apply to part C records and why this provision is not in the part B regulations. One commenter stated that this requirement conflicts with the FERPA and HIPAA confidentiality provisions.

Discussion: We agree with the commenters that it would not be appropriate to include language in the part C regulations concerning the issue of limited disclosures of personally identifiable information in early intervention records that may be sought by P&A agencies and have removed § 303.414(d).

As the commenters stated, there are a number of statutory authorities that may apply to part C records. Given the variety of factual circumstances to be considered—including the uncertainty as to what personally identifiable information will be sought about infants and toddlers with disabilities and the varying context and purposes under which the information may be sought—regulating could not address the specific circumstances in each particular case.

Changes: We have removed § 303.414(d).

Comment: A commenter requested that the Department define in § 303.414 the term *participating agency*.

Discussion: The term *participating agency* as used in § 303.414 is defined in § 303.403(c).

Changes: None.

Safeguards (§ 303.415)

Comment: One commenter agreed with the provisions in § 303.415(a) (regarding the protection of personally identifiable information at the collection, maintenance, use, storage, disclosure, and destruction stages), (b) (requiring an official to be responsible for ensuring the confidentiality of personally identifiable information), and (c) (training for persons collecting and using personally identifiable information), but suggested that the requirements in these paragraphs may be inconsistent with § 303.415(d).

Discussion: Section 303.415(d) requires that each participating agency maintain a current listing of the names and positions of agency employees who may have access to personally identifiable information and reflects current, long-standing Department policy and regulations. Paragraphs (a) through (c) of this section are consistent with paragraph (d) because paragraph (d) applies to the individuals listed in paragraph (c) of this section. Paragraph (d) of this section further safeguards the confidentiality of these records by preventing access to the records by those individuals not listed.

Changes: None.

Comment: One commenter suggested that § 303.415(d) is unnecessary because records are generally maintained electronically in order to be consistent with the FERPA and HIPAA requirements.

Discussion: This requirement is necessary because the public has a right to know who may have access to personally identifiable information about their child and family. The method a participating agency uses to implement the provisions in § 303.415(d) is best left to the participating agency to determine. The agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information, regardless of whether such information is maintained electronically or as a written record.

Changes: None.

Destruction of Information (§ 303.416)

Comment: None.

Discussion: For consistency within the confidentiality regulations that apply to participating agencies in §§ 303.402 through 303.417, we have replaced the reference to ''public agency'' in § 303.416(a) with the term ''participating agency.''

Changes: We have replaced the reference to ''public agency'' with ''participating agency'' in § 303.416(a).

Comment: A few commenters expressed concern that we have included statutory references to GEPA in § 303.416(a), but these references are not included in the corresponding part B provisions in 34 CFR 300.624. The commenters requested that for consistency these citations be removed from § 303.416(a) or be added to the regulations under part B of the Act.

Discussion: SEAs are aware of the applicability of GEPA to the part B program. Therefore, it is not necessary to add these references to the part B regulations. However, there may be lead agencies that are unaware of the applicability of GEPA to the part C program; accordingly, it is important that § 303.416(a) identify the specific citations to those GEPA and EDGAR provisions concerning the maintenance, use, disclosure, and destruction of records. Thus, we have revised the citation to GEPA provisions to refer to 20 U.S.C. 1232f, which contains fiscal recordkeeping requirements. Lead agencies that are not SEAs may be similarly unfamiliar with the provisions in parts 76 and 80 of EDGAR that apply to the early intervention records, including, for example, the recordkeeping requirements in 34 CFR 80.42(b).

Changes: We have revised the citation to GEPA provisions in § 303.416 to refer to 20 U.S.C. 1232f.

Enforcement (§ 303.417)

Comment: One commenter recommended revising the language in § 303.417 because the proposed phrasing was awkward.

Discussion: We agree that § 303.417 should be clarified. We have amended § 303.417 to clarify that the enforcement policies and procedures that a State must have in effect are consistent with §§ 303.401 through 303.417, and include sanctions and the right to file a State complaint under §§ 303.432 through 303.434.

Changes: We have amended § 303.417 to indicate that the lead agency must have in effect the policies and procedures, including sanctions and the right to file a complaint under §§ 303.432 through 303.434, that a State uses to ensure that its policies and procedures, consistent with §§ 303.401 through 303.417, are followed and that the requirements of the Act and the regulations in this part are met.

Parental Consent and Ability To Decline Services (§ 303.420)

Comment: Some commenters requested that the Office of Special Education and Rehabilitative Services (OSERS) provide clarification regarding parental consent for the assessments used to report on child outcomes in the SPP/APR. One commenter requested that the OSERS September 2006 (revised October 2007) frequently asked questions (FAQ) document located at *http://www.rrfcnetwork.org/content/view/409/47/#cfiscal* be used as a reference point for clarification regarding parental consent for the assessments used to report child outcomes.

Discussion: If the lead agency collects, uses, or maintains information about an eligible child to meet the SPP/APR reporting requirements of the Department under part C of the Act, including the required reporting on child outcomes (which information is reported based on aggregate numbers of children, and not by individual child), generally, the information is not personally identifiable provided that the State has addressed any confidentiality constraints as a result of small data cells and, thus, prior written parental consent would not be required. However, as noted in the FAQ document referenced by the commenter, prior written parental consent is required under § 303.420 if the collection of outcome information is a part of the lead agency's evaluation to determine initial or continuing eligibility of a child in the part C program. In this circumstance, States must provide prior written notice to the parents under § 303.421 and, if applicable, obtain parental consent for evaluation as required in § 303.420.

Changes: None.

Comment: One commenter stated that requiring parental consent in § 303.420 to administer screening procedures in § 303.320 may dissuade some parents from allowing a developmental screening to be conducted.

Discussion: It is important for parents to be able to determine whether their child should receive a developmental screening. We have added in § 303.420(a)(1), regarding parental consent for screening, a reference to the screening provisions in § 303.320.

Changes: We added, in § 303.420(a)(1), a reference to § 303.320.

Comment: A few commenters requested that the word ''initial'' in current § 303.404 be reinserted into § 303.420(a)(2) before the words ''evaluation and assessment.''

Discussion: Consistent with section 639(a)(3) of the Act and the current policies and practice in the vast majority of States, the Department's position is that parental consent is required for all evaluations, including an initial evaluation and assessment of a child and all subsequent evaluations and assessments of a child. To clarify this point, we have amended the regulations to indicate that the consent provisions in § 303.420(a)(2) apply to all evaluations and assessments of a child.

Changes: We have added the word ''all'' to § 303.420(a)(2).

Comment: None.

Discussion: The Department received a large number of comments on proposed § 303.420(a)(4) as it relates to the lead agency obtaining parental consent prior to accessing public benefits or insurance. We have addressed those comments in the *Analysis of Comments and Changes* for subpart F of this part.

Changes: We have revised § 303.420(a)(4) to clarify that the lead agency must ensure that parental consent is obtained before public benefits or insurance or private insurance is used if such consent is required under § 303.520.

Comment: One commenter recommended that § 303.420, regarding parental consent and declining services, be amended to specifically reflect the language in part C of the Act. The commenter stated that there are inherent differences between part C and part B of the Act and that the part B requirements in 34 CFR 300.300(a)(3)(i) should not be adopted without revision. Specifically, the commenter pointed out that § 303.420(c)(1), which permits a lead agency to use the due process hearing procedures to challenge a parent's refusal to consent to an initial evaluation and assessments of a child for early intervention services, should not apply to part C because participation in early intervention services is voluntary. The commenter recommended removing this paragraph.

Discussion: We agree with the commenter that the participation of infants and toddlers with disabilities and their families in the part C program is voluntary and a parent may refuse an initial evaluation or assessment without the lead agency being able to use the due process hearing procedures under this part or under the regulations under part B of the Act to challenge the parent's refusal.

Additionally, because the lead agency may not use due process hearing procedures to challenge a parent's refusal to provide consent required under this part, we have added in new § 303.420(c) that such due process hearing procedures may not be used to challenge the parent's refusal to provide any consent that is required under paragraph (a) of this section. Therefore, we have amended § 303.420(c) accordingly.

Changes: We have amended § 303.420(c) to indicate that a lead agency may not use the due process hearing procedures under this part or part B of the Act to challenge a parent's refusal to provide any consent that is required under paragraph (a) of this section.

Comment: None.

Discussion: For consistency with § 303.414 and internal consistency within § 303.420, we refer to the confidentiality exceptions in § 303.414 instead of referring to the exchange of personally identifiable information in § 303.401.

Changes: We have revised § 303.420(a)(5) to read ''Disclosure of personally identifiable information consistent with § 303.414.''

Prior Written Notice and Procedural Safeguards Notice (§ 303.421)

Comment: A few commenters objected to the phrase ''reasonable time'' in § 303.421, which requires that prior written notice be given to parents a reasonable time before the lead agency under part C of the Act or an EIS provider proposes, or refuses, to take certain actions concerning their child. One commenter requested that ''reasonable time'' be replaced with a specific timeframe, for example, five days.

Discussion: Quantifying the phrase ''reasonable time'' in § 303.421(a) would be inappropriate because what constitutes a reasonable time may vary based on the individual circumstances of each case. However, we would expect a lead agency to provide notice under § 303.421 within a timeframe that allows the parent time to respond to the notice before the lead agency takes, or refuses to take, the actions listed in § 303.421(a).

Changes: None.

Comment: One commenter recommended adding language to § 303.421(c) to require that the prior written notice and procedural safeguards notice be provided in braille

to individuals who are blind or visually impaired.

Discussion: The commenter's concerns are addressed in § 303.421(c)(1)(ii), which requires that the notice be provided in the native language of the parent as the term *native language* is defined in § 303.25. Section 303.25(b) requires that for an individual who is blind or visually impaired the term *native language* means the mode of communication that is normally used by the individual (such as sign language, braille, or oral communication). Therefore, we decline to revise the regulation as requested by the commenter.

Changes: None.

Surrogate Parents (§ 303.422)

Comment: A few commenters recommended amending the language in § 303.422, concerning surrogate parents, to align the language with the parallel provisions in 34 CFR 300.519 of the part B regulations.

Discussion: Section 303.422, concerning surrogate parents, is primarily aligned with the requirements in sections 639(a)(5) of the Act and reflects many of the parallel provisions regarding surrogate parents in section 615(b)(2) of the Act and 34 CFR 300.519 of the part B regulations. Section 303.422 does not include the language from 34 CFR 300.519(a)(4) and (f) of the part B regulations because these provisions are not applicable to the part C program. Specifically, the language in the part B regulations references an unaccompanied homeless youth under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)). The language from 34 CFR 300.519(c) of the part B regulations, although slightly modified for clarity, is applicable to the part C program. We have amended § 303.422 to add a new paragraph (c) to state that ''in the case of a child who is a ward of the State, the surrogate parent, instead of being appointed by the lead agency under paragraph (b)(1) of this section, may be appointed by the judge overseeing the infant or toddler's case provided that the surrogate parent meets the requirements in paragraphs (d)(2)(i) and (e) of this section.''

Changes: We have added new paragraph (c) and renumbered the subsequent paragraphs accordingly.

Comment: A few commenters requested that the Department clarify the phrase ''cannot locate a parent'' in § 303.422(a)(2), which requires each lead agency or other public agency to ensure that the rights of a child are protected when no parent can be located. One commenter pointed out that the language in § 303.422(a)(2) is different from the language in current § 303.406(a)(2), which states that each lead agency must ensure that the rights of a child are protected when the public agency cannot discover the whereabouts of a parent. The commenter asked whether there is a distinction between the current requirements and those in § 303.422(a)(2) and whether the Department is changing its position.

Discussion: Section 303.422(a)(2) is substantively unchanged from current § 303.406(a)(2). Although we used the simpler term ''locate a parent'' in place of the term ''discover the whereabouts of a parent,'' we have not changed the meaning of the regulations, and the regulations continue to require that the lead agency make reasonable efforts to discover the whereabouts of a parent before assigning a surrogate parent, consistent with sections 615(b)(2)(A) and 639(a)(5) of the Act.

Changes: None.

Comment: A few commenters recommended expanding the requirement in § 303.422(b)(2) to require that for children who are wards of the State or placed in foster care, a lead agency must consult with all individuals involved with the care of the child, including but not limited to, the child's care giver, appointed guardian, social worker, and attorney, when appointing a surrogate parent. The commenters stated this would ensure a fully informed decision when appointing a surrogate parent for children who are wards of the State or placed in foster care.

Discussion: Section 303.422(b)(2) requires the lead agency, when determining whether and who to appoint as a surrogate parent for children who are wards of the State or placed in foster care, to consult with the public agency with whom care of the child has been assigned. The individuals involved in implementing the provisions in § 303.422 for children who are wards of the State or placed in foster care will vary on a case-by-case basis. The regulations as written provide the flexibility necessary for a lead agency and the public agency, as part of the consultation process in § 303.422, to decide who should be involved in implementing the requirements of this section.

Changes: None.

Comment: One commenter stated that a lead agency should not consult with a child welfare agency with regard to assigning a surrogate parent, as required in § 303.422(b)(2), because the foster parent is the parent and can make decisions.

Discussion: The surrogate parent provisions in § 303.422 are only relevant if a parent is unavailable. If a foster parent meets the definition of *parent* in § 303.27 there would be no need for a surrogate parent to be assigned and the consultation provision in § 303.422(b)(2) would not apply.

Changes: None.

Comment: A few commenters recommended adding language specifying that a surrogate parent cannot be a person involved in the education or care of the child.

Discussion: We agree that this additional language would provide useful clarification and have amended the regulations to add language to § 303.422(d)(2)(i) clarifying that an employee of a public agency that provides education or care to a child or any family member of the child cannot be a surrogate parent.

Changes: We have amended § 303.422(d)(2)(i) to expressly prohibit any employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to a child or any family member of the child from serving as a surrogate parent for that child.

Comment: One commenter recommended adding language to § 303.422 to indicate that a lead agency may not remove a surrogate parent based upon a disagreement with a surrogate parent or because a surrogate parent refuses to consent to the provision of early intervention services.

Discussion: The Act is silent on when or how a surrogate parent can be removed. However, a lead agency has a responsibility to ensure that a surrogate parent is carrying out his or her responsibilities; therefore, there are some circumstances when removal may be appropriate. A mere disagreement with the decisions of a surrogate parent about appropriate services or placements for a child, however, generally would not be sufficient to give rise to a removal, as the role of a surrogate parent is to represent the interests of the child, which may not be the same as the interests of the public agency. We do not think a regulation is necessary because these circumstances may be resolved under State law. Additionally, the rights of an infant or toddler with a disability are adequately protected by Titles II and VI of the ADA, which prohibit retaliation or coercion against any individual who exercises their rights under Federal law for the purpose of assisting children with disabilities, to protect the child's rights under this statute.

Changes: None.

Comment: A few commenters recommended that we establish a

timeline, such as 30 days, for the lead agency or other public agency to identify and assign a surrogate parent. Other commenters expressed concern that significant delays will result in cases where a surrogate parent must be appointed in order to provide consent.

Discussion: We agree that a timeline to assign a surrogate parent should be included in these regulations and have changed § 303.422 to require a lead agency to make reasonable efforts to ensure that a surrogate parent is assigned not more than 30 days after the public agency determines that a child needs a surrogate parent. Given that the development of infants and toddlers quickly changes, identifying a surrogate parent in a timely manner is important to a child, prevents undue delays, and aids the effective implementation of the requirements of this part. Additionally, a 30-day time frame to identify a surrogate parent is consistent with 34 CFR 300.519(h) of the part B regulations and establishes a timeframe in which a surrogate parent must be appointed, thus preventing undue delays. We have revised § 303.422 accordingly.

Changes: We have added paragraph § 303.422(g) to require that the lead agency make reasonable efforts to ensure that a surrogate parent is assigned not more than 30 days after a public agency determines that the child needs a surrogate parent.

State Dispute Resolution Options (§ 303.430)

Comment: One commenter requested that we retain Note 2 from current § 303.420, concerning the importance of establishing State administrative procedures that result in speedy resolution of complaints because an infant's or toddler's development is so rapid that undue delay could be potentially harmful.

Discussion: We agree with the commenter that Note 2, following current § 303.420, is important and have included the substance of that note in the timelines in these regulations. For States that choose to adopt part C due process procedures, § 303.437(b) requires each lead agency to ensure that, not later than 30 days after the receipt of a parent's due process complaint, the due process hearing is completed and a written decision is mailed to each of the parties. For States that choose to adopt part B due process procedures, § 303.440(c) requires the lead agency to adopt either a 30- or 45-day timeline, subject to § 303.447(a), for the resolution of due process complaints. Additionally, the requirements for State complaint procedures in § 303.433(a), provide that, within 60 days after a complaint is filed, the lead agency must resolve the complaint. Therefore, it is not necessary to retain in § 303.430 verbatim the language of note 2 in current § 303.420.

Changes: None.

Comment: Several commenters expressed concerns with the dispute resolution options in § 303.430. A few commenters stated that the options do not fit into the part C program because the child's time in the program is limited. The commenters stated that the 30-day timeline for the resolution period and the 45-day timeline for the due process hearing in States that choose to adopt part B due process procedures under section 615 of the Act are too long.

Discussion: Section 303.430 requires each statewide system to include procedures to resolve complaints through mediation, State complaint procedures, and due process procedures. The concerns about the timelines for the resolution period and the due process hearing in States that choose to adopt part B due process procedures under section 615 of the Act, are more fully addressed in the *Analysis of Comments and Changes* in response to the comments received on § 303.440.

Changes: None.

Comment: None.

Discussion: We have revised the introductory text of § 303.430(d) to remove the phrase ''in addition to adopting the procedures in paragraphs (b) and (c) of this section'' because these requirements do not need to be referenced in paragraph (d) and to do so would be redundant with the requirements already cited in paragraphs (b) and (c) of § 303.430.

Changes: We have removed from § 303.430(d) the phrase ''in addition to adopting the procedures in paragraphs (b) and (c) of this section.''

Comment: Many commenters expressed concern that the language in proposed § 303.430(e)(3) relates not to pendency, but to the requirement in section 635(c)(2)(D) of the Act and § 303.211(b)(4) that IFSP services continue to be provided to a toddler with a disability until a part B eligibility determination is made for that child in a State that elects to make part C services available beyond age three under § 303.211. A few other commenters indicated that proposed § 303.430(e)(3) conflicts with sections 607(a) and (b) and 615(j) of the Act and the Third Circuit decision in *Pardini* v. *Allegheny Intermediate Unit,* 420 F.3d 181 (3d Cir. 2005), *cert. denied,* 126 S.Ct. 1646 (2006). One commenter, recommended referencing part B eligibility as well as ineligibility in proposed § 303.430(e)(1).

Discussion: We agree with commenters who noted that the requirement in proposed § 303.430(e)(3) applies only to those States that elect to offer services under § 303.211 and is not a pendency provision and, thus, we have moved the substance of proposed § 303.430(e)(3) to § 303.211(b)(4). These comments and the resulting changes are fully addressed in the *Analysis of Comments and Changes* for § 303.211(b)(4) in subpart C of this part.

Changes: We have moved the substance in § 303.430(e)(3) to § 303.211(b)(4).

Mediation (§ 303.431)

Comment: One commenter requested that the Department clarify the phrase ''including matters arising prior to the filing of a due process complaint'' as used in § 303.431(a) to make clear when mediation may be used by parties.

Discussion: We agree that § 303.431(a) needs clarification regarding when mediation is available. Section 303.431 incorporates sections 639(a)(8) and 615(e)(1) of the Act, and requires lead agencies to ensure that procedures are established and implemented to allow parties to resolve disputes involving any matter under part C of the Act through a mediation process, including matters arising prior to the filing of a due process complaint. Thus, under § 303.431 parties to disputes may request mediation at any time to resolve any matter arising under this part, regardless of whether a due process complaint or a State complaint is filed. We have amended § 303.431 to expressly provide that mediation may be used ''at any time.''

Changes: We have added the phrase ''at any time'' to the end of § 303.431(a).

Comment: One commenter requested that the phrase ''parent's right to a due process hearing'' in current § 303.419(b)(1)(ii) be maintained in § 303.431(b)(1)(ii).

Discussion: We agree with the commenter; the language ''parent's right to a due process hearing'' aligns with section 615(e)(2)(A)(ii) of the Act and should be used in these regulations.

Changes: We have replaced the phrase ''hearing on the parent's due process complaint'' with the phrase ''due process hearing'' in § 303.431(b)(1)(ii).

Adoption of State Complaint Procedures (§ 303.432)

Comment: None.

Discussion: We have moved in § 303.432(b)(1) the modifying phrase ''who is the subject of the complaint'' to follow the phrase ''the infant or toddler

with a disability'' to clarify that it is the infant or toddler with the disability who is the subject of the complaint.

Changes: We have moved in § 303.432(b)(1) the phrase ''who is the subject of the complaint'' to follow the phrase ''the infant or toddler with a disability.''

Comment: A few commenters requested that § 303.432 explicitly state that monetary reimbursement and compensatory education are potential remedies for State complaints.

Discussion: The lead agency is responsible for ensuring that all public agencies within its jurisdiction meet the requirements of the Act and its implementing regulations. In light of the lead agency's general supervisory authority under sections 634 and 635 of the Act, the lead agency should have the flexibility to determine the appropriate remedies or corrective actions necessary to resolve a complaint in which it has determined that a public agency has failed to provide appropriate services to an infant or toddler with a disability, including the award of compensatory services or monetary reimbursement. To make this clear, we have changed § 303.432(b)(1) to include compensatory services and monetary reimbursement as examples of corrective actions that may be appropriate to address the needs of an infant or toddler with a disability who is the subject of a complaint and the infant's or toddler's family.

Changes: We have added in § 303.432(b)(1) the parenthetical ''(such as compensatory services or monetary reimbursement).''

Minimum State Complaint Procedures (§ 303.433)

Comment: One commenter requested that § 303.433 be amended to indicate that either party may request an extension of the 60-day time limit in § 303.433 when there are legitimate reasons for such a request.

Discussion: Section 303.433 provides that each lead agency must include in its State complaint procedures a time limit of 60 days after a State complaint is filed to complete its review of the complaint and issue a written decision to the complainant that addresses each allegation in the complaint and that contains findings of fact and conclusions and the reasons for the lead agency's final decision. Section 303.433(b)(1) further provides that State complaint procedures must permit an extension of the 60-day time limit only if exceptional circumstances exist with respect to a particular complaint or the parties to the complaint agree to extend the time in order to engage in mediation pursuant to § 303.433(a)(3)(ii).

The lead agency determines when there are exceptional circumstances with respect to a particular complaint that would justify an extension of the 60-day time limit in that complaint. A lead agency may extend the 60-day time limit due to exceptional circumstances, such as a governmentwide shutdown, if the lead agency needs additional information under § 303.433(a)(2) or (a)(3) and the relevant party is unavailable due to hospitalization, or if a parent complainant is unavailable due to illness and cannot provide the additional information under § 303.433(a)(2). Thus, we decline to add the provision suggested by the commenter.

Changes: None.

Comment: One commenter stated that setting aside any part of a State complaint as provided in § 303.433(c) may not be possible because the information that was set aside may be needed to complete the fact finding in that complaint.

Discussion: Section 303.433(c) provides that if a State complaint is received that is also the subject of a due process hearing under § 303.430(d), or contains multiple issues of which one or more are part of a due process hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of that hearing. Although § 303.433(c) requires that matters raised in both a State complaint and a due process hearing be resolved only through the due process hearing procedures, that does not preclude fact finding in relation to an issue in a State complaint that is different from the matters covered by the due process hearing, even though the facts may be related to the subject of, or another issue in, a due process proceeding, because § 303.433(c) also provides that any issue in the State complaint that is not a part of the due process hearing must be resolved through the State complaint procedures.

Changes: None.

Comment: One commenter recommended that we not adopt § 303.433(c)(3), which requires that the lead agency resolve a complaint alleging that a lead agency or EIS provider failed to implement a due process hearing. The commenter stated that this requirement could limit a lead agency's ability to contract with a third party for State dispute resolution services because third party contractors are often given the authority to enforce due process hearing decisions.

Discussion: Nothing in the Act prohibits the lead agency from contracting with a third party for State dispute resolution services and § 303.433(c)(3) would not interfere with a lead agency's ability to enter into such contracts. We note, however, in accepting funds under this part, the lead agency is responsible for the administration of part C in the State and the use of part C funds under sections 635(a)(10) and 637(a)(1) of the Act. Therefore, the lead agency retains the responsibility for full implementation of the requirements of this part, including the ultimate responsibility for the implementation of State dispute resolution decisions even if the services are being carried out by a third party under contract with the lead agency.

Changes: None.

Comment: None.

Discussion: To be consistent within § 303.433, we have added the term ''public agency'' to § 303.433(b)(1)(ii) and (c)(3).

Changes: We have added the term ''public agency'' to § 303.433(b)(1)(ii) and (c)(3).

Filing a Complaint (§ 303.434)

Comment: Several commenters supported the requirement in § 303.434(c) that a State complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received. However, one commenter recommended retaining the requirement in current § 303.511(b)(1) providing that the one-year timeline for filing a State complaint may be extended if the allegation that forms the basis of the complaint is continuing or recurring.

Discussion: A one-year timeline is reasonable and will assist lead agencies in ensuring the effective implementation of State complaint procedures and State part C programs. Limiting a State complaint to an allegation of a violation that occurred not more than one year prior to the date the lead agency receives the complaint will ensure that problems regarding a State's part C program are raised and addressed promptly. For these reasons, we decline to revise § 303.434(c) as requested by the commenter.

Changes: None.

Comment: Several commenters expressed concern that § 303.434(d), which requires the party filing the complaint to forward a copy of the complaint to the public agency or EIS provider, breaches parent confidentiality, may deter parents from filing complaints and, at a minimum, creates an additional barrier to filing a State complaint. One commenter recommended that § 303.434 specify the action that would be taken if a

complainant sends its State complaint only to the lead agency.

Discussion: Section 303.434(d) provides that the party filing the State complaint must forward a copy of the complaint to the public agency or EIS provider serving the child at the same time the party files the complaint with the lead agency. Requiring the complaint to be forwarded to the public agency or EIS provider serving the child at the same time the party files the complaint with the lead agency enables the public agency or EIS provider to be informed of the issues in the State complaint in order to provide an opportunity for the voluntary resolution of the complaint as set forth in § 303.433(a)(3).

We believe that providing the public agency or EIS provider with information about the complaint enables the parties to have the opportunity to resolve disputes directly at the earliest possible time and that this benefit outweighs the minimal burden placed on the complainant. Concerning the commenters' confidentiality concerns, the information that is provided by the complainant generally is information that should already be available to the public agency or EIS provider who is responsible for providing services to a particular child. In addition, the public agency or EIS provider needs to know the identity of the complainant and relevant allegations in the complaint (consistent with § 303.434) in order to propose a resolution of the issues.

Regarding the commenter's request that § 303.434(d) specify the consequences for failure by the complainant to forward a copy of the complaint to the public agency or EIS provider, we do not believe we need to require specific consequences for complainants for two reasons. First, parents file few State complaints under part C of the Act. States reported an average of fewer than two State complaints received by each lead agency in FFY 2006. Second, under § 303.433(a)(3), the lead agency must provide the public agency or EIS provider an opportunity to respond to the complaint, thereby implicitly requiring the lead agency to inform the public agency or EIS provider of the relevant allegations in the complaint. Thus, we decline to regulate as requested by the commenter.

Changes: None.

Appointment of an Impartial Due Process Hearing Officer (§ 303.435)

Comment: One commenter requested that § 303.435 include the relevant part B requirements in 34 CFR 300.511(c), concerning the specific qualifications required for due process hearing officers.

Discussion: Section 303.435 addresses the qualifications for due process hearing officers in States that choose to adopt the part C due process procedures under section 639 of the Act. These qualifications are substantively the same as those in 34 CFR 300.511(c) of the part B regulations and the qualifications in § 303.443(c) for States that choose to adopt the part B due process procedures under section 615 of the Act. While the language in § 303.435 and 34 CFR 300.511(c) is not identical, both sections require a due process hearing officer to have specific knowledge about the Act and the proper conduct of legal proceedings. Additionally, § 303.435 and 34 CFR 300.511(c) both require that the due process hearing officer be impartial using similar criteria regarding personal and professional conflicts of interest and employment status. Since there is no substantive difference between § 303.435 and 34 CFR 300.511(c), it is not necessary to amend § 303.435 as requested.

Changes: None.

Comment: One commenter requested that the Department clarify § 303.435(b)(2). Specifically, the commenter asked whether § 303.435(b)(2) would permit an employee of a lead agency who is an administrative law judge, to act as a hearing officer if that employee's job is to adjudicate disputes such as presiding over due process hearings under the Act and that employee is operating under a system of mandates pursuant to a State executive order designed to ensure his or her independence and impartiality.

Discussion: Section 303.435(b)(1) provides that a hearing officer may not be an employee of the lead agency or an EIS provider involved in the provision of early intervention services or care of the child, and the hearing officer may not have a personal or professional interest that would conflict with his or her objectivity in implementing due process hearing procedures. Section 303.435(b)(2) provides that a person who otherwise qualifies under paragraph (b)(1) of this section is not an employee of an agency for purposes of the prohibition in § 303.435(b)(1) solely because the person is paid by the agency to implement the due process hearing procedures. Under § 303.435(b)(2), the sole fact that an administrative law judge is an employee does not trigger the prohibition in § 303.435(b)(1) if that employee's job as an administrative law judge is to preside over due process hearings under the Act and is operating under a system of mandates pursuant to a State executive order designed to ensure his or her independence and impartiality.

Changes: None.

Parental Rights in Due Process Hearing Proceedings (§ 303.436)

Comment: A few commenters requested that § 303.436 stipulate that parents who pursue a due process hearing are entitled to due process hearing records, findings, and conclusions at no cost to the parent.

Discussion: We agree that a parent involved in a due process hearing should receive a copy of the transcription of the hearing (*i.e.,* a record of the hearing), the findings of fact, and the decisions at no cost.

Changes: Section 303.436(b)(4) and (b)(5) has been changed to specify that a parent involved in a due process hearing has the right to receive a written or electronic verbatim transcription of the hearing and a copy of the written findings of fact and decisions at no cost to the parent.

Convenience of Hearings and Timelines (§ 303.437)

Comment: Several commenters recommended that § 303.437, like 34 CFR 300.515(c) of the part B regulations, allow hearing officers to grant specific extensions of time beyond the period set out in 34 CFR 300.515 of the part B regulations at the request of either party.

Discussion: Sections 303.435 through 303.438 are substantively unchanged from current §§ 303.420 through 303.423, which prescribe a 30-day timeline for due process proceedings in States that adopt part C due process procedures under section 639 of the Act. However, we agree with the commenters that extensions to the 30-day timeline in § 303.437(b) may be necessary under certain circumstances (such as, unavailability of witnesses, exceptional child and family circumstances, and pending evaluations and assessments). Therefore, we have added a new paragraph (c) to this section providing that a hearing officer may grant specific extensions of time beyond the periods set out in paragraph (b) of this section at the request of either party.

Changes: We have added a new § 303.437(c), which provides that a hearing officer may grant specific extensions of time beyond the period set out in paragraph (b) of this section at the request of either party.

States That Choose To Adopt the Part B Due Process Procedures Under Section 615 of the Act (§§ 303.440 Through 303.447)

Comment: A few commenters recommended that the final regulations

clarify that the requirements in §§ 303.440 through 303.447 apply only to States that choose to adopt the part B due process procedures. Another commenter stated that the designated heading is confusing and may lead States to believe that they must adopt part B due process procedures.

Discussion: Grouping the requirements for due process procedures under two designated headings in this subpart, ''States That Choose To Adopt the part C Due Process Procedures under Section 639 of the Act'' and ''States That Choose to Adopt the part B Due Process Procedures under Section 615 of the Act'' clarifies that a lead agency may elect to adopt for the State either part C or part B procedures. The regulations clearly specify which due process procedures apply when the lead agency has made its choice under § 303.430(d).

Changes: None.

Comment: One commenter suggested that the regulations should encourage States to be innovative and create a due process hearing system that is specifically designed for part C of the Act, rather than adopt the part B due process hearing procedures. Another commenter suggested that allowing lead agencies to adopt the part B due process hearing procedures may not be consistent with the Act.

Discussion: We believe that providing States the option of adopting the part B due process procedures in lieu of using the part C due process hearing procedures is consistent with the Act. States were provided this option under the original part C regulations promulgated in 1989 to implement the Education of the Handicapped Act amendments of 1986 (Pub. L. 99–457), which established the early intervention program for infants and toddlers with disabilities.

We have maintained this option in these regulations because there are advantages and disadvantages for particular States to use the due process procedures under part C as opposed to part B of the Act. The vast majority of States use, and will likely continue to use, the part C due process procedures in §§ 303.435 through 303.438 instead of exercising the option to use the part B due process procedures to resolve disputes under part C of the Act. This is in part because the part B due process procedures in §§ 303.440 through 303.447 contain additional steps and procedures. Finally, even in the approximately 25 percent of States that have adopted the part B due process procedures, each State must update its State policies and procedures to reflect the requirements in §§ 303.440 through 303.447 and subject its updated policies and procedures to the public participation requirements in § 303.208(b).

In FFY 2006, approximately 15 States reported exercising the option to adopt the part B due process procedures while the remaining 41 States (which include the territories and outlying areas) reported adopting the part C due process procedures. In some of the 15 States that reported using the part B due process procedures, the lead agency is the SEA and administers both parts B and C of the Act. In a few other States that reported adopting the part B due process procedures, children receiving services under part C of the Act are also entitled to receive, under State law, FAPE, and thus, these States must provide parents with procedural protections under both parts B and C of the Act.

For these reasons, we will continue to allow States the option to adopt the due process procedures (with applicable public and stakeholder input) that are most appropriate for that State.

Changes: None.

Filing a Due Process Complaint (§ 303.440)

Comment: One commenter requested that the Department clarify the phrase ''or should have known'' as used in § 303.440(a)(2), regarding an alleged violation that forms the basis of a due process complaint.

Discussion: As provided in § 303.440(a)(2), in States that choose to adopt the part B due process procedures under section 615 of the Act, a due process complaint must allege a violation that occurred not more than two years before the date the parent or EIS provider knew, or should have known, about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint, in the time allowed by that State law. Whether a parent or public agency ''should have known'' about the action cited as the basis of the complaint is a determination that a due process hearing officer must make based on the individual facts of each case. Thus, further clarification of the term is not necessary or appropriate.

Changes: None.

Comment: One commenter expressed concern that § 303.440(c) allows States to choose either a 30- or 45-day timeline to resolve a due process complaint. The commenter stated that 30 days is sufficient and should be mandated, particularly given the short amount of time that infants and toddlers are eligible for part C services.

Discussion: The option in § 303.440(c) that allows lead agencies to adopt either a 30- or 45-day timeline to resolve a due process complaint is specific to States that choose to adopt part B due process procedures under section 615 of the Act. The part B regulations in 34 CFR 300.515(a) provide for a 45-day timeline for the due process hearing. Section 303.440(c) incorporates the 45-day timeline under the part B procedures, but also allows States that choose to adopt the part B procedures, to elect the shorter 30-day timeline provided under the part C due process procedures. This gives States that choose to adopt the part B due process procedures the flexibility to put in place a timeline shorter than that required under the part B due process procedures. Therefore, we do not believe it is appropriate to revise the regulation as requested by the commenter.

Changes: None.

Due Process Complaint (§ 303.441)

Comment: One commenter requested that the Department clarify whether the 15 days referred to in § 303.441(d)(1) are calendar days or working days.

Discussion: The 15 days are calendar days. As defined in § 303.9, a *day* means calendar day, unless otherwise indicated.

Changes: None.

Comment: One commenter recommended amending § 303.441(b) to reflect the part B provisions in 34 CFR 300.153(b)(4), which recognize that a homeless family may not have an address to list when filing a complaint.

Discussion: The commenter's concern is addressed in § 303.441(b)(4), which requires, in the case of a homeless child (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act), that the due process complaint include available contact information for the child and the name of the EIS provider serving the child.

Changes: None.

Comment: One commenter requested that § 303.441(d) specify that hearing officers must allow parties to amend their due process complaint notices unless doing so would prejudice the other party. The commenter stated that generally, parents may not understand fully the due process procedures and should be allowed to modify their due process complaint without having to file a new complaint and begin the process again.

Discussion: Section 303.441(d)(3)(i), consistent with section 615(c)(2)(E) of the Act, provides that a party may amend its due process complaint only if the other party consents in writing to the amendment and is given the

opportunity to resolve the due process complaint through a meeting; or, as provided in § 303.441(d)(3)(ii), the hearing officer grants permission to amend the complaint, except that the hearing officer may only grant permission to amend the complaint at any time not later than five days before the due process hearing begins. We further note that a party may withdraw its complaint, and re-file it. The regulation aligns with the Act and, therefore, we decline to revise the regulation as requested by the commenter.

Changes: None.

Comment: One commenter recommended extending the time when a party receiving a due process complaint must send a response that specifically addresses the issues raised in the due process complaint. The commenter stated that the 10 days provided in § 303.441(f) is not enough time to research and develop an appropriate response.

Discussion: Section 303.441(f) incorporates the requirements in section 615(c)(2)(B)(ii) of the Act, which provides that the receiving party must provide the party that filed the complaint a response to the complaint within 10 days of receiving the complaint. We do not have the authority to extend this time period.

Changes: None.

Resolution Process (§ 303.442)

Comment: One commenter requested that the Department revise the paragraph heading of § 303.442(a), ''Resolution meeting'' to read ''Meeting to obtain facts and details.''

Discussion: Section 303.442(a)(2) states that the purpose of the resolution meeting is for the parent of the child to discuss the due process complaint and the facts that form the basis of the due process complaint, so that the lead agency has the opportunity to resolve the dispute. ''Resolution meeting'' is thus, the appropriate paragraph heading for § 303.442(a).

Changes: None.

Comment: A few commenters stated that there is no statutory basis for the 30-day resolution timeline in § 303.442 and that the timeline is too long for a time-sensitive program like part C of the Act.

Discussion: Section 303.442, regarding the resolution process, only applies in cases where a State has chosen to adopt the part B due process procedures under section 615 of the Act. Section 303.442(b)(1) incorporates the 30-day resolution timeline specified in section 615(f)(1)(B)(ii) of the Act.

Changes: None.

Comment: A few commenters requested that § 303.442(b)(4) include a definition of the term ''reasonable effort.''

Discussion: Section 303.442(b)(4) provides that, if the lead agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, including documenting its efforts, the lead agency may, at the conclusion of the 30-day period, request that the hearing officer dismiss the parent's due process complaint. We would expect that throughout the 30-day resolution period the lead agency would make those efforts necessary, as dictated by the individual circumstances of each particular case, to encourage the parent to participate in the resolution meeting. If the lead agency requests the hearing officer to dismiss the parent's due process complaint pursuant to § 303.442(b)(4), it would be up to the hearing officer to determine whether the lead agency has made reasonable efforts to obtain the participation of the parent in the resolution meeting. Thus, specifying activities that would constitute reasonable efforts under § 303.442(b)(4) in all cases is not appropriate.

Changes: None.

Comment: Several commenters suggested that § 303.442(b)(4) is incompatible with the nature of the part C program because dismissing a case when a parent does not agree to participate in a resolution session may establish an adversarial relationship between the parents and the lead agency.

Discussion: Section 303.442(b)(4) provides that when a parent does not participate in the resolution meeting, despite the lead agency's reasonable efforts to persuade the parent to participate (which efforts must be documented), the lead agency may request that the hearing officer dismiss the due process complaint. Although this section provides the lead agency with the option to request dismissal, the lead agency is not required to request a dismissal and may agree instead to an extension of the time to conduct a resolution meeting in order for the parties to continue mediation efforts. Additionally, it is the due process hearing officer who determines whether dismissal of the due process complaint is warranted, based not only on the lead agency's request, if one is made, but also based on any parent's response. The availability of both the lead agency's option to request dismissal and the impartial hearing officer's determination ensures that dismissal of a due process complaint is based on case-specific circumstances.

Changes: None.

Comment: One commenter recommended that § 303.442(b) be amended to require the lead agency to present the requirements in this section to a parent verbally or in the parent's primary mode of communication, in order to ensure that a parent understands these requirements.

Discussion: Section 303.421(b)(3), regarding the content of the prior written notice and procedural safeguards notice, provides that the notice must be in sufficient detail to inform the parents about, among other things, how to file a due process complaint in the due process procedures the State has adopted pursuant to § 303.430(d), and any timelines under those procedures. Further, § 303.421(c)(1)(ii) requires that the notice be provided in the *native language,* as defined in § 303.25, of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. Thus, the regulations already address the commenter's concern regarding providing the notice in a parent's primary mode of communication and we do not believe that it is appropriate to amend the regulations to require verbal reading of the notice. We would expect that the notice would be read to a parent if the parent requested this assistance.

Changes: None.

Hearing Rights (§ 303.444)

Comment: One commenter questioned whether it is appropriate to have an infant or toddler at a due process hearing.

Discussion: While parents always have the right to determine whether their infant or toddler is present at a hearing, we do not believe it is necessary to specify this right in § 303.444(c)(1) because, in general, infants and toddlers with disabilities do not need to be present to either serve as witnesses at, or required participants in, a due process hearing. However, we note that under either the part B or part C due process hearing procedures, a parent is in the best position to decide whether an infant or toddler will attend the due process hearing.

Changes: We have removed § 303.444(c)(1) and renumbered paragraphs (c)(2) and (c)(3) as paragraphs (c)(1) and (c)(2) of this section.

Hearing Decisions (§ 303.445)

Comment: One commenter recommended eliminating the

provisions distinguishing between substantive and procedural violations of part C of the Act in § 303.445, stating that it is not appropriate to make this distinction in the part C regulations. According to the commenter, this regulation violates section 607(a) of the Act.

Discussion: Section 303.445 applies to States that choose to adopt the part B due process procedures under section 615 of the Act. Thus, it is appropriate to include language in § 303.445 that is parallel to 34 CFR 300.513, which reflects section 615(f)(3)(E) of the Act concerning the nature of hearing officer decisions, including the requirement that decisions be based on substantive grounds, and to include the standards under which a hearing officer may find that a child was denied appropriate identification, evaluation, placement, or provision of early intervention services based on procedural inadequacies. Section 303.445(a) is based on the requirements specified in section 615(f)(3)(E) of the Act and thus, is consistent with section 607(a) of the Act, which requires the Secretary to issue regulations that are necessary to ensure that there is compliance with the specific requirements of the Act.

Changes: None.

Comment: One commenter recommended that the heading of § 303.445(a) be amended to reflect the standard that a hearing officer must use to make decisions—which is whether the infant or toddler with a disability and his or her family were provided appropriate early intervention services.

Discussion: Section 303.445(a) incorporates section 615(f)(3)(E) of the Act, which provides the substantive and procedural grounds upon which the decision of a due process hearing officer may be based; these substantive and procedural grounds are broader than the standard suggested by the commenter. Therefore, we decline to amend the heading of this paragraph.

Changes: None.

Comment: None.

Discussion: In order to make § 303.446(b) consistent with § 303.443(b), which requires the lead agency to conduct the due process hearing, and section 635(a)(10) of the Act, which requires the lead agency to have a single line of responsibility, we have removed in § 303.446(b) the authority for a public agency (other than the lead agency) to conduct due process hearings when a State adopts under § 303.430(d) the part B due process procedures. However, we have retained the authority for the lead agency to establish procedures that would allow any party aggrieved by the findings and decision in the due process hearing to appeal to, or request reconsideration of the decision by, the lead agency. If the lead agency establishes such procedures, those procedures must meet the same requirements in § 303.446(b), (c), and (d).

Changes: We have removed the authority for public agencies (other than the lead agency) to conduct due process hearings in § 303.446(b), consistent with § 303.443(b), which requires the lead agency to conduct the due process hearing. We amended § 303.446(b) to permit the lead agency to establish procedures that would allow any party aggrieved by the findings and decision in the due process hearing to appeal to, or request reconsideration of the decision by, the lead agency.

Timelines and Convenience of Hearings and Reviews (§ 303.447)

Comment: One commenter requested that the word ''child'' as used in § 303.447(d), concerning the requirement that each hearing and each review involving oral arguments be conducted at a time and place that is reasonably convenient to the parents and child involved, be defined or removed.

Discussion: Section 303.6 defines the term *child* as it is used throughout this part.

Changes: None.

Civil Action (§ 303.448)

Comment: A few commenters recommended that § 303.448 stipulate that courts have subject-matter jurisdiction over actions brought under sections 615 and 639 of the Act, concerning procedural safeguards.

Discussion: Section 303.448 incorporates sections 615(i)(2), 615(i)(3)(A), 615(l), and 639 of the Act, which provide for the right of an aggrieved party to bring a civil action to appeal the findings and final decision of a due process hearing. Concerning the commenter's request to clarify subject-matter jurisdiction of courts to hear such a civil action, section 615(i)(2)(A) of the Act states that a civil action to appeal a due process decision may be brought in a district court of the United States without regard to the amount in controversy. These sections of the Act set forth the requisite subject-matter jurisdiction for Federal and State courts to hear such civil actions. Thus, it is not necessary to clarify subject-matter jurisdictional grounds beyond those identified in sections 615(i)(2), 615(i)(3)(A), 615(l), and 639 of the Act.

Changes: None.

Subpart F—Use of Funds and Payor of Last Resort

Use of funds, payor of Last Resort, and System of Payments (§ 303.500)

Comment: None.

Discussion: Given that the provisions in § 303.500 address the general requirements for each State's fiscal policies, we have moved the provision in proposed § 303.521(a), concerning the general option that a State may establish a system of payments (*i.e.,* financial sources such as insurance or family fees to pay for part C services), to § 303.500(b) and renumbered the other provisions in § 303.521 accordingly. We have added the term ''premiums'' to the examples of cost participation fees for clarity in § 303.500(b).

Changes: We have renumbered proposed § 303.500 as § 303.500(a) and moved the general requirement in the introductory text of proposed § 303.521(a) to § 303.500(b). We also added the phrase ''system of payments'' to the heading of § 303.500 and the word ''premiums'' to § 303.500(b).

Permissive Use of Funds by the Lead Agency (§ 303.501)

Comment: None.

Discussion: To ensure that the use of funds requirements in § 303.501 are also subject to other fiscal application requirements in §§ 303.120 through 303.122 and §§ 303.220 through 303.226 (concerning fiscal assurances each State must include in its application for funds), we have added references to these other fiscal provisions in §§ 303.120 through 303.122 and §§ 303.220 through 303.226.

Changes: We have added in the introductory text of § 303.501 references to §§ 303.120 through 303.122 and §§ 303.220 through 303.226.

Comment: One commenter requested clarification on the implementation of the requirement in § 303.501(a) that part C funds be used for direct early intervention services ''that are not otherwise funded through other public or private sources.'' This commenter also noted that funding sources might vary by child, which is difficult for a State to monitor.

Discussion: The purpose of § 303.501(a) is to ensure that Federal funds are used to supplement or increase the level of resources available in a State for the provision of early intervention services and are not used to replace existing resources. Section 303.501(a) incorporates the language in section 638(1) of the Act that permits, but does not require, States to use part C funds for direct early intervention services when there are no other public

or private sources available to pay for these services, subject to the requirements in §§ 303.510 through 303.521. In a State that uses part C funds to pay for direct early intervention services, the State must ensure implementation of the payor of last resort provisions in section 640 of the Act and in §§ 303.510 through 303.521.

With respect to the commenter's concern about identifying and monitoring funding sources to pay for a service for a particular child, under § 303.344(d)(1)(iv), the child's IFSP Team must identify in the IFSP the payment arrangements, which include identifying the funding source(s) that will be used to pay for each early intervention service identified in the IFSP. Consistent with § 303.33(b)(9), the role of a service coordinator includes coordinating the funding sources for early intervention services specified in the IFSP. States may monitor and implement the payor of last resort requirements in § 303.501(a) in a variety of ways. For example, a State may provide IFSP Teams with a list of resources that may be available to pay for a specific IFSP early intervention service in that State. A State may require service coordinators to review with parents available funding sources to pay for a specific IFSP service based on family-specific circumstances (*e.g.,* military families or children already enrolled in Title V or other programs) in order to implement the payor of last resort provisions in § 303.501(a). Given the parallel requirements in §§ 303.33(b)(9) and 303.344(d)(1)(iv) and the variety of ways in which States may implement the requirements in § 303.501(a), it is not feasible to further clarify how this provision might be implemented.

Changes: None.

Comment: Many commenters opposed the provision in § 303.501(d), which allows the use of part C funds to serve children over the age of three, because existing appropriations for part C are not sufficient to cover the cost of providing early intervention services to eligible infants and toddlers under age three and their families. Some commenters requested that the Department clarify that § 303.501(d) should not take effect until sufficient appropriations are available to trigger incentive funding under section 643(e) of the Act. One commenter supported § 303.501(e), which allows any State that does not provide services under § 303.204 for at-risk infants and toddlers, as defined in § 303.5, to strengthen the statewide system by initiating, expanding, or improving collaborative efforts related to at-risk infants and toddlers.

Discussion: The provisions in § 303.501(d) and (e), concerning a State's option to make available early intervention services in lieu of FAPE to children with disabilities beyond age three and strengthening the statewide system, directly reflect the language in section 638(4) and (5) of the Act. Under sections 632(5)(B)(ii) and 635(c) of the Act and § 303.211, States have the option, but are not required, to make part C services available to eligible children over the age of three. While the provision in section 643(e) of the Act requires the Department, in any fiscal year for which the appropriation for the part C program exceeds $460,000,000, to reserve a portion of the funds as incentive funds for States to serve children three years of age until entrance into elementary school, nothing in the Act (including sections 632(5)(B)(ii) and 635(c)) links the availability of the option to make part C services available to eligible children over the age of three to the availability of funding under section 643(e) of the Act.

Changes: None.

Payor of Last Resort (§ 303.510)

Comment: Several commenters requested that the language from the note following current § 303.527 (concerning the intent of Congress that other funding sources continue for services that would be available to eligible children but for the existence of programs under part C of the Act) be incorporated in the payor of last resort requirements in § 303.510. These commenters noted that the language in the note supports congressional intent for an interagency structure to finance early intervention services and is an important statement supporting States' efforts to develop the necessary partnerships to fund the part C system.

Discussion: The substance of the note that follows current § 303.527 is included in § 303.510(c) as a rule of construction. The rule of construction, which references funding sources under the Social Security Act, 42 U.S.C. 701, *et seq.* (SSA), clarifies that nothing in part C of the Act may be construed to permit a State (including the lead agency and other agencies in the State) to withdraw funding for services that currently are or would be made available to eligible children but for the existence of part C of the Act. Thus, funding from other sources would continue to be available to support services that are included in the IFSP. To make this clearer, we have amended § 303.510(c) to include a reference to section 1903(a) of the SSA, the specific section of the SSA regarding medical assistance for services and have clarified that nothing in this part may be construed to permit a State to reduce medical or other assistance available in the State.

Changes: We have amended § 303.510(c) by removing the final phrase ''within the State'' and including the phrases: (1) ''in the State'' and (2) ''including section 1903(a) of the SSA regarding medical assistance for services furnished to an infant or toddler with a disability when those services are included in the child's IFSP adopted pursuant to part C of the Act.''

Comment: One commenter opposed referencing § 303.520, regarding use of insurance for payment of services, in § 303.510(a), regarding payor of last resort. The commenter noted that in light of part C's payor of last resort requirements parental consent should not be required for the use of private insurance in § 303.520 because the requirement to obtain parental consent diminishes the lead agency's capacity to implement a consistent payor of last resort policy. The commenter requested that the Department clarify, amend, or remove the reference to § 303.520 in § 303.510(a).

Discussion: The requirement in § 303.510(a) directly incorporates the long-standing payor of last resort requirements in section 640(a) of the Act (and reflected in current § 303.527(a) and (b)). The reference to § 303.520 in § 303.510(a) was added to ensure that States do not interpret part C payor of last resort provisions to override the requirements in §§ 303.520 and 303.521, concerning use of insurance and systems of payments.

As discussed in response to comments on § 303.520, the Department has determined that funds from public health insurance or benefits (*e.g.,* Medicaid or CHIP) or private insurance are not considered available funding sources under part C's payor of last resort provisions, unless a parent has provided the consent required under § 303.520(a)(1) and (b)(1), concerning parental consent for use of public benefits or insurance or private insurance, or one of the exceptions under § 303.520(a)(2) or (b)(2) applies. When other public funds are available to pay for part C services, such as funds from the Department of Defense's TRI–CARE medical assistance program or TANF, part C funds are the payor of last resort.

Changes: None.

Comment: Several commenters recommended adding a reference to the Children's Health Insurance Program

(CHIP) in § 303.510(c), which requires that nothing in this part be construed to permit a State to reduce medical or other available assistance or to alter eligibility under Title V of the SSA or Title XIX of the SSA, within the State, because CHIP is a potential Federal funding source for early intervention services.

Discussion: Section 303.510(c) directly incorporates the payor of last resort provisions in section 640 of the Act, which only expressly reference Titles V and XIX of the SSA (which are the statutory authorities respectively for the Maternal and Child Health and Medicaid public benefits programs). No other statutory authorities are cited. We believe it would be inappropriate to add a reference to CHIP without also adding statutory authorities for all other funding sources.

Changes: None.

Methods To Ensure the Provision of, and Financial Responsibility for, Part C Services (§ 303.511)

Comment: None.

Discussion: We have changed the title of § 303.511 to better align with the title of section 640(b)(1) of the Act, which addresses methods of ensuring and establishing financial responsibility for part C services.

Changes: We have changed the title of § 303.511 to ''*Methods to ensure the provision of, and financial responsibility for, Part C services''.*

Comment: One commenter requested that § 303.511(a) be clarified to require States to have in place methods for establishing financial responsibility and for providing early intervention services using one of the three methods listed in § 303.511(a). The commenter stated that, as proposed, § 303.511(a) appeared to require that States (a) establish financial responsibility in State law or regulation, (b) sign interagency and intra-agency agreements, and (c) have other written methods determined by the Governor, or the Governor's designee, and approved by the Secretary as part of the State's application.

Discussion: We agree that clarification of this provision is necessary and have amended proposed § 303.511(a) and removed proposed § 303.511(b). New § 303.511(a) has been added to track the language of section 640(b)(1)(A) of the Act, requiring each State to ensure that has in place methods for State interagency coordination such that the Chief Executive Officer of a State or designee of the Chief Executive Officer shall ensure that the interagency agreement or other method for interagency coordination is in effect between each State public agency and the designated lead agency. New § 303.511(a)(1) incorporates proposed § 303.511(b), providing that the interagency coordination must ensure the provision of, and financial responsibility for, early intervention services provided under this part. New § 303.511(a)(2) requires that such services be consistent with the requirements of section 635 of the Act and the State's application under section 637 of the Act, including the provision of such services during the pendency of any dispute between the State agencies.

Proposed § 303.511(a) has been redesignated as § 303.511(b) and has been revised to indicate that States must meet the requirements of this section using one of the three methods listed.

Changes: We have added new paragraph § 303.511(a), removed proposed § 303.511(b), and redesignated proposed paragraph (a) as new paragraph (b). We revised § 303.511(b) by adding the phrase ''in one of the following''.

Comment: Two commenters supported the addition of proposed § 303.511(a)(2), redesignated § 303.511(b)(2), permitting States to use signed interagency and intra-agency agreements to establish financial responsibility and provide early intervention services. Other commenters requested that the Department require States to report to the Secretary the dollar amounts that flow into the system based on the use of interagency and intra-agency agreements.

Discussion: The Department does not require States to submit data to the Secretary on the amount of funding obtained for part C services through interagency or intra-agency agreements because the Department does not have a programmatic or regulatory need to collect such information at this time and we do not want to place an additional data collection burden on States. However, States may choose to collect such data and may need these data to track the amount of funds expended and budgeted for the provision of early intervention services in order to meet part C's nonsupplanting requirements in § 303.225.

Changes: None.

Comment: One commenter requested, for clarity, that the word ''method'' in proposed § 303.511(b), regarding methods for establishing financial responsibility and providing early intervention services, be replaced with ''formal interagency agreement or other written method.''

Discussion: Proposed § 303.511(b), redesignated § 303.511(a)(1), directly incorporates the language in section 640(b) of the Act concerning obligations to ensure, and methods of ensuring, services. Section 640(b) of the Act and § 303.511(a)(1) make clear that ''method'' refers to the manner in which a State ensures the fiscal responsibility of each agency for paying for part C services, which could include a State law, regulation, signed interagency or intra-agency agreement, or other appropriate written method. Adding the phrase ''formal interagency agreement or other written method'' to the regulation could appear to limit the options a State has for meeting these requirements or indicate a preference for the method to be used.

Changes: None.

Comments: None.

Discussion: As part of the State's responsibility to have methods in place for establishing financial responsibility, it is critical that not only should such methods be consistent with the State's funding policies adopted under Subpart F (including the system of payments) but such methods must expressly include any provisions the State has adopted under § 303.520 regarding the use of insurance to pay for part C services. Many of the provisions in § 303.520 regarding use of public benefits or insurance or use of private insurance can only be implemented with one of the express methods identified in section 640 of the Act and in § 303.511 (such as an interagency agreement, State statute, or Medicaid State plan) and the State must include its provisions regarding use of insurance in one of these methods to ensure adherence to these requirements.

Changes: We have added to the end of § 303.511(d)(2) the phrase ''and include any provisions the State has adopted under § 303.520 regarding the use of insurance to pay for part C services.''

Policies Related To Use of Insurance To Pay for Part C Services (§ 303.520)

Use of Public Benefits or Insurance To Pay for Part C Services (§ 303.520(a))

Comment: We received many comments on the use of public benefits or insurance to pay for part C services. Most commenters, including parents, parent advocacy groups, State lead agencies, and EIS providers, supported proposed § 303.520(a)(1)(iii), which would have required parental consent for enrollment in a public benefits or insurance program when a parent is eligible under, but not already enrolled in, such a program. These commenters maintained that a State should not be able to require a parent to enroll in a public benefits or insurance program,

such as Medicaid, as a condition of receiving IDEA part C services because the act of enrollment could impose costs on parents and families, affect their rights under other Federal programs, and have an impact on a parent's credit rating.

However, the vast majority of commenters, including parents, parent advocacy groups, State lead agencies, and EIS providers, opposed proposed § 303.520(a)(1)(i) that would have required parental consent for using a child's or parent's public benefits or insurance to pay for part C services when the child or parent is already enrolled in such a program. Several commenters, including a State Interagency Coordinating Council and a parent advocacy group, recommended that States be required to provide notice to parents in lieu of obtaining parental consent when the child or parent is already enrolled in such a program, particularly if the child or parent does not incur specified costs.

Commenters gave the following reasons for opposing the parental consent requirement in proposed § 303.520(a)(1)(i) when a child or parent is already enrolled in a public benefits or insurance program: (1) The use of public benefits or insurance is an important funding source for IDEA part C services, (2) there may be an administrative burden on State lead agencies and EIS providers in obtaining parental consent that could result in a delay in providing services to children and families, (3) IDEA statutory provisions, including sections 635(a)(10) and 640, require State lead agencies to coordinate all funding sources and to use IDEA part C funds as a payor of last resort, respectively; (4) Federal IDEA part C funds are designed to be the ''glue money,'' and not the primary funding source and thus only to be used when other Federal, State, and local funds are not available to pay for IDEA part C services; and (5) when a child or parent is already enrolled in a public benefits or insurance program, a consent requirement does nothing to protect privacy given that the agency responsible for the administration of public insurance or public benefits already has personal information about the child and family and that other concerns, such as avoiding the potential negative impact on a parent's credit rating, do not apply when a child or parent is already enrolled in a public insurance or benefits program. Additionally, two commenters who opposed the parental consent requirement when a child or parent is already enrolled in a public benefits or insurance program noted that parents already have the right under part C of the Act to consent to each and every part C service on the IFSP and that a separate consent provision provided parents with no additional protections.

A minority of commenters supported proposed § 303.520(a)(1)(i). The primary reasons cited by commenters for supporting a parental consent requirement when a child or family is already enrolled in a public benefits or insurance program were that: (1) Parents should be informed of all potential costs regarding use of their benefits; (2) parents should understand any potential limitations in coverage or future negative consequences and consent ensures accountability; (3) the IDEA part C consent regulations should align with the IDEA part B consent regulations; and (4) the consent provisions for public and private insurance should be aligned.

The commenters who expressed concern regarding the potential costs for parents of using public benefits or insurance to pay for IDEA part C services cited costs such as decreasing available lifetime coverage for a child or parent; paying for services that would otherwise be covered by the public benefits or insurance program; increasing premiums or discontinuing public benefits or insurance for that child or parent as a result of such use; and risking loss of eligibility for Medicaid home and community-based waivers based on overall health expenses.

Discussion: We are restructuring and revising § 303.520(a) regarding the use of public benefits or insurance to pay for part C services in response to commenters' concerns. As described in the following paragraphs, we believe this approach is consistent with the statutory framework and the provisions in sections 632(4)(B), 635(a)(10), 639(a)(2), and 640 of the Act.

Statutory framework. Section 632(4)(B) of IDEA, which defines early intervention services, includes in the definition a requirement that such services must be provided at no cost, except where Federal or State law provides for a system of payments by families, which can include costs such as charging parents a sliding scale fee for part C services. Section 635(a)(10)(B) requires the State lead agency to identify and coordinate all available resources in the State from Federal, State, local, and private sources. Section 639(a)(2) of the Act requires the State to ensure the confidentiality of personally identifiable information, including the right of parents to written notice of and written consent to the exchange of such information among agencies consistent with Federal and State law. Section 640 of IDEA requires the State lead agency to use Federal IDEA part C funds as a payor of last resort; requires State interagency mechanisms to ensure the timely provision of, and payment for, early intervention services; and explicitly references the use of other public funding sources, such as Medicaid, to pay for part C services. Read together, these IDEA part C statutory provisions require States to use public benefits or insurance (when available) to pay for part C services instead of using Federal IDEA part C funds, and also require States to protect the privacy rights of parents and their children.

Consent to enroll in a public benefits or insurance program. We appreciate the commenters' concerns that the act of enrolling in a public benefits or insurance program may impose costs on parents and families, affect parents' and families' rights under other Federal programs, or have an effect on a parent's credit rating. The act of enrollment involves disclosure of personally identifiable information regarding the child and family. Therefore, we are retaining the provision in proposed § 303.520(a)(1)(iii) in new paragraph (a)(2)(i) of § 303.520. This provision specifies that a State may not require a parent to sign up for or enroll in public benefits or insurance programs as a condition of receiving part C services and must obtain parental consent prior to requiring enrollment. A consent requirement for enrollment protects parents' financial interests by allowing them to consider the costs they may incur by enrolling in a public benefits or insurance program. Additionally, a consent requirement for enrollment protects parents' rights regarding the disclosure of personally identifiable information.

Children and parents who are already enrolled in a public benefits or insurance program. We are persuaded by commenters who opposed the requirement in proposed § 303.520(a)(1)(i) to obtain parental consent when a child or parent is already enrolled in a public benefits or insurance program. The commenters argued that requiring consent could affect the timely provision of part C services to children and families and that requiring parental consent when a child or parent is already enrolled in a public benefits or insurance program would not provide additional privacy protections given that the public benefits or insurance program already has personal information about the child or parent. We also note that the consent provisions in § 303.414

regarding the confidentiality of personally identifiable information (where applicable) already provide parents with privacy protections. Additionally, we recognize the importance of public benefits or insurance as a funding source for part C services and the provisions in sections 632(4)(B), 635(a)(10), and 640 of the Act, which include a reference to State systems of payments, require States to coordinate all resources, and require States to use part C funds as a payor of last resort, respectively. Therefore, we are replacing proposed § 303.520(a)(1)(i) with § 303.520(a)(3) regarding written notification to parents.

No-cost protections. We agree with commenters who noted that parents must understand the implications of using their public benefits or insurance to pay for part C services and the importance of parents understanding their confidentiality rights. We also agree with commenters who expressed concern that the State should not use a child's or parent's public benefits or insurance if the parent would incur specific costs as a result of the use of those benefits or insurance. Thus, we are making the following changes in these final regulations:

(1) Adding new § 303.520(a)(1) explicitly stating that the State may not use the public benefits or insurance of a child or parent to pay for part C services unless the State both provides parents with written notification about the IDEA part C no-cost protections and applicable confidentiality provisions and meets the additional specific no-cost protections identified in new § 303.520(a)(2);

(2) Adding new § 303.520(a)(2)(ii) stating that parental consent must be obtained if use of a child's or parent's public benefits or insurance would result in the following specified costs: (a) A decrease in the available lifetime coverage for a child or parent; (b) payment for services that would otherwise be covered by the public benefits or insurance program; (c) increases in premiums or discontinuation of public benefits or insurance for that child or the parents as a result of such use; or (d) a risk of loss of eligibility for the child or the parents for Medicaid home and community-based waivers based on aggregate health expenses.

(3) Adding new § 303.520(a)(2)(iii) stating that if a parent does not provide consent under new § 303.520(a)(2)(ii), the State must still make available those part C services in the IFSP to which the parent has provided consent.

Written notification to parents. As noted previously, we agree that parents must be informed regarding the implications of a public agency using their public benefits or insurance. Therefore, we are adding in new § 303.520(a)(3) that, prior to using a child's or parent's public benefits or insurance to pay for part C services, the State must provide written notification to the child's parents. This notification may be provided at any time but in no case later than when the State seeks to use the public benefits or insurance to pay for part C services; without providing the notice, the State may not use such funds to pay for part C services. The written notification must include the following four important pieces of information.

First, the notice must include a statement that parental consent must be obtained under § 303.414, if that provision applies, before the State lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time. The consent provision in § 303.414 applies in States where the State lead agency is not the State Medicaid or public benefits or insurance agency or if the State lead agency chooses to adopt a consent provision even if it is the State Medicaid or public benefits or insurance agency.

Second, the notice must include a statement of the no-cost protection provisions in new § 303.520(a)(2) (*i.e.,* that parents cannot be required to enroll in public insurance or benefits programs and consent must be obtained if use of such insurance or benefits would result in specified costs) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services in the IFSP for which the parent has provided consent.

Third, the notice must include a statement that parents have the right under § 303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time.

Fourth, the notice must include a statement of the general categories of costs that the parent could incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles). We believe it is important to include this last element in the written notice to ensure that parents are informed of the general potential costs that may result from using their public benefits or insurance to pay for part C services. Additionally, we are adding this last element in response to the many comments we received about the need to make parents aware of these general costs.

Finally, we note that, under Title VI of the Civil Rights Act of 1964 and implementing regulations (42 U.S.C. 2000d *et seq.* and 34 CFR 100.1 *et seq.*), State lead agencies, as recipients of Federal funds, must take reasonable steps to ensure that persons of limited English proficiency (LEP) have meaningful access to programs and activities funded by the Federal government, including part C services and any notices required under these regulations and part C of the Act. Providing meaningful access may require the State lead agency to ensure that the notice is provided in a language other than English either through oral or written translation.

Consent provisions under Part C and Part B of the Act and alignment between public and private insurance. In response to commenters' concerns about other part C consent provisions and alignment between parts B and C of IDEA, we note that under section 639(a)(3) of the Act and § 303.420, parents have a separate right to consent to part C services in the IFSP and to any changes in the frequency or intensity of services in the IFSP and the right to decline at any time the receipt of a particular part C service without jeopardizing the right to any other part C service in the IFSP. Thus, while we appreciate the commenters' desire to align the provisions related to the use of public insurance under parts B and C of the Act, the differences in how these two programs treat costs to families, the responsibility for funding, and the consent for services, as well as the administrative structure of part C programs argue against treating this issue in precisely the same manner in both programs.

We have aligned where practicable the consent provisions for the use of public and private insurance to pay for part C services, partly in response to commenters. Specifically, for a State to use private insurance or to use public benefits or insurance to pay for part C services, the State may use such funding sources without obtaining parental consent when the State ensures that parents do not incur specific costs (as set forth in §§ 303.520(a)(2) and 303.520(b)(2)), but must obtain parental consent when such costs are incurred as a result of using such funding sources. We also place continued importance on informing parents of the potential costs through the notification provisions in §§ 303.520(a)(3) and (a)(4) for public

benefits or insurance and ensuring that States provide parents with a copy of the State's system of payments policies under § 303.520(b)(1)(iii) for private insurance. The one unique scenario for public benefits or insurance is the initial act of enrollment for which there is no parallel for private insurance and we are maintaining a parent consent requirement in new § 303.520(a)(2)(i) for this circumstance for the reasons described earlier.

Costs associated with using public benefits or insurance. We are retaining in new § 303.520(a)(4) the provisions in proposed § 303.520(a)(2), which require the State to identify in its system of payments policies under § 303.521 any costs that the parent would incur as a result of a State using a child's or parent's public benefits or insurance to pay for part C services (such as co-payments or deductibles, or the required use of private insurance as the primary insurance). New § 303.520(a)(4) also specifies that the written notification provided under new § 303.520(a)(3) must identify these costs. The State must comply with both of these requirements in order to use the child's or parent's public benefits or insurance for part C services. The Secretary believes the notification provision is vital to parents being informed about these potential costs and the system of payments policies requirement ensures that as the State's system of payments policies are being developed and subject to public participation, these potential costs are identified as part of the overall costs in the State's system of payments for part C services.

Changes: We have restructured § 303.520 to add a new paragraph (a)(1) that requires the State to provide parents with written notification of the no-cost and confidentiality provisions in paragraph (a)(3) and to meet the no-cost protections identified in paragraph (a)(2) before it may use the public benefits or insurance of a child or parent to pay for part C services.

New § 303.520(a)(2)(i) provides that with regard to using the public benefits or insurance of a child or parent to pay for part C services, a State may not require a parent to enroll in a public benefits or insurance program as a condition of receiving part C services, and clarifies that the State must obtain parental consent prior to using those benefits or insurance if the child or parent is not already enrolled in a public benefits or insurance program.

We have added in new § 303.520(a)(2)(ii) the requirement that, in addition to providing the parent the written notification, a State must obtain parental consent if use of a child's or parent's public benefits or insurance would result in the following specified costs: A decrease in the available lifetime coverage or any other insured benefit for a child or parent; payment for services that would otherwise be covered by the public benefits or insurance program; increases in premiums or discontinuation of public insurance or benefits for that child or parent as a result of such use; or a risk of loss of eligibility for the child or the parent for Medicaid home and community-based waivers based on aggregate health expenses.

We have added, in new § 303.520(a)(2)(iii), a provision clarifying that if a parent does not provide consent under new § 303.520(a)(2)(ii), the State must still make available those part C services in the IFSP to which the parent has provided consent.

The contents of the written notification are specified in § 303.520(a)(3). Specifically, the notification must include: (1) A statement that parental consent must be obtained under § 303.414, if that provision applies, before the State lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid); (2) a statement of the no-cost protection provisions in new § 303.520(a)(2) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services in the IFSP for which the parent has provided consent; (3) a statement that the parents have the right under § 303.414, if that provision applies, to withdraw consent to disclose a child's personally identifiable information at any time; and (4) a statement of the general categories of costs that the parent would incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Finally, new § 303.520(a)(4) requires the State to identify both, in its system of payments policies under § 303.521 and the written notification provided under new § 303.520(a)(3), any costs that the parent would incur as a result of the State's using a child's or parent's public benefits or insurance to pay for part C services (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Comment: One commenter supported proposed § 303.520(a)(1)(ii), which would allow a public agency to use public insurance or benefits for Medicaid-eligible children in foster care without parental consent. Two commenters suggested that this section should specifically refer to both children in ''foster care'' and ''wards of the State.''

Discussion: We are removing proposed § 303.520(a)(1)(ii) because there is no cost for the use of Medicaid for children who are automatically considered eligible and enrolled under Medicaid because of their status in foster care under section 472 in Title XIX of the Social Security Act (SSA). We also do not need to explicitly add a reference to ''wards of the State'' because section 472 of the SSA applies to children who are ''wards of the State;'' therefore, there would be no consent requirement for such children.

Changes: We have removed proposed § 303.520(a)(1)(ii).

Use of Private Insurance To Pay for Part C Services (§ 303.520(b))

Comment: Most commenters, including lead agencies, parent groups, professional organizations, EIS providers, national organizations, a State interagency coordinating council, and individuals, supported the requirement in proposed § 303.520(b)(1)(i) that a State may access a parent's private insurance to pay for part C services only if it obtains consent from the parent. Commenters supported the requirement that consent be provided in accordance with the definition of this term in § 303.7, which requires that the parent be informed of all relevant information and that the consent be in writing.

Several commenters opposed requiring parental consent before accessing private insurance stating that requiring consent would result in a loss of funding for States. A few of these commenters recognized the need to protect a family's confidential information, but encouraged the Department to consider other means to protect personally identifiable information that may not adversely affect funding for early intervention services under part C of the Act. One commenter opposed the parental consent requirement in proposed § 303.520(b) because the commenter noted that the State already must obtain parental consent for services under § 303.420 and questioned how the State could bill private insurance without parental knowledge.

Discussion: The Department agrees with the majority of commenters that a

State must obtain parental consent before accessing a parent's private insurance because of the potential costs that can be incurred by a family with a privately insured child or parent as a direct result of using such insurance, as well as the other potential negative effects on the availability of private insurance for other family medical expenses, including services needed by the child that are not covered by part C. The Department believes that parental consent must be required when the lead agency or EIS provider seeks to use private insurance to pay for the initial provision of any early intervention service in the IFSP and each time consent for services is required due to an increase in the provision of services in the child's IFSP.

With regard to the potential loss of funds to a State, the Department believes that the potential costs to parents outweigh the need to make private insurance funds available to lead agencies unless the cost protections in proposed § 303.520(b)(2) are adopted by the State. We disagree with the commenter who opposed the requirement for separate parental consent for the use of private insurance. We believe separate consent is needed because States implement the IFSP provisions in a variety of ways and may not have identified all funding sources for each service when they obtain consent for that service under § 303.420.

Changes: We have added new § 303.520(b)(1)(i) to specify that parental consent is required when the lead agency or EIS provider seeks to use private insurance to pay for the initial provision of any early intervention service in the IFSP and each time consent for services is required due to an increase in the provision of services in the child's IFSP.

Comment: Some commenters requested clarification on when consent is required if a State wishes to use insurance or benefits for a parent who is determined unable to pay. Some commenters expressed concerns that parents who had been determined unable to pay would still incur costs as a result of using their insurance or benefits for part C services.

Discussion: We agree that the requirements in this section could be more clearly presented. We have restructured § 303.520(b) for clarity. Paragraph (b)(1) of this section sets forth the general parental consent requirement and paragraph (b)(2) of this section sets forth the specific exceptions to parental consent. We have reworded the heading for this section to make clear that this section applies to any State that uses private insurance to pay for part C services. We also have moved the substance of proposed § 303.520(b)(1)(iv) concerning a parent's inability to pay and a State's obligation to provide part C services, to new § 303.520(c).

Regarding commenters' concerns that parents who had been determined unable to pay would still incur costs as a result of using their insurance or benefits for part C services, § 303.521(a)(6) requires the lead agency to pay for costs such as co-payments or deductibles if a parent is determined unable to pay.

Changes: We have revised the language in paragraph (b), and added a new paragraph (c).

Comment: Some commenters expressed concern that the use of private insurance under § 303.520(b) for part C services could make private insurance benefits unavailable for additional medical or other services that are not covered by part C of the Act. One commenter recommended that exemptions be available to families if using their private insurance to pay for early intervention services reduces the benefits they receive through private providers. The commenter stated that families should not be penalized for allowing a State to use their insurance to pay for early intervention services.

Discussion: It is the Department's position that including an exception to parental consent is not necessary because consent is voluntary. A parent may always decline a request from the lead agency or EIS provider to consent to the use of the parent's private insurance for all or any specific part C service.

In those very few States that have adopted statutory protections concerning private health insurance coverage for early intervention services under part C of the Act that meet the requirements in § 303.520(b)(2) we agree that is important for a parent to be informed of potential costs if a State were to use a parent's private insurance. Thus, we have added a provision in new § 303.520(b)(1)(iii) that requires a State to provide parents with a copy of its system of payments policies when using the parent's private insurance to pay for part C services. Moreover, the parent may elect to decline services at any time under § 303.420(a)(3).

Changes: We have added the phrase ''or initially using benefits under a child or parent's private insurance policy to pay for an early intervention service under paragraph (b)(2) of this section'' in § 303.520(b)(1)(iii).

Comment: None.

Discussion: For consistency with § 303.520(b)(1)(iii), we have added ''premiums'' as an example of a potential cost in § 303.520(b)(1)(ii), which requires a State to identify in its system of payments policies the potential costs that parents would incur if the State uses their private insurance policy to pay for part C services.

Changes: We have added a reference to premiums in § 303.520(b)(1)(ii).

Comment: Commenters supported the requirement in proposed § 303.520(b)(1)(iii) that a State provide a copy of its system of payments policies when obtaining consent to use the parent's private insurance and some commenters requested that the regulation clarify that this copy be provided to the parent because it is the parent who needs to be informed of potential costs as a result of the use of the parent's private insurance to pay for early intervention services. One commenter requested that a State include in its system of payments policies specific information about any potential effect the use of private insurance could have on the parent's annual or lifetime caps under the parent's private insurance.

Discussion: Section 303.520(b)(1)(iii), as proposed, specifically stated that the lead agency, when obtaining consent, must provide parents with a copy of the State's system of payments policies that identify the potential costs that the parent may incur as a result of the use of the parent's insurance to pay for part C early intervention services. We agree that notifying parents of potential costs under § 303.520(b)(1)(iii) requires States to identify out-of-pocket costs such as co-payments, premiums, or deductibles as well as other long-term costs such as loss of benefits due to annual or lifetime insurance caps.

We also have revised § 303.520(b)(1)(iii) to clarify that the State system of payments policies must identify the potential costs that parents may incur when their private insurance is used to pay for early intervention services under this part.

Changes: We have revised proposed § 303.520(b)(1)(iii) to add a reference to parents and to clarify that potential costs identified in the policies may include other long-term costs such as loss of benefits resulting from annual or lifetime insurance caps under a private insurance policy. We also have replaced the phrase ''while enrolled in a private insurance program'' with the phrase ''when their private insurance is used to pay for early intervention services under this part.''

Comment: Some commenters supported proposed § 303.520(b)(2), which does not require the lead agency to obtain parental consent when a State

has enacted specific statutory cost protections. These commenters stated that § 303.520(b)(2) would protect families while balancing the need to make private insurance funds available to pay for part C services. A few commenters requested clarification of § 303.520(b)(2).

Some commenters opposed this exception to the parental consent requirement because it: (1) Would result in litigation; (2) lacks statutory authority; (3) is inconsistent with the part B regulations in 34 CFR 300.154(e) concerning accessing private insurance to pay for services under part B of the Act; (4) is inconsistent with confidentiality protections under the Act and HIPAA and also with the Employee Retirement Income Security Act of 1974 (ERISA); and (5) could not be uniformly applied because not all private insurance policies are subject to State statutes.

Discussion: The purpose of the exception in § 303.520(b)(2) is to enable the lead agency in a State that has adopted specific statutory cost protections to use private insurance to pay for part C services. In those States that have adopted such protections, private insurance funds are used to pay for part C services (*e.g.,* occupational or speech therapy) that are considered medically necessary for an infant or toddler with a disability. We have clarified proposed § 303.520(b)(2) to make clear that the exception to parental consent applies only if the State's statutory protections expressly provide that for the protections listed in new § 303.520(b)(2)(i), (b)(2)(ii), and (b)(2)(iii).

The implementation of such State statutory protections is consistent with sections 632(4)(B) and 640 of the Act. Section 632(4)(B) of the Act requires early intervention services to be provided at no cost except where a State has enacted a system of payments. Section 640 of the Act requires Federal part C funds to be used as the payor of last resort. Providing an exception to parental consent when a State statute expressly provides specific cost protections is consistent with sections 632(4)(B) and 640 of the Act.

These statutory cost protections include providing that: (1) A child or parent would not experience a loss of benefits because of annual or lifetime caps under a policy when private insurance is used to pay for part C services; (2) a child, parent, or family member's health insurance cannot be discontinued because the coverage was used to pay for early intervention services; and (3) health insurance premiums cannot be increased due to use of the health insurance to pay for part C services.

We understand the commenters' concerns about potential litigation by families and the commenters' question about whether all private insurance policies in a State are subject to that State's statutory protections. The exceptions to parental consent identified in proposed § 303.520(b)(2) apply only to the extent that the State statute provides the protections in that section for private insurance policies in the State. Additionally, several State statutes that fall under this exception have been in place for years without any litigation.

We recognize that this exception to parental consent for use of private insurance to pay for services differs from the implementing regulations of part B of the Act, which do not contain a similar exception. However, part B of the Act requires FAPE be provided at no cost. In contrast, part C of the Act explicitly authorizes States to establish a system of payments that may result in a parent incurring some costs. The exception in proposed § 303.520(b)(2) ensures that parents are afforded needed protections while providing the lead agency with the ability to use private insurance to pay for part C services in those States, maximize funding sources, and use part C funds as a payor of last resort.

The Secretary believes these part C regulations protect parents in all States by providing them with information about the State's system of payments, including (if applicable) the relevant use of private insurance and exceptions regarding specific statutory no-cost protections. Additionally, parents ultimately retain the right to decline or revoke consent for any particular part C service in the IFSP for their child if they do not wish to have their private insurance used for a particular service.

Concerning the commenter's concern that personally identifiable information would be disclosed to private insurers without consent, we recognize that the filing of claims for early intervention services may reveal limited personally identifiable information not already disclosed to the insurer, but on balance, it is the Department's position that this disclosure is necessary in this limited circumstance to implement the requirements of sections 632(4)(B) and 640 of the Act.

Changes: We have clarified § 303.520(b)(2) by moving the phrase ''the use of private health insurance to pay for part C services cannot'' to each of § 303.520(b)(2)(i), (b)(2)(ii), and (b)(2)(iii). We also have replaced the word ''or'' that appears at the end of § 303.520(b)(2)(ii) with the word ''and''. Finally, we have added the phrase ''expressly provides'' to the introductory text of § 303.520(b)(2).

Inability to Pay (§ 303.520(c))

Comment: None.

Discussion: Proposed § 303.520(b)(1)(iv) should have applied to both the use of public insurance and benefits and private insurance for payment for services. We have removed proposed § 303.520(b)(1)(iv), and added a new § 303.520(c) to reflect the requirement that the inability to pay provisions in this section apply to both the use of public insurance and benefits and private insurance.

Changes: We have removed proposed § 303.520(b)(1)(iv) and added new § 303.520(c).

Proceeds or Funds From Public Insurance or Benefits or From Private Insurance (§ 303.520(c), Redesignated § 303.520(d))

Comment: Some commenters requested clarification on proposed § 303.520(c)(3), which provided that States could exclude from the calculation of State and local expenditures under proposed § 303.225 (prohibition against supplanting), the State portion of funds from a Federal public benefits program such as Medicaid. Some commenters objected to the provision because they viewed it as administratively burdensome and stated it would create significant challenges with data collection and reporting.

Discussion: As discussed in the *Analysis of Comments and Changes* section accompanying § 303.225, since the publication of the IDEA part C NPRM in May 2007, part C State lead agencies have raised a number of issues regarding the MOE provisions in the part C regulations (which implement part C's supplement not supplant requirements). Therefore, we are removing proposed § 303.520(c)(3) and intend to issue an NPRM addressing MOE requirements under part C of the Act.

Changes: We have removed proposed paragraph (c)(3) and renumbered the paragraphs in this section accordingly.

Comment: Several commenters, including a few lead agencies, supported proposed § 303.520(c), redesignated § 303.520(d), which provided that proceeds or funds from public insurance or benefits or private insurance are not treated as program income for purposes of 34 CFR 80.25, the EDGAR provision regarding program income. However, some commenters, including most lead agencies under part C of the Act, opposed this provision

stating that lead agencies under part C of the Act generally do not have a mechanism to track or account for the use of funds from public insurance or benefits or private insurance or the ability to direct how these funds will be used.

Discussion: The commenters have misinterpreted proposed § 303.520(c)(1), redesignated § 303.520(d)(1). Proposed § 303.520(c)(1), redesignated § 303.520(d)(1), states that for purposes of 34 CFR 80.25, proceeds or funds from public insurance or benefits or from private insurance are not treated as program income. Therefore, States do not need to maintain data on these funds for program income purposes.

Changes: None.

Comment: A few commenters recommended that under section 618 of the Act, the Department require States to collect and report to the Secretary data on the costs assessed to parents and the payments obtained from public and private insurance for early intervention services. These commenters recommended that the Department conduct a study to determine how the regulations concerning the use of private insurance in § 303.520 and the States' systems of payments and fees in § 303.521 affect family participation in part C of the Act.

Discussion: Section 618 of the Act does not require States to report data on their use of insurance or a system of payments, and we do not want to place this added data collection and paperwork burden on States. The Department has long required each State that adopts a system of payments (including the use of insurance or family fees to pay for part C services) to submit its policies and procedures as part of the State's part C grant application. This requirement is reflected in § 303.203(b). Data from FY 2009 indicate that approximately 23 States have a system of payments that includes express authority to charge parents for some part C services. Data from the last few years indicate an increase in the number of States that have adopted a system of payments and an increase in the fees parents are charged for part C services in those States that have the authority to charge a parent a fee for part C services. Through the application process, the Department will continue to obtain information on whether and how a State is implementing a system of payments (including the use of insurance).

Each State is unique and its system of payments policies and procedures are subject to the public participation requirements in § 303.208. Through the public participation process, all stakeholders, including parents of infants and toddlers with disabilities, have an opportunity to comment on whether and what policies and procedures should be adopted by the State. The decision of whether the Department needs to conduct a study on the impact of a system of payments (including the use of insurance) on a family's decision to participate in part C of the Act is a policy decision that is best left to the Department and should not be a subject of these regulations.

Changes: None.

System of Payments and Fees (§ 303.521)

Comment: Commenters requested that we define the term, ''actual cost of the part C services'' in proposed § 303.521, which stated that a State's system of payments policies must include an assurance that families will not be charged any more than the actual cost of the part C service. Two commenters requested that this provision expressly specify that a State can bill both insurance and parents for early intervention services as long as the combination of the two does not exceed the actual cost of services. One commenter asked whether family fees can exceed the actual cost of services.

Discussion: Subject to any consent requirements in §§ 304.420 and 303.520, the lead agency may use, as part of its system of payments, funds from multiple sources (*e.g.,* public insurance or benefits, private insurance, and family fees) to pay for each part C service in an IFSP. However, the lead agency may not receive funds (whether from one or a variety of sources, such as family fees or insurance, to pay for a particular service) that exceed the actual cost of providing the service. Under a State's system of payments, the State may not charge a family an amount that exceeds the actual cost of providing a particular part C service. Nor may the State charge a family for amounts received by the State from other funding sources for that service. Also, families may not be charged for the cost of services specified in § 303.521(b)(2), including evaluations and assessments.

The actual cost for a part C early intervention service may vary by State and, therefore, it is not appropriate to define the term ''actual costs of service.''

Proposed § 303.521(a)(4)(iii) included two distinct requirements relating to families not being charged more than the actual cost of service and families with insurance not being charged disproportionately more than those without insurance. We have clarified this section by separating the two requirements into paragraphs (a)(4)(iii) and (a)(4)(iv) of this section, respectively. The language in new § 303.521(a)(4)(iv) is the same as proposed § 303.521(a)(4)(iii), regarding the prohibition that families with public insurance or benefits or private insurance not be charged disproportionately more than families who do not have public insurance or benefits or private insurance. In § 303.521(a)(4)(iii), we have further clarified in a parenthetical that a family may not be charged any more than the actual cost of the part C service (factoring in any amount received from other sources for payment for that service).

Changes: We have added the following parenthetical ''(factoring in any amount received from other sources for payment for that service)'' to revised § 303.521(a)(4)(iii), regarding the requirement that the lead agency cannot charge a family more than the actual cost of a service. We have moved the language from proposed § 303.521(a)(4)(iii) to a new § 303.521(a)(4)(iv) regarding the provision that families with public insurance or benefits or private insurance will not be charged disproportionately more than families who do not have public insurance or benefits or private insurance.

Comment: One commenter recommended that the ''or'' in § 303.521(a) should be ''and/or.''

Discussion: We agree with the commenter that the language in the second parenthetical in the introductory text of § 303.521(a) should be amended to make clear that the fees charged to a family under a State system of payments can include one or more of the following funding sources: A child's or parent's public insurance, public benefits, or private insurance. Therefore, we have amended § 303.521(a) accordingly.

Changes: We have amended the second parenthetical in the introductory text of § 303.521(a) to say ''(including any fees charged to the family as a result of using one or more of the family's public insurance, public benefits, or private insurance).''

Comment: One commenter requested that the regulations in § 303.521(a) specify how and how often a State must evaluate a family's ability or inability to pay.

Discussion: A State is not required to reevaluate a parent's ability or inability to pay. Therefore, it is the Department's position that it is not appropriate to add such a provision to § 303.521(a) because some States may not wish to reevaluate a parent's ability to pay given that a

child may receive services at most for three years and many children do not enter the part C program until they are at least 18 months of age.

However, if a State requires that a lead agency's determination of a parent's ability or inability to pay be reevaluated on an annual or other basis, the State must include such a provision in its system of payments policies that is provided to parents under § 303.521(e) in order for parents to be informed of when and how they may be required to provide financial information. We are adding language requiring the policies to specify when and how the State makes its determination of the ability or inability to pay.

Upon further review of proposed § 303.521(a)(3), we realized that the State's policies must define not only a parent's inability to pay but also a parent's ability to pay. We have added ''ability to pay'' to the definitional requirement. Additionally, we are clarifying that in defining a parent's ability to pay, the State must include consideration of family expenses such as extraordinary medical expenses as many families with infants and toddlers with disabilities have unusually high medical expenses.

Changes: We have revised § 303.521(a)(3) to provide that the State's system of payments policies must indicate when and how the State makes its determination regarding a parent's ability or inability to pay, and, in defining the ability to pay, include extraordinary medical expenses as an example of family expenses.

Comment: One commenter requested that the final regulations provide further guidance on developing a State system of payments. The commenter recommended that, to ensure that a system of payments does not discourage families from participating in early intervention programs, the Department should develop regulations that set a maximum contribution limit by families.

Discussion: Section 632(4)(B) of the Act, concerning the definition of ''early intervention services,'' and § 303.521, concerning a system of payments and fees, provide States with the option to establish a system of payments that sets forth policies specifying the amount of fees (including any fees charged to the family as a result of using one or more of the family's public insurance, public benefits, or private insurance) that are subject to the State's system of payments. While we appreciate the commenter's request that the regulations identify maximum fiscal contributions for parents, the Department's position is that States must have flexibility in determining the system of payments, including any fee structure.

However, the State's fee structure is subject to the requirements in § 303.521(a), which requires that families not be charged more than the actual cost of the part C service and that a parent's inability to pay will not result in a delay or denial of services under this part. We also expect to provide additional technical assistance and guidance to States on State system of payments.

Changes: None.

Comment: Two commenters recommended that we revise § 303.521(a) to require that States provide families with an explanation of each item that is billed to them or to their insurance to ensure that the parents can confirm that the charges match the level or amount of service provided to children and their families.

Discussion: Part C of the Act does not address the methods that States must use to bill parents for part C services. However, many lead agencies have developed policies and procedures regarding billing parents for part C services. With regard to insurance billing, lead agencies may, but are not required under part C of the Act to, develop methods or a process to inform a parent of each item billed to the insurance of the parent or the amount of insurance proceeds received for payment of early intervention services for their infant or toddler with a disability and the child's family. The Department's position is that including such provisions in the regulations is not necessary because it is best left to States to determine which billing methods are most compatible with established State policies and procedures.

Changes: None.

Comment: One commenter recommended requiring States to provide an assurance that the quality of part C services will be maintained regardless of the financial situation of the child or family.

Discussion: Consistent with section 635(a)(4) of the Act, regarding requirements for a statewide system, and § 303.340, regarding IFSPs, each lead agency under part C must ensure, for each infant or toddler with a disability, regardless of financial situation, the development, review, and implementation of an IFSP that is consistent with the definition of that term in § 303.20, and meets the requirements in §§ 303.342 through 303.345. The lead agency under part C of the Act also must ensure the provision of the early intervention services identified in the child's IFSP, regardless of the financial situation of the child or family. Given these provisions, the Department's position is that requiring States to provide the additional assurance suggested by the commenter is not necessary.

Changes: None.

Comment: One commenter opposed the language in § 303.521(a)(6) that permits the lead agency to use part C or other funds to pay the parent's share in a State with a system of payments with family fees, when the parent is determined able to pay. According to the commenter, this provision could be read to permit an agency to obligate part C funds for costs or fees that a parent might otherwise be required to pay. The commenter requested that this paragraph be clarified or that part C funds be increased to fund this requirement.

Discussion: Section 303.521(a)(6) provides States with a system of payments the option of using part C funds to pay for those costs, such as co-payments, that would be incurred by the parent based on the use of the child's or parent's public benefits or insurance or private insurance to pay for part C services. By permitting, but not requiring, lead agencies to use part C funds to pay for a parent's out-of-pocket costs even when the parent is able to pay, the lead agency may be able to neutralize the financial impact on a parent and thus encourage the parent to provide any consent needed under § 303.520. We also have revised this section to further clarify that if a parent is determined unable to pay, the lead agency must use part C or other funds to pay for the costs identified in § 303.520(b)(2) or the fees charged to the parent under § 303.521(a)(1).

Changes: We have revised § 303.521(a)(6) to clarify that the lead agency may use part C funds to pay for costs such as premiums, deductibles, or copayments identified in § 303.520(b)(2) that it must use part C or other funds to pay for the costs identified in § 303.520(b)(2) or the fees charged to the parent under § 303.521(a)(1) for a parent determined unable to pay.

Comment: One commenter recommended that a State with a system of payments that requires a family cost share or private insurance component should not be allowed to charge families for services that must be provided to a child in order for the child to receive FAPE under part B of the Act, particularly once a child turns three and services are provided at no cost to parents.

Discussion: If a child is eligible at or before age three under part B of the Act to receive FAPE and the service is

identified on the child's IEP as part of FAPE for that child, then, under 34 CFR 300.17(a), that service must be provided at no cost to the parent. If a State elects to continue to provide part C services for children age three and older who were receiving part C services, and a parent provides consent for such services, the part C provisions apply, including those relating to a State system of payments.

Changes: None.

Comment: One commenter asked, with respect to § 303.521(c), whether a State that has a FAPE mandate for children under the age of three or a State that uses funds under part B of the Act to serve children under age three can have a system of payments to provide part C services to children from age three until kindergarten.

Discussion: A State that elects to offer services under § 303.211 and has a State law mandating FAPE for children with disabilities for particular ages (such as ages three through five) must ensure that services that are a part of FAPE for an eligible child in that age range are provided at no cost. If there are part C services that are available to a child with a disability under § 303.211 that are not part of FAPE for that child, the State may adopt a system of payments for such services.

Changes: None.

Comment: One commenter requested clarification on § 303.521(b), concerning mandatory public agency functions that are not subject to fees that public agencies must perform. The commenter expressed concern that requiring these functions ''to be carried out at public expense by a State'' prohibits local early intervention programs from using local funds to pay for these functions.

Discussion: The requirement in § 303.521(b) does not prohibit local early intervention programs from using local funds to pay for these functions. For clarity, we have removed the phrase ''by a State.''

Changes: We have removed the phrase ''by a State'' from § 303.521(b).

Comment: Several commenters recommended that we require a State to include in its system of payments policies information on the family's procedural safeguards.

Discussion: We agree with commenters that States must inform parents about procedural safeguards when the State determines a parent's ability to pay or imposes a fee on parents. We have added in new § 303.521(e) the requirement that States establish written policies as part of their system of payments to inform parents about the availability of procedural safeguards.

We have clarified that the State must inform parents of the availability of existing dispute resolution procedures, including participating in mediation in accordance with § 303.431, requesting a due process hearing under § 303.436 or § 303.441, whichever is applicable, or filing a State complaint under § 303.434. Additionally, we have provided States with the flexibility to use any other procedure established by the State for speedy resolution of financial claims, provided that such use does not delay or deny a parent's procedural rights under this part. If a State uses such other procedures, it must inform parents of those procedures.

We also have clarified that a State may inform parents of these procedural safeguard options by either providing parents with a copy of the State's system of payments policies when obtaining consent for the provision of early intervention services under § 303.420(a)(3) or including this information with the notice provided to parents in § 303.421.

Changes: We have added a new § 303.521(e).

Subpart G—State Interagency Coordinating Council

Composition (§ 303.601)

Comment: One commenter requested that the Department require a State representative of the child protective services agency to serve as a member of the State Interagency Coordinating Council (Council).

Discussion: Neither section 641(b) of the Act nor § 303.601 requires the Governor to appoint, nor prohibits the Governor from appointing, to the Council a State representative from the agency responsible for child protective services. Under section 641(b)(1)(L) of the Act and § 303.601(a)(12), the Governor must appoint a representative from the State child welfare agency that is responsible for foster care in that State (*i.e.,* the State agency that is responsible for administering Title IV–E of the SSA in the State). In many States, this State child welfare agency is also the State child protective services agency that is responsible for administering CAPTA.

Section 641(b)(2) of the Act and § 303.601(c) permit the Governor to appoint to the Council members other than those specified by the Act. The Governor may appoint to the Council a representative from the State agency responsible for administering CAPTA if the Governor determines it is appropriate in that particular State. Responsibilities of this State agency also may include coordinating child find efforts or implementing section 637(a)(6) of the Act, which requires the State to have referral policies for a child under the age of three who is involved in a substantiated case of child abuse or neglect or who is identified as affected by either illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. Additionally, nothing in the Act would prevent the Governor from appointing a representative from the State agency responsible for implementing other early childhood programs such as the Maternal, Infant, and Early Childhood Home Visiting Program passed on March 23, 2010, amending Title V of the Social Security Act or a representative from the State's EHDI system.

Given that the decision to appoint any other members to the Council (other than those specified in section 641(b)(1) of the Act) is at the discretion of the Governor of the State according to the needs of that State, we decline to include in § 303.601 the appointment suggested by the commenter.

Changes: None.

Comment: A few commenters supported proposed § 303.601(a)(1)(iii), which stated that a parent could not be appointed as a member of the Council if he or she was an employee of a public or private agency involved in providing early intervention services because, in their view, including parents who are also EIS providers on the Council would be a conflict of interest. However, the majority of commenters opposed this proposal because, in their view, parents who are also EIS providers may bring a valuable perspective to the Council in terms of understanding issues from different standpoints and may be able to anticipate the impact of a given policy or procedure in unique ways. Some commenters questioned whether preventing parents from serving on the Council somehow suggests that the contribution and comments of parents of children with disabilities who are not also employed by EIS providers are more valuable than parents who are employed by EIS providers. One commenter recommended that these regulations require that the Council's bylaws or State law stipulate that no member, including parents who are EIS providers, may vote on an issue that may represent a conflict of interest.

Discussion: We agree that the appointment to the Council of parents of children with disabilities who are also employed by EIS providers could bring a unique perspective to the work of the Council. For this reason, we have removed proposed § 303.601(a)(1)(iii), which would have prohibited an employee of a public or private agency

involved in providing early intervention services from being appointed and serving as a parent member of the Council. The language in proposed § 303.601(a)(1)(iii) reflected the Department's recommendation in the note to current § 303.600 that parents selected to serve on the Council not be employees of any agency involved in providing early intervention services. With the removal of proposed § 303.601(a)(1)(iii), parents who are employees of a public or private agency involved in providing early intervention services could serve as parent members of the Council in accordance with the requirements that at least 20 percent of the Council be comprised of parent members of children with disabilities aged 12 or younger and at least one parent member be the parent of an infant or toddler with a disability or a child with a disability aged six years or younger. Finally, like all Council members, pursuant to § 303.601(d), a parent member of the Council who is an employee of a public or private agency involved in providing early intervention services may not cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

Changes: We have removed proposed § 303.601(a)(1)(iii), which stated that a parent member on the Council may not be an employee of a public or private agency involved in providing early intervention services.

Comment: Section 303.601(b), which permits a Governor to appoint a member of the Council to represent more than one program or agency from the list in section 641(b) of the Act, drew a number of comments. Most commenters objected to this provision due primarily to concerns that an individual representing more than one program or agency on the Council may have potential conflicts of interest in carrying out his or her duties.

Discussion: Section 641(b) of the Act is silent on the issue of whether the Governor must appoint separate individuals to represent each of the constituencies that must be represented on the Council. The Department's position is that it is a reasonable interpretation to allow one individual to serve more than one required Council member role because, in some States, a single agency performs multiple functions that coincide with the Council representation requirements in section 641(b) of the Act. Additionally, allowing a member of the Council to represent more than one program or agency would not result in actual or apparent conflicts of interest because, pursuant to § 303.601(d), no member of the Council may cast a vote (and, thus, would need to recuse himself or herself from the vote) on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

Changes: None.

Use of Funds by the Council (§ 303.603)

Comment: One commenter requested clarification on when or why the Council, which is an advisory body, would conduct hearings pursuant to § 303.603(a)(1). The commenter stated that while the Council may participate in hearings, given its advisory nature, it would not be appropriate for the Council to hold hearings.

Discussion: Section 641(d) of the Act specifically allows the Council, subject to the approval of the Governor, to prepare and approve a budget using part C funds to conduct hearings and forums as may be necessary to carry out its functions under part C of the Act. The Act does not specify the circumstances under which the Council may convene a hearing or forum. It is not appropriate for the Department to stipulate such circumstances, as that decision is best left to the Council.

Changes: None.

Comment: One commenter requested that the Department revise the regulations to provide compensation for parents who serve on the Council. A few commenters recommended that parent members of the Council receive compensation regardless of their employment status.

Discussion: Providing compensation for parents who serve on the Council is specifically addressed in § 303.603(a)(2) and (a)(3), which is consistent with section 641(d) of the Act. Section 303.603(a)(2) and (a)(3) provides that all Council members, including parents, may be reimbursed for reasonable and necessary expenses for attending Council meetings and performing Council duties (including child care for parent members) and may receive compensation if not employed or if required to forfeit wages from other employment when performing official Council business.

Changes: None.

Functions of the Council—Required Duties (§ 303.604)

Comment: One commenter recommended that the final regulations expressly state that the Council may continue to work with the lead agency on preparing the mandatory annual report that the Council must submit to the Governor and to the Secretary, and that if the Council concurs with the State's APR that is prepared by the lead agency, the Council may elect to sign a statement indicating its concurrence with the lead agency's APR in lieu of the Council preparing its own separate annual performance report.

Discussion: Section 303.604(c), regarding the requirement that the Council annually report to the Governor and the Secretary on the status of early intervention service programs for infants and toddlers with disabilities and their families under part C of the Act, remains substantively unchanged from current § 303.654 and is consistent with section 641(e)(1)(D) of the Act. Section 303.604(c)(2) expressly provides that the Council's annual report must contain the information required by the Secretary.

Under current Departmental policy, the Council may choose to prepare and submit its own annual report to meet the requirements in section 641(e)(1)(D) of the Act (current § 303.654 and new § 303.604(c)), or certify its concurrence with the APR submitted by the lead agency under § 303.702(b)(2). Therefore, it is the Department's position that adding language regarding how the Council may meet its annual reporting requirement is not necessary.

Changes: None.

Comment: A few commenters recommended that § 303.604(a)(3), regarding the promotion of methods for intra-agency and interagency collaboration on child find, monitoring, financial responsibility, and the provision of early intervention services and transition, be deleted because, according to these commenters, the language in this section is not aligned with section 641(e) of the Act. Specifically, the commenters suggested that section 641(e) of the Act does not include or imply that the functions of the Council include promoting methods for interagency collaboration regarding child find, monitoring, financial responsibility, provision of early intervention services, and transition. Another commenter requested that the Department clarify the meaning of the term ''methods,'' as it is used in § 303.604(a)(3).

Discussion: Under section 641(e) of the Act, the functions of the Council include, among other duties, advising and assisting the lead agency in carrying out its single line of responsibility for the State's part C statewide system under 635(a)(10) of the Act. The single line of responsibility covers, in part, general supervision and monitoring; coordination of Federal, State, local and private resources; assignment of financial responsibility to the appropriate agency; development of

procedures that ensure timely service provision; resolution of intra-agency and interagency disputes; and entry into interagency agreements that define each agency's financial responsibility for early intervention services and that include all additional components necessary for ensuring cooperation and coordination between agencies. One of the Council's roles under section 641(e)(1)(C) of the Act is to advise the lead agency and the SEA on early childhood transition policies. The Department has found that noncompliance with part C requirements can be due to barriers identified by lead agencies in intra-agency and interagency coordination that correspond to the areas under the lead agency's single line of responsibility (*i.e.,* child find, monitoring, financial responsibility, provision of early intervention services, and transition).

Thus, the Department's position is that the language in § 303.604(a)(3) is consistent with section 641(e) of the Act. Section 303.604(a)(3) ensures that the Council advises the lead agency in exercising its authority under section 635(a)(10) of the Act to ensure that there is a single line of responsibility for the State's part C statewide system.

Additionally, although section 641(e)(1)(A) of the Act only refers to interagency agreements, we have included in § 303.604(a)(3), the Council's role in promoting intra-agency agreements. We have included the reference to intra-agency agreements because within many lead agencies that are also SEAs, separate offices administer the early intervention service program under part C of the Act and the preschool program under part B of the Act. To facilitate the identification of, and the provision of early intervention services to, infants and toddlers with disabilities and their families, many SEA lead agencies have developed intra-agency memoranda or agreements to meet the lead agency's general supervision responsibilities under section 635(a)(10) of the Act (including specifically the areas of child find, monitoring, financial responsibility, provision of early intervention services, and transition).

In § 303.604(a)(3), we have intentionally used the word ''methods'' rather than ''interagency agreements.'' The term ''methods'' is intended to be broader than ''interagency agreements'' and to include entering into interagency agreements; this use of the term ''methods'' aligns § 303.604(a)(3) with the reference in section 640(b) of the Act to methods of ensuring services (which may include an interagency agreement or other mechanism for interagency coordination). We believe that further clarification of the term ''method'' is not needed.

Changes: None.

Comment: One commenter recommended revising the reporting period for the annual report to the Governor and to the Secretary in § 303.604(c)(2). The commenter stated that the reporting period is inconsistent with section 641(e)(1)(D) of the Act.

Discussion: Section 641(e)(1)(D) of the Act does not specify the reporting period; rather, it requires the Council to prepare and submit to the Governor and to the Secretary an annual report on the status of early intervention programs for infants and toddlers with disabilities and their families in the State. The language in § 303.604(c)(2) is consistent with this requirement and clarifies that the information in the report be ''for the year for which the report is made.'' Thus, if the Council submits a report to the Governor and Secretary for FFY 2006, § 303.604(c)(2) simply requires that the information in that report be from the FFY 2006 reporting period (*i.e.,* July 1, 2006 through June 30, 2007).

Changes: None.

Comment: A few commenters expressed concern that the regulations no longer stipulate that the Council must advise and assist the lead agency in the development and implementation of the policies that constitute the statewide system and suggested that the omission of this requirement would diminish the authority of the Council.

Discussion: Sections 303.604 and 303.605 incorporate the requirements in section 641(e)(1) and (e)(2) of the Act, regarding the functions, duties, and authorized activities of the Council. Section 641(e)(1)(B) and § 303.604(a)(4) continue to require the Council to advise and assist the lead agency in preparing the State's part C application and any amendments thereto. The requirement in current § 303.650(a)(1) that the Council advise and assist the lead agency in the development and implementation of the policies that constitute the part C statewide system was based on the requirement in section 641(e)(1)(B) of the Act that the Council advise and assist the lead agency in preparing its State's part C application. Prior to the 2004 amendments, the Act required each State to submit, as part of its part C application, the State's policies that constituted its part C statewide system.

However, in 2004, section 634 of the Act was revised to no longer require each State to submit, as part of its part C application, all of the State's policies for the statewide system identified in section 635 of the Act; instead only those policies, procedures, descriptions, methods, certifications, and other items that are identified or referenced in, or the Department determines are needed under, section 637(a) of the Act and subpart C of these regulation must be included in a State's grant application. Thus, the function of the Council in advising and assisting the lead agency in the preparation of its part C application, would include advice and assistance concerning any policies the lead agency developed to meet the requirements in section 637(a) of the Act. The Council also has an opportunity to comment on other State part C policies when the lead agency adopts or revises its policies that are part of the State's part C statewide system because the lead agency must make those policies available for public comment and hearing based on the requirements in § 303.208(b).

Changes: None.

Authorized Activities by the Council (§ 303.605)

Comment: None.

Discussion: With The Improving Head Start for School Readiness Act of 2007, Congress amended the Head Start Act. Section 642B of the Head Start Act now requires the Governor of each State to designate or establish a council to serve as the State Advisory Council on Early Childhood Education and Care (referred to as State Advisory Councils). 42 U.S.C. 9837b(b)(1)(A)(i). The overall responsibility of each State Advisory Council on Early Childhood Education and Care is to lead the development or enhancement of a high-quality, comprehensive system of early childhood development and care that ensures statewide coordination and collaboration among the wide range of early childhood programs and services in the State, including child care, Head Start, the IDEA programs (including the IDEA program under part C of the Act and the preschool program under section 619 and part B of the Act), and pre-kindergarten programs and services. Because this requirement regarding State Advisory Councils on Early Childhood Education and Care was established after the proposed part C regulations were published, in final § 303.605 we have added coordination with these State Advisory Councils as an authorized activity of the SICC. Such coordination may allow States to offer joint professional development opportunities for EIS professionals with other early learning professionals including those who work in child care, Head Start and Early Head Start, State funded preschool, 619 programs, and

early elementary education to address such issues as school readiness across all the major domains of early learning and transition to elementary school. This change will not impose an additional burden on the SICC because it is an optional duty under § 303.605 and not a required duty under § 303.604.

Changes: New § 303.605(c) has been added to allow the SICC to coordinate and collaborate with the State Advisory Council on Early Childhood Education and Care, as described in section 642B(b)(1)(A)(i) of the Head Start Act, 42 U.S.C. 9837b(b)(1)(A)(i).

Subpart H—Federal and State Monitoring and Enforcement; Reporting; and Allocation of Funds

Comment: None.

Discussion: We have revised the heading of subpart H to reflect the titles and sequence of the sections in this subpart.

Changes: We have changed the title of subpart H by removing the terms ''administration'' and ''technical assistance'' and adding the term ''reporting.'' We also have reordered the words in the title to better reflect the order of the sections in this subpart.

State Monitoring and Enforcement (§ 303.700)

Comment: One commenter recommended that § 303.700(a)(2), which requires lead agencies to make determinations annually about the performance of EIS programs using the categories in § 303.703(b), be deleted because the requirements have no statutory authority.

Discussion: We disagree with the commenter. Section 303.700(a)(2) requires lead agencies to make annual determinations about the performance of EIS programs. This requirement is consistent with sections 616(a)(1)(C), (a)(3), (b)(2)(C)(i), (b)(2)(C)(ii)(I), and (e) and 642 of the Act.

Sections 616(a)(1)(C) and 642 of the Act require the Secretary to require States (and the designated lead agencies charged with implementing part C of the Act in the State under section 635(a)(10) of the Act) to monitor and enforce part C of the Act in accordance with the monitoring priorities established by the Secretary under section 616(a)(3) of the Act (as modified by section 642 of the Act) and the statutory enforcement options identified in section 616(e) of the Act.

Sections 616(a)(3) and 642 of the Act require the Secretary to require States to monitor EIS providers located in the State using quantifiable indicators in each of the priority areas specified in section 616(a)(3) of the Act (as modified by section 642 of the Act), as well as any qualitative indicators that are needed to measure performance in those priority areas, except the State exercise of its general supervisory responsibility because ''State general supervisory responsibility'' applies only to States. Section 616(a)(1)(C)(ii) of the Act requires each State to enforce part C of the Act in accordance with sections 616(e) and 642 of the Act. Section 616(e) of the Act describes the enforcement actions the Secretary must take if the Secretary determines, based on the information provided by the State in its APR, information obtained through monitoring visits, and any other publicly available information, that the State needs assistance, needs intervention, or needs substantial intervention in implementing the requirements of part C of the Act.

These statutory provisions must be read in conjunction with sections 616(b)(2)(C) and 642 of the Act, which require State lead agencies to: (1) Publicly report on the performance of each EIS program using the State's targets established in its SPP under the priority areas described in section 616(a)(3) of the Act, and (2) report annually to the Secretary through the APR on the performance of the State in meeting the State's targets in the SPP.

Thus, lead agencies must make annual determinations about the performance of each EIS program using the categories in section 616(d)(2) and (e) of the Act and § 303.703(b). This requirement stems from the statutory requirement that lead agencies must monitor EIS providers located in the State using quantifiable and qualitative indicators as specified in section 616(a)(3) of the Act (as modified by section 642 of the Act), enforce part C of the Act in accordance with section 616(e) of the Act (which refers to the requirement that the Secretary make annual determinations about the performance of each State using these same determination categories), and from sections 616(b)(2)(C)(i) and (b)(2)(C)(ii)(I) and 642 of the Act, which require lead agencies to analyze and publicly report on the performance of each EIS program on an annual basis.

Changes: None.

Comment: One commenter expressed concern that the Department uses the terms ''program'' and ''provider'' inconsistently throughout these regulations and that the reference in § 303.700(a)(3) to EIS program should instead or also include a reference to an EIS provider.

Discussion: We recognize that clarification is needed in the use of the term EIS program in § 303.700(a)(3), regarding the available appropriate enforcement mechanisms identified in §§ 303.700(a)(3) and 303.704(a)(2) that the lead agency must use if it determines (for two consecutive years) that an EIS program needs assistance. If the lead agency determines for two consecutive years that an EIS program needs assistance, it must take one of two actions: (1) Advise the EIS program of available sources of technical assistance that may help the EIS program or (2) impose conditions on the funds it provides to the EIS program, or if the lead agency provides funds to an EIS provider (that is part of the EIS program) that is partially the reason the EIS program is in need of assistance for two years, then the EIS provider. If the lead agency provides part C funds to an EIS provider, it may be appropriate for the lead agency to impose conditions on the part C funds that the lead agency provides to the EIS provider. The lead agency may impose conditions on its funding of an EIS program or EIS provider in lieu of, or in addition to, providing technical assistance under § 303.700(a)(3).

Changes: We have added the phrase ''or, if the lead agency does not provide part C funds to the EIS program, an EIS provider'' to the parenthetical in § 303.700(a)(3).

Comment: One commenter recommended that § 303.700(a)(4) be revised to require the lead agency to report ''frequently,'' and not ''annually,'' on the performance of its State and each EIS program located in its State.

Discussion: Section 303.700(a)(4) reflects the requirements in sections 616(b)(2)(C)(ii)(I) and 642 of the Act, which require State lead agencies to report annually to the public on the performance of each EIS program located in the State in relation to the State's SPP targets. While a lead agency may elect to report more frequently to the public on the performance of its EIS programs, we do not believe that these regulations should require a lead agency to do so.

Changes: None.

Comment: One commenter stated that the proposed language in § 303.700(b), while placing particular emphasis on requirements that are most closely related to improving early intervention results for infants and toddlers with disabilities and their families, was excessive and may not result in better services. The commenter further recommended that every effort be made to clarify and minimize the words in this paragraph to better focus on direct services, child and family outcomes,

and the IFSP process and service implementation.

Discussion: Section 303.700(b) incorporates the language from section 616(a)(2) of the Act (as modified by section 642 of the Act), regarding the primary focus of Federal and State monitoring. State monitoring requirements are addressed in more detail, including the areas mentioned by the commenter, through the SPP/APR process. For example, as part of the SPP/APR process, the Secretary has established monitoring priorities and indicators for States that reflect the goals of improving early intervention results and functional outcomes for infants and toddlers with disabilities while ensuring that EIS programs comply with key part C requirements, including those relating to the timely provision of early intervention services, child outcomes, family capacity, timely evaluations, assessments, initial IFSP development, and transition. Thus, the revisions to § 303.700(b) recommended by the commenter are not necessary.

Changes: None.

Comment: A few commenters recommended adding child find, public awareness, eligibility, and service provision to § 303.700(d), which lists the areas on which the State must annually collect and report data. One commenter recommended that we include in these regulations the Department's SPP indicator that requires States to evaluate the effectiveness of their part C program as it relates to family outcomes. Another commenter recommended that these regulations require States to report to the Secretary on family outcomes. The commenter also recommended that, if States are required to report on family outcomes, the regulations should clarify the definition of family supports and services that are identified through the family assessment.

Discussion: Section 616(a) of the Act (as modified by section 642 of the Act) requires States to focus their monitoring activities on improving early intervention results and functional outcomes for infants and toddlers with disabilities and meeting the program requirements in part C of the Act. Section 616 of the Act further requires that the Secretary establish indicators to adequately measure performance in several priority areas.

The Secretary has established 14 such indicators under part C of the Act for State reporting in the SPP/APR, and, through the OMB public review process for information collections, has solicited public comments on these indicators several times since the 2004 amendments to the Act. These indicators address critical, substantive requirements of part C of the Act, including those relating to child find for children ages birth to one year and birth to three years; provision of early intervention services in natural environments; early intervention child outcomes; family capacity; timely initial evaluations, assessments and IFSP development; timely service provision; and transition services. While not specifically included as an SPP/APR indicator, the Department's position is that public awareness is covered under the two child find indicators. For example, a State must have an effective public awareness program to ensure that eligible infants and toddlers are identified for early intervention services.

Finally, issues related to family outcomes are adequately addressed by the SPP/APR indicator that measures family capacity because that indicator is designed to evaluate whether families know their rights, can effectively communicate their needs, and can assist their children to develop and learn. Moreover, we believe that it is not appropriate to include in these regulations any specific SPP/APR indicator because the Secretary must retain flexibility to revise indicators as necessary.

Changes: None.

Comment: One commenter objected to the language in § 303.700(e) that requires a State, when it identifies noncompliance with the requirements of part C of the Act by EIS programs and EIS providers, to ensure that the noncompliance is corrected as soon as possible and in no case later than one year after the State's identification of the noncompliance. The commenter suggested that a one-year timeline for correction is unreasonable. In contrast, a few commenters recommended that § 303.700(e) be revised to require that all identified noncompliance be corrected as soon as possible, but no later than 90 days after identification.

Discussion: Correcting noncompliance as soon as possible is a critical responsibility of lead agencies and EIS providers, and, as discussed in the preamble of subpart B of these regulations, the Department's position is that correction as soon as possible but no later than one year is a reasonable timeframe for an EIS provider to correct noncompliant policies, procedures, or practices and for the lead agency to verify that the EIS program or EIS provider is complying with the requirements of part C of the Act.

The Department's position is that a 90-day period from the identification of noncompliance would not be workable because it is unlikely that all instances of noncompliance could be corrected in that timeframe. For example, if a lead agency identified an EIS provider as noncompliant in making individualized decisions concerning the settings in which infants or toddlers with disabilities receive early intervention services, the lead agency would need to determine the potential causes of the noncompliance and appropriate corrective actions, which might include training service coordinators, reviewing IFSP Team guidelines, or examining other policies, procedures or practices, to ensure that the EIS provider had corrected any noncompliant policies, procedures, or practices, and that the IFSP Teams, subsequent to those corrections, were making EIS setting determinations consistent with part C requirements. To take corrective action and verify correction in a case such as this would likely require more than 90 days to complete.

Through our monitoring experience, we have observed that, in most cases, when a lead agency makes a good faith effort, the needed corrective actions can be accomplished and their effectiveness verified within one year from identification of the noncompliance. Timely correction of noncompliance is critical to ensure proper and effective implementation of part C of the Act. Therefore, it is the Department's position that correction as soon as possible, but not later than one year from identification, is appropriate.

Changes: None.

State Performance Plans and Data Collection (§ 303.701)

Comment: One commenter supported the requirement in § 303.701(a) that each State include in its SPP a description of how the State will improve its implementation of part C requirements. Another commenter supported the requirement in § 303.701(c) that each State collect valid and reliable information on all SPP indicators. This commenter requested that the regulations also require each State to document the process used to verify the validity and reliability of the data provided on the SPP indicators.

Discussion: As noted elsewhere in this preamble, the Secretary has established 14 indicators in the SPP for part C of the Act. One of these indicators (Indicator 14) requires each State to demonstrate that it reports timely and accurate data under the reporting requirements in section 618 of the Act and in the SPP and APR. Further, to ensure valid and reliable data for each SPP/APR indicator, States must report data in their SPP/APR

submissions according to required measurements and from specified data sources. In addition to the percentages required in the indicators, lead agencies are required to provide the actual numbers used in their calculations. The Department's position is that these SPP/APR requirements address the commenter's concern that States document how they verify the validity and reliability of the data they report under the indicators in their APRs.

Changes: None.

Comment: One commenter recommended that the Secretary not be permitted to impose additional data collection requirements on States unless existing data collection elements are eliminated.

Discussion: The majority of the information collected by the Secretary under part C of the Act is required by sections 616 and 618 of the Act (as those sections are modified by section 642 of the Act). Restricting the Secretary's ability to collect information, as requested by the commenter, is not appropriate because the Secretary needs the flexibility to collect information necessary to ensure the effective operation and implementation of the part C program. This responsibility comes not only from the Act, but also from the Department's inherent authority to ensure that the laws it is charged with implementing are carried out. Additionally, as discussed elsewhere in this preamble, the Department is required to solicit public comments through the OMB public review process whenever it intends to remove or add information collections.

Changes: None.

State Use of Targets and Reporting (§ 303.702)

Comment: One commenter recommended that § 303.702(a), which requires each State to use the targets established in the SPP to analyze the performance of each EIS program in implementing part C of the Act, be amended to require each lead agency to define geographically the local lead agency or EIS program.

Discussion: There is no local lead agency under part C of the Act, but rather a State lead agency that is designated by the Governor in accordance with section 635(a)(10) of the Act to be responsible for implementing part C of the Act in the State. The lead agency implements the requirements of a statewide system under part C of the Act either by using its own personnel, through contracts with EIS providers or through other arrangements, such as interagency agreements, with State public agencies.

Section 303.12 defines *EIS providers* as entities or individuals that provide early intervention services under part C of the Act. As clarified in section 642(2) of the Act, EIS providers often serve a comparable role under part C of the Act that LEAs serve under part B of the Act. The definition of an *EIS program,* in contrast, is an entity designated by the lead agency to be responsible for performance reporting to the Secretary and the public under §§ 303.700 through 303.702 (see the definition of *EIS program* in § 303.11). Although we expect, in most cases, that the lead agency will designate its EIS programs on a geographic basis (*e.g.,* counties, parishes, and health or school districts), it is not always feasible to do so. Therefore, it is the Department's position that it is not necessary to require States to make EIS program designations by geographic areas. States currently administer their part C programs through a variety of administrative structures. For example, multiple EIS providers may provide services in one or more overlapping geographic areas. Therefore, States cannot be expected to revise their existing administrative structures for the sole purpose of reporting performance data by geographic areas within a State.

Changes: None.

Comment: Section 303.702(b)(1)(i)(A) requires that the lead agency report annually to the public on the performance of each EIS program located in the State in relation to the targets in its SPP no later than 60 days following the State's submission of its APR to the Secretary. One commenter supported this 60-day timeline. Another commenter disagreed, stating that the 60-day reporting timeline is not realistic. This commenter recommended that the lead agency be required to report to the public as soon as practicable, but not later than the end of the calendar year in which the State's APR is due to the Secretary.

Discussion: We believe that it is important for the public to be informed in a timely manner regarding the performance of each EIS program in meeting the targets in the State's SPP. States are generally required to submit their APRs to the Secretary by February 1st following the end of the Federal fiscal reporting period. For example, the FFY 2006 APR, which requires data to be reported for the period July 1, 2006 to June 30, 2007 for the FFY 2006 reporting year, was due February 1, 2008. Some data reported in the February 2008 APR submission were collected by States in the fall of 2006. To ensure the usefulness of these data, we agree with the commenter that States must make the data publicly available as soon as practicable.

We also agree with the commenter that additional time may be needed beyond the 60 days from the date the State submits its APR. We consider 120 days to be an appropriate timeframe for States to develop and make public the reports on the performance of EIS programs on the targets in the SPP and have made this change in the regulations. With this change, a State will have four months before the State reports its APR data by EIS program to the public. Given that States will have reported to the public on this information at least two times prior to the effective date of these regulations, the Department's position is that States will already have effective and efficient systems in place to report within the 120-day timeframe.

Changes: We have revised the timeline in § 303.702(b) for the State to report annually to the public on the performance of each EIS program located in the State on the targets in the State's performance plan to be ''as soon as practicable but no later than 120 days'' following the State's APR submission.

Enforcement (§ 303.704)

Comment: One commenter stated that § 303.704, regarding enforcement under part C of the Act, requires significant clarification. For example, the commenter questioned whether the Department would impose sanctions if it determined that a State needed assistance one year and the following year determined that the State needed intervention.

Another commenter argued that the two consecutive year and three consecutive year timeframes in § 303.704(a) and (b) are unrealistic and that these timeframes, which relate to the Secretary's annual determinations regarding State performance under part C of the Act, should refer to program years, not consecutive years.

Discussion: Section 303.704 incorporates the language in section 616(e)(1) through (e)(3) of the Act, which provides the minimum enforcement actions the Secretary must take to ensure compliance with the Act when the Secretary determines that a State needs assistance for two consecutive years in implementing the requirements of part C of the Act, or is in need of intervention in implementing the requirements of part C for three consecutive years, or any time the Secretary determines that a State needs substantial intervention in implementing the requirements of part C of the Act. It is expected that under

most circumstances, the Department will follow the procedures specified in section 616(e)(1) through (e)(3) of the Act and § 303.707 in enforcing part C of the Act. However, sections 616(g) and 642 of the Act make clear that the Secretary has the authority to use enforcement mechanisms, including sanctions under GEPA and EDGAR, to monitor and enforce the implementation of part C of the Act.

In instances where the determinations for a State are different in consecutive years (*e.g.,* ''needs assistance'' in year one and ''needs intervention'' in the following year), the Department may use the enforcement mechanisms under GEPA and EDGAR in addition to those identified in the Act and § 303.707. Whether the Department will need to use additional enforcement mechanisms will depend on the unique facts of the situation. Thus, it is not possible for the Department to identify in these regulations all situations in which the use of those enforcement mechanisms may be appropriate.

Finally, we decline to change the references in this section from ''consecutive years'' to ''program years'' because section 616(e) of the Act, which is the statutory authority for § 303.704, refers to consecutive years.

Changes: None.

Comment: None.

Discussion: To be consistent with section 642(3) of the Act, the terms ''instructional'' and ''instruction'' in § 303.704(a)(1)(ii) have been revised to refer to ''early intervention service provision.''

Changes: The terms ''instructional'' and ''instruction'' in § 303.704(a)(1)(ii) have been revised to refer to ''early intervention service provision.''

Withholding Funds (§ 303.705)

Comment: One commenter requested that the phrase ''minimum reasonable notice,'' as used in this section, be explicitly defined.

Discussion: The term ''minimum reasonable notice'' is not in § 303.705(a), which incorporates the requirement in section 616(e)(4) of the Act that the Secretary must provide reasonable notice and an opportunity for a hearing to a State prior to the withholding of any funds under the Act to that State. We believe that ''reasonable notice'' as used in § 303.705(a) reflects the common understanding of the term—that the notice should be sufficiently informative and timely given the circumstances. Thus, we do not believe that it would be appropriate to further clarify ''reasonable notice'' as used in § 303.705(a) because what constitutes reasonable notice will, by necessity, depend on the nature of the details in each particular situation.

Changes: None.

Comment: One commenter expressed concern that the terms ''program'' and ''provider'' are used inconsistently throughout these regulations. The commenter specifically suggested that the term ''EIS program'' be added to § 303.705(c)(1)(ii), as an entity subject to the lead agency's suspension of further payments of part C funds when the Secretary withholds those funds to the State.

Discussion: We agree with the commenter that the term EIS programs should be added to § 303.705(c)(1)(ii) in addition to the existing reference to EIS providers because the terms have different definitions.

Under § 303.12, *EIS providers* are entities or individuals that provide early intervention services under part C of the Act, regardless of whether they receive part C Federal funds, and may include, where appropriate, the lead agency and other public agencies responsible for providing early intervention services to infants and toddlers with disabilities in the State. EIS programs are different; under § 303.11, an *EIS program* is an entity designated by the lead agency for reporting under sections 616 and 642 of the Act and §§ 303.700 through 303.702.

Lead agencies do not always provide part C funds directly to an EIS provider, but instead may provide part C funds to an EIS program. Thus, it would be appropriate to clarify in § 303.705(c)(1)(ii) that the lead agency must not make further payments of funds under part C of the Act to specified State agencies, EIS programs or, if the lead agency does not provide part C funds to the EIS program, EIS providers that caused or were involved in the Secretary's determination under § 303.703(b)(1).

Changes: We have added to § 303.705(c)(1)(ii) a reference to ''EIS programs'' and the phrase ''if the lead agency does not provide part C funds to the EIS program,''.

Public Attention (§ 303.706)

Comment: A few commenters stated that § 303.706 should not specify the methods of public notification that States must use, and that the public notification language in § 303.706 should be the same as the language in the corresponding part B regulation, which allows the State to determine the methods of notification to the public.

Discussion: The public notification requirement in § 303.706 is consistent with other public reporting requirements in subpart H of these regulations, specifically the public reporting requirements relating to the SPP and APRs and public reporting on EIS program performance in § 303.702(b)(1)(i)(B). The Department's position is that it is important for States to provide information to the public related to its monitoring and enforcement actions in a consistent manner. Therefore, we decline to revise § 303.706 as requested by the commenters.

Changes: None.

Reports—Program Information

Annual Report of Children Served—Report Requirement (§ 303.721)

Comment: One commenter asked the Department to clarify the child count reporting requirements in § 303.721. Specifically, the commenter asked for clarification on whether States are required to pick one date between October 1st and December 1st and report the count for that date or report cumulatively on every child served between those two dates. Two other commenters stated that the data reported to Congress should not be based on point-in-time counts, but on cumulative counts of all infants and toddlers served during the entire program fiscal year.

One commenter recommended that the Department establish a single due date for all reports that are required to be submitted annually under section 618 of the Act and § 303.721. Another commenter supported the language in this section because it provides flexibility for States.

Discussion: Section 303.721 describes the annual report of children served under part C of the Act that is required by section 618 of the Act (as modified by section 642 of the Act). Section 303.721 provides States with the flexibility to determine the specific date between October 1st and December 1st on which to collect the State's child count and service settings data under part C of the Act. States must choose a date between October 1st and December 1st of each year and collect point-in-time child count and settings data on that date. To ensure consistency, States are encouraged to use the same date from year to year. We believe it is appropriate to continue to require States to report point-in-time data on child count and settings because the Department has required point-in-time data under part C of the Act since 1992. Revising this standard would impose burdens on States as they would need to redesign their data collection systems, and it also would affect the Department's ability to compare data from multiple years and develop trend

data. While States are not required to submit cumulative child count data, they may provide such additional information in the child count data information collection form (Table 1—Report of Children Receiving Early Intervention Services in Accordance with part C).

Concerning combining due dates for State submissions required under section 618 of the Act and § 303.721, States currently have two submission dates, one for child count data and service setting data and a second for child exit and dispute resolution data. The child count and service setting data are point-in-time collections taken on a date between October 1 and December 1 and due the following February 1st. The child exit and dispute resolution data are collected throughout the year and due the November 1st following the end of the reporting year (July 1 through June 30). Combining the due dates for these collections is not appropriate since they are different types of collections. Regulating on the due dates of these data requirements is not necessary because these data collections are reviewed through the OMB data collection process. Nothing prevents a State from collecting child count and service setting data at the same point in time for a particular reporting period if that reduces the State's burden in the data collection process.

Changes: None.

Comment: One commenter recommended that data elements for the annual report of children served be merged and condensed. One commenter requested that lead agencies be required to track: (1) Premature infants who, at a later date, receive early intervention services but could have been served earlier if the State had presumptive eligibility criteria; and (2) families who decline services due to cost-sharing requirements.

Discussion: Following the amendments to the Act in 2004, the Department examined all of the then-existing part C data collection requirements under section 618 of the Act. Based on that examination, the Department eliminated two collections (reporting on numbers of service personnel and types of early intervention services) for the section 618 data collection. It is not appropriate to condense or merge additional data elements at this time because the data currently collected are either (1) required by section 618 of the Act, or (2) expressly authorized under the Act and necessary for the Secretary to ensure proper implementation of the part C program and to measure program performance under the Government Performance and Results Act of 1993.

We decline to add, as requested by the commenter, data collection requirements for the part C program in these regulations at this time because we are sensitive to the concerns of States and local entities about increasing data collection burden. We believe that the data States must collect under the regulations will enable the Secretary to effectively monitor and measure the implementation of the part C program. We are not convinced that the benefits associated with collecting additional data, including that data suggested by the commenter, would outweigh the burden on States and local entities required to collect the data.

Changes: None.

Comment: One commenter recommended that § 303.721(b) be deleted because the tracking and reporting requirements in the section relate to children ages three and older who are eligible for services under section 619 of part B of the Act and should be the responsibility of the part B program.

Discussion: Section 303.721(b) provides that if a State adopts the option under section 635(c) of the Act and § 303.211 to make early intervention services under part C of the Act available to children ages three and older, the lead agency must report on the number and percentage of children with disabilities who are eligible for services under section 619 of the Act but whose parents choose for such children to continue to receive early intervention services. Therefore, because these children are being served under part C of the Act, it is appropriate for the State part C program, and not the State part B program, to be responsible for reporting these data under section 618(a)(1)(B) and 635(c)(3) of the Act and § 303.721(b).

Changes: None.

Annual Report of Children Served—Certification (§ 303.723)

Comment: One commenter expressed support for the requirement in § 303.723 that the lead agency certify the accuracy of the data submitted under § 303.721. Two other commenters recommended deleting this section in its entirety. One commenter stated that any count based on sampling cannot be ''accurate and unduplicated.'' The other commenter stated that accurate and unduplicated counts should not require extra certification.

Discussion: It is critical that data reported by States be accurate. One way to ensure accuracy of that data is to require lead agency officials to submit a certification attesting to the data's accuracy, as is required by § 303.723. Concerning the accuracy of data collected through sampling, when a State uses sampling as a methodology to obtain its child count data, the State must first, in accordance with OMB-approved information collection requirements, have its sampling plan approved by the Department. Prior to receiving approval of a sampling plan, the State must demonstrate that its proposed sampling plan will result in the collection of valid, reliable, and accurate data. Currently no State has elected to use sampling when collecting the data required under section 618 of the Act and § 303.721. For these reasons, we decline to delete § 303.723 as requested by the commenters.

Changes: None.

Annual Report of Children Served—Other Responsibilities of the Lead Agency (§ 303.724)

Comment: One commenter expressed support for § 303.724, citing the importance of having States establish procedures to verify the accuracy of the data they collect and report. One commenter recommended that this section be amended to be consistent with section 618(b)(2) of the Act, which provides that the Secretary may permit States to obtain the data required under section 618 of the Act through sampling, to avoid a duplication of effort in States that sample to obtain section 618 data. Several commenters suggested that complying with the requirements in § 303.724 would place a significant burden on States and their data collection contractors. One commenter stated that some States use electronic systems to collect and track part C data and that these systems do not necessarily rely on EIS providers to submit child counts to the lead agency, and thus, an EIS provider could not be expected to certify child count data. The commenter recommended that EIS provider certification only be required when applicable to a State's procedures for reporting unduplicated and accurate child counts.

Discussion: Collection of accurate, unduplicated data begins at the EIS provider level. Therefore, requiring the lead agency to establish procedures that must be implemented by EIS providers, including certifications about the accuracy of the data and the dates by which EIS providers must report that data to the lead agency, is reasonable and necessary. The Department's position is that § 303.724 is consistent with the requirement in section 618 of the Act that allows States to use sampling when collecting section 618

data because, pursuant to the OMB-approved information collection forms for section 618 State-reported data, States are required to ensure collection of accurate data when they use sampling and have a plan approved by the Department prior to collecting data through sampling.

We agree with commenters that in some States with electronic systems for collecting and maintaining data, the State lead agency does not use EIS providers to collect State child count data. However, in those States where EIS providers still play a key role in collecting State child count data, it is appropriate for each EIS provider to certify that the data it reports to the lead agency are unduplicated and accurate. Therefore, we have revised § 303.724 to only require that, as one of the commenters suggested, the EIS provider certify the accuracy and nonduplication of data that the EIS provider is required to collect and report to the lead agency.

Changes: We have added to the lead-in to § 303.724 the following language ''conduct its own child count or use EIS providers to complete its child count. If the lead agency uses EIS providers to complete its child count, then the lead agency must:''

Allocation of Funds

Payments to Indians (§ 303.731)

Comment: One commenter requested that the Department clarify how the 1.25 percent amount in § 303.731, regarding part C funds provided by the Department to the Secretary of the Interior, is calculated or from where this percent is derived. The commenter suggested that the funding for tribes should be determined by the same funding formula that is used for States.

A few commenters suggested revising this section to require tribes and States to continue to collaborate and coordinate services and also to describe the role of the Secretary of the Interior related to the funding of all tribes that wish to participate as partners in the part C program. The commenters further recommended adding a non-supplanting clause to this section. One commenter recommended that the title of this section be revised to read: ''Payments to Indian Tribes, Tribal Organizations, or Consortia'' because the current heading is misleading and may be offensive to some.

Discussion: Section 303.731(a) provides that the Secretary will make payments to the Secretary of the Interior in the amount of 1.25 percent of the aggregate amount available to all States under part C of the Act so that the Secretary of the Interior can distribute funds to tribes, tribal organizations, and consortia to coordinate assistance in providing early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools operated or funded by the Secretary of the Interior. The 1.25 percent payment by the Department of Education to the Secretary of the Interior is required by section 643(b)(1) of the Act, which provides that this percentage be taken from the aggregate amount of part C funds available to all States.

Section 643(b)(1) of the Act and § 303.731(a)(1) clearly state that funds provided under this section are to be used for the coordination of assistance in the provision of early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary schools and secondary schools for Indian children operated or funded by the Department of the Interior. Under section 634(1), the lead agency is responsible for ensuring that early intervention services are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers residing on a reservation geographically located in the State. Under section 643(b)(4), Indian tribes, tribal organizations, and consortia that receive funds from the Secretary of the Interior must coordinate with the State, through the lead agency responsible for providing early intervention services under part C of the Act in that State. This coordination is to ensure that eligible Indian infants and toddlers with disabilities under the age of three in the State are identified, evaluated, and provided early intervention services. Including a requirement for additional coordination may be unnecessarily restrictive as States, through their lead agencies, and Indian tribes, tribal organizations, and consortia currently use a variety of mechanisms through their child find efforts, interagency agreements, and other methods to meet their respective responsibilities under part C of the Act.

It is not appropriate to add a nonsupplanting clause to this section because there is no statutory provision that requires Indian tribes, tribal organizations, and consortia to meet a nonsupplanting requirement. Rather, it is the State, under section 637(b)(5)(B) of the Act that must ensure that Federal funds made available under section 643 of the Act will be used to supplement not supplant the levels of State and local funds expended for infants and toddlers with disabilities and their families.

The U.S. Department of Interior performs two roles under section 643 of the Act. First, section 643(b) of the Act requires the Secretary of the Interior to distribute the entirety of part C funds received from the Secretary of Education to tribes, tribal organizations, or consortia of those entities for the coordination of assistance and provision of early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. Second, the Secretary of the Interior, in accordance with section 643(b)(5) of the Act, must submit to the Secretary of Education on a biennial basis a report that includes a summary of the information that tribes, tribal organizations, or consortia that receive part C funds must submit to the Secretary of the Interior under this section.

Finally, in order to avoid confusion and to ensure consistency between the language in the Act and the language in the regulations, we have maintained the heading of this regulatory section to be the same as the corresponding section in the Act (the heading ''Payments to Indians'' is taken directly from the Act).

Changes: None.

Comment: None.

Discussion: To be consistent with section 643(b)(1) of the Act, we have deleted the words ''after the Secretary determines the amount of payments to be made to the jurisdictions under § 303.730(a)'' from § 303.731(a)(3).

Changes: We have deleted the words ''after the Secretary determines the amount of payments to be made to the jurisdictions under § 303.730(a)'' from § 303.731(a)(3).

State Allotments (§ 303.732)

Comment: One commenter stated that the Federal part C funding formula is not sound and should be modified. Several commenters recommended revising § 303.732, regarding State allotments of funds available under part C of the Act, to give States at least 120 days notice of their actual allocation for the next fiscal year. One commenter recommended defining the phrase ''ratably reduce'' as used in paragraph (c) of this section. Another commenter requested that the Department define the phrase ''most recent satisfactory data'' as used in paragraph (d)(2) of this section.

Discussion: Section 643 of the Act sets forth the statutory funding formula for distributing part C funds to States and the formula in § 303.732 is taken directly from section 643(c) of the Act.

This formula requires data on the number of children under the age of three in each State. The phrase ''ratably reduce'' in section 643(c)(3) of the Act, and reflected in § 303.732(c)(1), has the plain meaning that any reduction in the appropriation for part C of the Act will be proportionately reflected in the allotment for each State. Further clarification is not necessary.

Additionally, it is not necessary to define ''most recent satisfactory data'' because this phrase also has a plain meaning—that is, it refers to the most recent population data on the number of infants and toddlers in States that are available to the Department at the time the Department calculates State allocations under part C of the Act. For the purpose of these allocations, the Department uses the most recent data provided by the United States Bureau of the Census (U.S. Census Bureau) as the ''most recent satisfactory data.''

It is the Department's position that the regulations should not require the Secretary to inform States of their allocations 120 days prior to making the funds available to the States because the Department believes that the final allocations should be based on the most recent U.S. Census Bureau data available at the time the Department issues part C grants, and that data could, in some years, result in changes in the estimated allocations within 120 days of making awards.

Changes: None.

Comment: None.

Discussion: To be consistent with section 643(c)(1) of the Act, we have added the words ''and any amount to be reserved for State incentive grants under § 303.734'' to § 303.732(d)(1).

Changes: We have added ''and any amount to be reserved for State incentive grants under § 303.734'' to § 303.732(d)(1).

Reservation for State Incentive Grants (§ 303.734)

Comment: A few commenters supported § 303.734(a), which requires the Secretary to reserve 15 percent of the appropriated amount exceeding $460,000,000 to make available State incentive grants to States that implement the option to continue to provide early intervention services to children age three and older. However, many commenters objected to the set-aside for States that are carrying out a policy under section 635(c) of the Act stating that the overall funding levels for the part C program are inadequate to serve the current population of children ages birth to age three, let alone the population of children age three and older. Another commenter expressed concern that this set-aside provision takes away funds from States that do not adopt a policy under section 635(a) of the Act. Other commenters requested that § 303.734(a) not be implemented until the part C program is fully funded.

Discussion: Consistent with section 643 of the Act and under the provisions in § 303.734, the Secretary is required, in any fiscal year that the appropriation exceeds $460,000,000, to reserve 15 percent of the appropriated amount exceeding $460,000,000 to make available State incentive grants (SIG) to States that choose the option to make services available to children ages three and older under § 303.211. We do not agree that the provisions in § 303.734 take funds away from States that do not adopt a policy under section 635(a) of the Act and § 303.211. Any State has the option to make IDEA part C services available to eligible children with disabilities ages three and older under § 303.211. States have the option under § 303.211 to make IDEA part C services available to eligible children with disabilities beyond age three regardless of whether funds are available and granted under section 643(e) of the Act and § 303.734. However, the State incentive grant funds available and granted undersection 643(e) of the Act and § 303.734 must be used to facilitate the implementation of the provisions in § 303.211.

Changes: None.

Comment: One commenter recommended that § 303.734(a) be revised to clarify that a State is eligible to receive part C funds under this section even if the State elects to make part C services available only to a subset of children from the age of three to when the child enters, or is eligible under State law to enter, kindergarten or elementary school in the State, instead of children throughout the entire age range. Another commenter recommended defining the method the Department will use to distribute funds under § 303.734(a).

Discussion: We agree that § 303.734(a) should clarify that a State that elects to make part C services available to a subset of children specified in § 303.211(a)(2) is eligible for any part C funds that are available under section 643(e) of the Act, and we have made this change. With regard to clarifying the method of distributing funds under this section, section 643(e) of the Act provides that for any fiscal year for which the amount appropriated under section 644 of the Act exceeds $460,000,000, the Secretary shall reserve 15 percent of such appropriated amount to provide grants to States that elect, under section 635(c) of the Act, to serve children beyond age three. In FY 2009, the appropriation exceeded $460,000,000 due to the enactment of ARRA and the Department reserved funding for SIG grants under section 643(c) of the Act. The Department received applications from, and made SIG grants to, two States that submitted policies under section 635(c) of the Act to serve children beyond age three and four. No States applied to implement section 635(c) of the Act in FY 2005 through FY 2008 or FY 2010, which the Department believes can be explained by the lack of funding in those years for the SIG grants.

Changes: We have added language to § 303.734(a) to clarify that a State that makes part C services available according to a subset of children specified in § 303.211(a)(2) would be eligible for any funds available pursuant to section 643(e) of the Act.

Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action. The potential costs associated with these final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

The Department has also reviewed these regulations pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct

regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

We emphasize as well that Executive Order 13563 requires agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In its February 2, 2011, memorandum (M–11–10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these regulations only upon a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on the analysis below, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Potential Costs and Benefits

This analysis does not attempt to cover every change in the regulations implementing part C of the Act governing the Early Intervention Program for Infants and Toddlers with Disabilities. We have included an analysis of the costs and benefits of the most significant changes. In conducting this analysis, the Department examined the extent to which changes made by these regulations add to or reduce the costs for State lead agencies and others, as compared to the costs of implementing the part C program under the previously existing regulations. Based on the following analysis, the Secretary has concluded that the changes reflected in the final regulations will not impose significant costs on the States.

Section 303.211—State Option To Make Part C Services Available to Children Ages Three and Older

Section 303.211 incorporates the provisions of section 635(c) of the Act, which allow States to continue to serve children with disabilities ages three through five under part C of the Act if those children previously received services under part C of the Act and are eligible for services under section 619 of part B of the Act. Offering services under part C of the Act is a State option. In addition, § 303.211(a)(2) clarifies that a State may choose to serve a subset of this age range.

In the NPRM, we requested comments from the public on initial costs related to establishing or enhancing the infrastructure of the part C lead agencies necessary to serve children ages three through five; differences in the costs of providing the services required by the Act to children with disabilities ages three through five years old under part C of the Act versus part B of the Act; the benefits to parents and children of receiving continued services under part C of the Act rather than under part B of the Act; the extent to which States expect families to choose continuation of part C services beyond age two; the extent to which States may choose to exercise the option of serving children with disabilities ages three through five years old under part C of the Act; and possible sources of funding for providing part C services to these children. However, we did not receive comments on possible costs related to these changes.

If a State elects to exercise the option to serve three through five year olds under part C of the Act, the lead agency is responsible for the costs of providing the direct part C services to children whose families elect to continue services under part C. In addition, the State's part C lead agency could incur some transition costs in implementing this option. For example, if the part C lead agency is not the SEA, it would need to develop the capacity to serve older children. The intensity and type of services and settings needed for three through five year olds would be different from those that are appropriate for children ages birth through two, and the program would need to include an educational component, which is not required for preschool children being served under part B of the Act. The part C lead agency may also have to establish relationships with different providers or, at the very least, amend agreements or contracts with existing providers. On the other hand, part C of the Act provides for establishment of a system of payments, which might reduce the cost to the State of providing services to children ages three through five served under part C of the Act.

The SEA is the lead agency in 14 of the 56 State agencies. In these States, extending the age range of children served by the part C program would primarily involve a shifting of costs among programs within the same agency. The State may incur some transition costs related to training and administration. However, these costs would not be significant.

If a State elects to provide services under part C to children ages three through five, and the lead agency is not the SEA, the SEA and LEAs in that State would experience savings because they would be responsible for providing services under part B of the Act to fewer children ages three through five, but this is not likely to result in overall savings for the State because the lead agency would incur higher costs, and the SEA and LEAs would still be required to maintain their Section 619 preschool programs to serve children with disabilities ages three through five years old who are not served under this option because parents have the right to choose between part C or part B services.

If a State elects to make part C services available to children ages three and older, § 303.209(f)(2) requires the State to make the annual notice required under § 303.211(b)(1) available to parents at the transition conference when the parent is presented with the initial option for the child to receive services under § 303.211 or under section 619 of the Act. Although this requirement adds to the cost of implementing the State option, we estimate that the costs would be insignificant, even if all States elected to exercise the option and proposed to make services available to children until their 5th birthday.

Based on the experience of the two States that have already opted to make part C services available to children three and older, we estimate that the annual notice would be approximately five pages long. We further estimate that it would cost approximately $.25 to photocopy a single notice and that approximately 220,000 notices would be needed, based on the number of three and four year old children we would expect to be eligible to continue to receive services under part C, for an annual cost of $55,000. This estimate would represent a lower-bound insofar as it assumes the notice would be limited to addressing the specific requirements of the Act and these regulations. In order to ensure that all families of eligible children are aware of the potential benefits of continuing to receive services under the part C programs, States may opt to develop brochures and other materials to publicize this option. For example, the two States that received State incentive grants in FY 2009 each requested approximately $30,000 to support the development and printing of brochures about the part C option. If all States

opted to extend part C services to eligible children beyond their third birthday and developed and printed similar materials, we estimate that States could spend as much as $1.6 million to provide information on the part C option to eligible children.

Sections 303.301 Through 303.320—Public Awareness, Comprehensive Child Find System, Referrals, and Screening

Sections 303.301 and 303.302 combine the child find and public awareness requirements from section 635(a)(5) and (a)(6) of the Act and reflect the Act's increased emphasis on specific subpopulations of infants and toddlers with disabilities who may potentially be eligible for and need early intervention services under part C of the Act. Section 303.302 requires States, consistent with the Act, to identify, locate, and evaluate all eligible infants and toddlers with disabilities, including children who are covered by CAPTA, homeless, in foster care, or wards of the State. Section 303.303 requires the State to have referral procedures to be used by specified primary referral sources and requires such procedures to provide for the referral of certain children covered by CAPTA. Section 303.303(b) clarifies that referral of children covered by CAPTA is limited to children under the age of three who are the subject of a substantiated case of child abuse or neglect or who are identified as directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. This change is consistent with the CAPTA provision in 43 U.S.C. 5106a(b)(2)(A)(xxi) that became effective in June 2003, which requires States receiving CAPTA funds to adopt policies providing for children under the age of three who are involved in a substantiated case of child abuse or neglect to be referred to the part C program. Section 303.301 also provides that, under a State's public awareness program, the lead agency must prepare information on the availability of early intervention services and disseminate such information to all primary referral sources so that these sources may give the information to parents of infants and toddlers, especially parents with premature infants or infants with other physical risk factors associated with learning or developmental complications.

Since States have been required under the Act to conduct child find activities to identify all infants and toddlers with disabilities since the part C program began in 1989, and the CAPTA requirements have been in place since June 2003, we are not estimating any increase in costs as a result of these changes. Part C lead agencies should already have the infrastructure needed to meet all of the IDEA child find requirements, including those requirements relating to children covered by CAPTA and those who are homeless, in foster care, or wards of the State.

In addition, § 303.320 allows the lead agency to adopt procedures for screening to determine whether a child is suspected of having a disability. The use of screening as a vehicle to identify children potentially eligible for part C services may reduce the number of evaluations and assessments that would otherwise need to be conducted and, thus, reduce potential evaluation and assessment costs for the State. As discussed previously in the *Analysis of Comments and Changes,* some commenters suggested that § 303.320(a)(3), which allows a parent to request an evaluation even after the lead agency determines—using its screening procedures—that the child is not suspected of having a disability, would diminish the cost-effectiveness of screening. However, we believe that parents are in a unique position to observe their child's development and may notice things which suggest a developmental delay or disability that could be missed by a screening. For this reason, it is the Department's position that this parental right to request an evaluation—along with other regulations in this part—provide for a rigorous child find system, which ensures that infants and toddlers with disabilities will receive the early intervention services they need. This is cost-effective because providing these services may reduce the need for special education and related services for these children when they reach school age.

Section 303.344(e)—Content of an IFSP

The current regulations in § 303.344(e) require the IFSP to include, to the extent appropriate, those medical and other services that the child needs, but are not required by part C of the Act, and the funding sources to be used in paying for those services or the steps that will be taken to secure those services through public or private sources. Section 303.344(e) of the final regulations retains the requirement for the IFSP Team to identify in the IFSP, to the extent appropriate, medical and other services that the child or family needs or is receiving, but that are not required by part C of the Act, and, if those services are not currently being provided, the steps that will be taken to assist the family in securing those services through public or private sources. However, the IFSP Teams are no longer required to identify funding sources for these services.

Eliminating the requirement that IFSPs identify the funding sources for services not required by part C of the Act will reduce the burden on service coordinators and will save IFSP Teams time during meetings and time preparing the IFSP. The requirement to identify funding for other services is overly burdensome, given that there may be many other services that infants and toddlers with disabilities and their families receive (*e.g.,* foster care, services through individualized safe plans of care, and medical and other services), and IFSP Teams may have limited knowledge about funding for these services.

The service coordinator typically would be responsible for obtaining this information. While we do not have any data on the number of hours service coordinators spend on this activity, we do know that many children served under part C of the Act have significant health care needs, and it could take several hours or more to identify funding for medical services needed by these children. For purposes of this analysis, we assume that service coordinators spend, on average, a minimum of two hours per year per child identifying funding for services not required by IDEA and describing this information in the IFSP. Based on employee compensation costs for health care and social assistance personnel calculated by the Bureau of Labor Statistics (BLS),[2] we estimate average compensation for service coordinators to be approximately $34.99 per hour. Pursuant to section 637(b)(4) of the Act, each State submits an annual count to the Department of the number of children with disabilities ages birth through two served in the State. An analysis of trends in the annual count and in census data for this age range indicates that the States will serve approximately 352,000 children under part C of the Act in fiscal year 2011. Based on these estimates, we estimate that savings from this change could be as much as $24.6 million.

Since the BLS health care and social assistance personnel category is broad and may overestimate salaries for service coordinators, we also examined available data on wages and salaries for early intervention specialists employed by non-profit organizations, school districts, private companies, State and

[2] U.S. Department of Labor, Bureau of Labor Statistics, Table 4, State and local government, by occupational and industry group, last modified September 8, 2010, *http://www.bls.gov/news.release/ecec.t04.htm.*

local governments, and colleges and universities to derive a lower-bound estimate for these savings based on an hourly wage of $14.60.[3] Using the BLS estimate of fringe benefit costs for health care and social assistance personnel of $12.67 per hour, the lower-bound estimate of the savings from this change would be $19.2 million per year.

Section 303.409(c)—Fees for Records

Section 303.409(c) requires the lead agency to provide parents with a copy of each evaluation, assessment, and IFSP pertaining to their child at no cost to the parents as soon as possible after the IFSP meeting. We do not anticipate that requiring States to provide a copy of evaluations, assessments, and IFSPs to parents, from the child's early intervention record, would result in a significant cost burden to States. Assuming that these documents, in total, would average no more than 100 pages, the cost of providing a copy to parents for the estimated 352,000 children served under the part C program in 2011 would be $3.8 million, at a cost of $0.05 per photocopied page and no more than 10 minutes of a service coordinator's time using the previous compensation estimate of $34.99 per hour. As a standard practice, most States already provide these documents at no cost to parents, so the effective cost of this change would be minimal.

Section 303.436(b)—Parental Rights in Due Process Hearing Proceedings

Section 303.436(b)(4) and (b)(5) has been changed to specify that a parent involved in a due process hearing has the right to receive a written or electronic verbatim transcription of the hearing and a copy of the written findings of fact and decisions at no cost to the parent. The cost impact of this requirement is likely to be minimal because there are very few due process hearings under the part C program. According to APR data submitted by States for FY 2008 (2008–09 reporting period), only 18 due process hearings were held during this period. If a typical due process hearing lasts no more than 16 hours and an hour of testimony results in roughly 40 pages of printed text, the cost to a State of providing an additional copy of the hearing transcript at $0.50 per page would be $320.00. Assuming that there could be as many as 20 due process hearings, the annual cost of this requirement would be no more than $6,400.

Section 303.520(a)—Policies Related to the Use of Public Benefits or Insurance To Pay for Part C Services

This section addresses the use of public benefits or insurance to pay for part C services, which is not addressed in the current regulations. Section 303.520(a) establishes three new requirements that are designed to provide important protections for parents of infants and toddlers with disabilities balanced against the need for States to have access to public benefits and public insurance to finance part C services while implementing the system of payments, coordination of funding sources, and payor of last resort requirements under sections 632(4), 635(a)(10)(B) and 640 of the Act.

Section 303.520(a)(2)(i) prohibits a State from requiring a parent to enroll in a public benefits or insurance program as a condition of receiving part C services. Under this section, a State may seek to enroll a parent in a public benefits or insurance program, but a parent can decline to enroll without affecting any right to receive part C services. The purpose of this provision is to protect the parent's right to confidentiality of personally identifiable information (where the lead agency is the same State agency that administers the public benefits or insurance program, such as Medicaid) and to protect the parents from incurring costs involuntarily. We expect this clarification to affect a limited number of States as the majority of States with systems of payments on file with the Department in FFY 2009 that address the use of public benefits or insurance to pay for part C services do not require families to enroll in those programs in order to receive part C services. Moreover, we believe that most parents will agree to enroll their infants and toddlers in programs like Medicaid voluntarily since it is generally to the family's advantage to obtain health insurance for all family members to pay for general medical care, including well baby visits and routine immunizations.

However, the few States that currently require parents to enroll in public benefits or insurance programs in order to receive part C services could potentially lose revenue if eligible parents decline to enroll in these programs. However, this potential loss of public benefits or insurance funds is outweighed by the benefits of protecting the privacy and autonomy of parents (including minimizing any potential negative financial impact that use of public benefits or insurance may have on parents). Moreover, the loss of public benefits or insurance does not increase the cost of early intervention services; it shifts the cost of those services to another revenue source.

Section 303.520(a)(2)(ii) requires the State to obtain consent to use a child's or parent's public benefits or insurance to pay for part C services if such use would have a cost impact on the family, specifically if that use would decrease available lifetime coverage or any other insured benefit of the child or parent, result in the parents paying for services that would otherwise be covered by the program, result in any increase in premiums or discontinuation of benefits or insurance, or risk loss of eligibility for the child or parents for home and community-based waivers based on aggregate health-related expenditures.

We would expect that there would be few instances in which parental consent would be required under this provision because Medicaid is the primary source of public insurance for part C services and Medicaid generally does not have limitations on lifetime coverage, pose any risk of increased premiums, or present any risk of loss of eligibility or discontinuation of benefits or insurance that would trigger the consent requirement. However, in those instances where there was a risk of increased premiums or out-of-pocket costs, States may create incentives for parents to provide consent by ensuring that the State's system of payments ensures that no out-of-pocket costs (including premium costs) are incurred by those parents eligible for Medicaid (currently 133% of the Federal poverty level).

Finally, § 303.520(a)(1) permits the State to access a child's or parent's public benefits or insurance if the State provides written notification to the child's parents and so long as the parent would not incur the specified costs identified above as a result of the use of those benefits, unless the parent had provided consent to use of such benefits for those services.

Section 303.520(a)(3) specifies that this written notification must include: (1) A statement that parental consent must be obtained under § 303.414 (where applicable) before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program; (2) a statement of the no cost provisions in new § 303.520(a)(2) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services in the IFSP for which the

[3] Estimate based on an analysis of early intervention specialist salaries conducted by the PayScale Corporation and updated on November 12, 2010 (*http://www.payscale.com/research/US/Job=Early_Intervention_Specialist/Salary*).

parent has provided consent; (3) a statement that the parents have the right under § 303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program at any time; and (4) a statement of the general categories of costs that the parent could incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

Although the specific format and content may vary by State, we estimate that it would take no more than 10 hours per State to draft a written notice that complied with these requirements and that the notice would not exceed 4 pages in length.

According to the National Compensation Survey from the Bureau of Labor Statistics, the median hourly wage for lawyers employed full-time in State or local government is $38.46.[4] With benefit costs of approximately 35 percent, we estimate that the cost per State of drafting and translating this notice into other languages, if applicable, would be no more than $520, for a national cost of $29,120.

We also expect that providing this notification to parents will not have a significant cost impact because the timing of the written notification is left to the discretion of the State lead agency. In many instances, States would have an opportunity to provide this notification, either by mail or in person, in conjunction with the prior written notice already required under § 303.421 or other required documentation (such as a copy of the IFSP) or at the IFSP meeting or periodic review and would incur only the additional cost of photocopying the notification.

The National Early Intervention Longitudinal Study (NEILS) collected data on a representative sample of 3,338 children who entered the part C program for the first time between September 1997 and November 1998 and at various points until the children entered Kindergarten. These data indicate that 44 percent of the families participating in the part C program participate in a government-assisted health insurance or public benefits program such as Medicaid or the Children's Health Insurance Program (CHIP).[5] Although we do not have the benefit of more recent data, we assume that the percentage of part C families enrolled in public benefits or insurance programs has remained fairly constant and that approximately 155,000 of the 353,028 infants and toddlers served under part C in the fall of 2009 are in families that also participate in public benefits or insurance programs. For the reasons already described, we assume for this analysis that virtually all of the families participating in a public benefits or insurance program would be covered by the notification requirements and not the consent requirements that apply if use of the parent's insurance is expected to result in certain specified costs.

We estimate that the cost of producing this notification for the estimated 155,000 infants and toddlers who participate in both the part C program and a public benefits or insurance program would be at most $341,000 per year for all States, if each 4-page notice cost 20 cents to photocopy and required 5 minutes of administrative personnel time.[6]

In some instances, States would be unable to provide this written notification at the initial or other IFSP meeting in person during a service visit, or in conjunction with other mailings, and may need to provide written notification by mail separately. Assuming that sending written notification by mail is required for one quarter of the eligible infants and toddlers and would require 44 cents in postage and 10 cents for an envelope, the additional cost of mailing these notifications would be an estimated $20,925 annually.

We believe that the potential cost to States of implementing this required notification is very minor and would be offset by the benefits of ensuring that parents are aware that their child's personally identifiable information will be disclosed to the State agency responsible for the State's public benefits or insurance program, that this disclosure and billing cannot result in specified costs to them, that they have the right under § 303.414 (where applicable) to withdraw consent for this disclosure at any time, and that refusal to provide consent or withdrawal of this consent will not jeopardize their child's access to services under the part C program.

Section 303.520(b)—Policies Related to Use of Private Insurance To Pay for Part C Services

Under § 303.520(b), a State may not access a parent's private insurance to pay for part C services unless the parent provides consent to do so, except in States that have enacted legislation that provides certain no-cost protections. Overall, we do not believe the final regulations will have a significant effect on States because private insurance funds represent a more limited proportion of States' part C budgets than funds from public benefits or insurance programs. Twenty-six States reported in either their FFY 2001 or 2002 part C APRs that they used funds from private insurance and/or family fees to pay for part C services.[7] For 21 of these 26 jurisdictions, the average percentage of the State's overall part C budget that represented funds from private insurance and/or family fees was 4.9 percent. Notably, those few States for which private insurance represents a relatively larger share of their budget (*i.e.,* more than 10 percent) are States that would not be subject to the general consent requirement because they have enacted State statutes providing the requisite protections. That is, as required by § 303.520(b), the State legislation ensures that the use of private health insurance to pay for part C services would not: (1) Count towards or result in a loss of benefits due to the annual or lifetime health insurance coverage caps for the infant or toddler with a disability or family, (2) negatively affect the availability of health insurance for the child and family, (3) result in the discontinuation of health insurance coverage, or (4) be the basis for increasing the private insurance premiums for the child or family. In States without these statutes, it is unlikely that these States are accessing private insurance to any significant extent without parental consent.

Part C services must be provided free of charge unless the State has established a system of payments. States wishing to use a parent's or child's private insurance funds to pay for part C services should have already included this option in a system of payments, especially in cases where the use of private insurance involves co-payments and deductibles. Even in cases where the State might be willing to cover the up-front costs (*e.g.,* the co-payment) in order to obtain parental consent to use private insurance, the State could not

[4] *http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf.*

[5] Unpublished analysis of NEILS data by SRI, International, for the U.S. Department of Education. Additional information on the NEILS, including access to a public use dataset, is available on the study Web site (*http://www.sri.com/neils*).

[6] Calculated using the median hourly wage for secretaries and administrative assistants employed full-time by State or local governments of $17.75 (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*) with benefit costs of 35 percent.

[7] The 2002 Part C APR was the last APR in which State lead agencies were required to report data on funding sources.

have done so without access to personally identifiable information that could not be obtained without consent. As such, the requirement to obtain parental consent to use private insurance is not a change in practice. Any potential loss of revenue to States from not being able to access private insurance because parents will not provide consent would be offset by the benefits of protecting the autonomy of the family and the benefits of ensuring that they are not unknowingly incurring costs.

Section 303.521(c)—States With FAPE Mandates or That Use Part B Funds To Provide Services to Infants and Toddlers With Disabilities

This provision incorporates long-standing policy and requirements under part B of the Act that, if a State is required under State law to provide FAPE for, or uses funds under part B of the Act to pay for, services for infants and toddlers with disabilities or a subset of children with disabilities under the age of three, the State must ensure that those services that constitute FAPE are provided at no cost. For example, if a State has established a system of payments under part C of the Act, but under State law mandates FAPE for a particular subgroup of children under the age of three (either by age and/or disability group, such as individuals who are blind), the State cannot charge for any services that are part of FAPE for that child or family. Because § 303.521(c) clarifies current requirements and practice, this change is not expected to result in any change in costs for State agencies, early intervention service providers, or families.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of each of the affected sections of the regulations.

These final regulations include the following five information collection requirements associated with the following provisions: §§ 303.101, 303.111 through 303.126, 303.200 through 303.227, 303.301, 303.430, 303.431(a)(2)(i), 303.432 through 303.434, 303.440(b), 303.443(c)(3), 303.520(a), 303.701, 303.702, and 303.720 through 303.724.

A description of these provisions is given below with an estimate of the annual recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

Collection of information: IDEA part C State Performance Plan (SPP) and Annual Performance Report (APR), (Information Collection 1820–0578). Affected regulation sections for this information collection are §§ 303.124, 303.701 and 303.702.

Each statewide system must include a system for compiling and timely reporting accurate data. Each State must have in place, a performance plan that evaluates the State's efforts to implement the requirements and purposes of part C of the Act and describes how the State will improve implementation. Each State also must report annually to the public on the performance of each EIS provider in the State on the targets in the State's performance plan, and the State must report annually to the Secretary on the performance of the State under the State's performance plan.

Annual reporting and recordkeeping burden for this collection of information is estimated to be 180 hours annually for maintaining the SPP and 1800 hours completing the APR, for each of 56 respondents. The total annual burden to States for maintaining the SPP is estimated to be 10,080 hours. Of the total 180 hours, it is estimated that 100 hours will be spent planning the report, 50 hours will be spent writing the report, and 30 hours will be spent typing and compiling the report. Of the estimated 1800 hours for completing the APR, it is estimated that 1720 hours will be spent planning (*i.e.,* setting up data collection processes, reporting data, cleaning and analyzing the data, *etc.*) the report, 40 hours will be spent writing the report, and 40 hours will be spent typing and compiling the report. The total annual burden to States for completing the APR is estimated to be 100,800. The Council reviews, provides comments on, and certifies the lead agency's report, and either agrees or disagrees with the report. The estimated annual burden for the Council is two hours to review, certify, and add comments to each report, as needed.

Collection of information: Annual State Application under part C of the Individuals with Disabilities Education Act, as amended. (Information Collection 1820–0550) Affected regulation sections for this information collection are §§ 303.101, 303.111 through 303.126, and 303.200 through 303.227. Under § 303.101, States are required to submit in the grant application new and/or revised State policies, procedures, methods, certifications, and descriptions that are described in §§ 303.201 through 303.212 of subpart C of these regulations and assurances for the application requirements in §§ 303.111 through 303.126 and 303.221 through 303.227.

There are 56 respondents who are required to submit the part C Annual State Application if they seek to receive Federal part C funds. The annual data burden for this collection is estimated to average 10 hours per respondent. Thus, the annual total burden estimate for this information collection is 560 hours. No changes are expected to the version of Information Collection 1820–0550 that is approved by OMB through December 31, 2010.

Collection of information: Report of Infants and Toddlers Receiving Early Intervention Services in Accordance with part C; Report of Program Settings Where Early Intervention Services are Provided to Infants and Toddlers with Disabilities and Their Families in Accordance with part C of the Act: (Information Collection 1820–0557) Affected regulation sections for this information collection are §§ 303.124 and 303.720 through 303.724.

Each lead agency that receives assistance under part C of the Act must provide data each year to the Secretary and the public on infants and toddlers with disabilities. There are 56 respondents who are required to provide part C data on infants and toddlers with disabilities. There are three Tables found in this collection. The estimated burden for this collection is 107 hours per State agency or 5,987 hours total.

Collection of Information: Report of Dispute Resolution Under part C of the Individuals With Disabilities Education Act Complaints, Mediations, and Due Process Hearings (Information Collection 1820–0678) The affected regulation section for this information collection is § 303.430. Under sections 616(a)(3)(B), 618(a)(1)(F), (a)(1)(H), and (a)(3), 639(a)(1), and 642 of the Act, the Secretary requires States to report data on the dispute resolution procedures the State is required to maintain under § 303.430. Each State must report the number of due process complaints, number of due process hearings conducted and the number of mediations held and the number of settlement agreements reached through such mediations. Additionally, if the State has adopted under § 303.430(d)(2) the part B due process hearing procedures, the State must report on the number of dispute resolution sessions and the number of settlement

agreements reached through such resolution sessions. The data collection form provides instructions and information for States for submitting their dispute resolution data.

There are 56 respondents who are required to submit data regarding the part C dispute resolution process. The total burden for all States was calculated by multiplying the average number of hours by 56. For lead agencies, the estimated average burden is 60 hours per lead agency, representing a total burden estimate of 3,360 hours. The required number of hours needed to produce these data is expected to decline as systems are expanded to collect all required data elements, personnel are trained on reporting these data, and edits are implemented to automate data cleaning.

Collection of Information: State and EIS Record Keeping, Notification, Reporting, and Third Party Disclosure Requirements under part C (Information Collection 1820–0682). Affected regulation sections for this information collection are §§ 303.430(c) and (d)(2), 303.431(b)(2)(i), 303.432 through 303.434, 303.440(b), 303.443(c)(3), and 303.520(a). The Act requires State lead agencies and EIS providers to gather, maintain, report, and disclose various information and data, but the Act does not require this information and data to be submitted to the Department.

Each State lead agency must have on file a list of mediators and procedures to ensure the timely resolution of State complaints. There are 56 State-level record keepers who must maintain a list of mediators. It is estimated to take approximately three hours annually for record keepers to update and maintain the lists, representing a total burden of 168 hours. Each of the 56 State lead agencies process on average three complaints annually. It takes approximately 24 hours for a State lead agency to issue a written decision to a complaint, representing a total burden of 4032 hours. If the State lead agency adopts part B due process hearing procedures, then the lead agency must also have on file a list of hearing officers and must provide parents information on low-cost legal and other services under specific circumstances. There are approximately 45 State due process complaints annually, and the data burden is expected to require an average of 30 minutes per hearing request to inform parents of the availability of low-cost legal services, representing a total burden of 22.5 hours. Approximately 15 States have adopted part B due process procedures for part C. It is estimated to take approximately three hours annually for record keepers to update and maintain the lists, representing a total burden of 45 hours. Additionally, each State lead agency must provide a written notification to parents prior to accessing a child's or parent's public benefits or insurance. For each State lead agency, it takes an average of about 10 hours to draft the notice, representing a total burden of 560 hours. As discussed in the supporting statement, other requirements identified in the NPRM as potential information collections, were not specific collections but rather affirmative responsibilities of lead agencies and EIS providers regarding fiscal and programmatic requirements.

The estimated average burden is 86 hours per lead agency. Annual reporting, notification, and recordkeeping burden for this collection of information is estimated to be approximately 4827.5 hours for 56 respondents (State lead agencies).

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with this order, we intend this document to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM published in the **Federal Register** on May 9, 2007, and in accordance with section 441 of the General Education Provisions Act, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. Based on the response to the NPRM and on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number 84.181)

List of Subjects in 34 CFR Part 303

Education of individuals with disabilities, Grant programs—education, Infants and toddlers, Reporting and recordkeeping requirements.

Dated: August 31, 2011.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by revising part 303 to read as follows:

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES

Subpart A—General

Purpose and Applicable Regulations

Sec.

Definitions Used in This Part

Authority: 20 U.S.C. 1431 through 1444, unless otherwise noted.

Subpart A—General

Purpose and Applicable Regulations

§ 303.1 Purpose of the early intervention program for infants and toddlers with disabilities.

The purpose of this part is to provide financial assistance to States to—

(a) Develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families;

(b) Facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);

(c) Enhance State capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families;

(d) Enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, including historically underrepresented populations, particularly minority, low-income, inner-city, and rural children, and infants and toddlers in foster care; and

(e) Encourage States to expand opportunities for children under three years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.

(Authority: 20 U.S.C. 1400(d)(2), 1431(a)(5), 1431(b))

§ 303.2 Eligible recipients of an award and applicability of this part.

(a) *Eligible recipients of an award.* Eligible recipients include the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, the Secretary of the Interior, and the following jurisdictions: Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(b) *Applicability of this part.*

(1) The provisions of this part apply to—

(i) The State lead agency and any EIS provider that is part of the statewide system of early intervention, regardless of whether that EIS provider receives funds under part C of the Act; and

(ii) All children referred to the part C program, including infants and toddlers with disabilities consistent with the definitions in §§ 303.6 and 303.21, and their families.

(2) The provisions of this part do not apply to any child with a disability receiving a free appropriate public education or FAPE under 34 CFR part 300.

(Authority: 20 U.S.C. 1401(31), 1434, 1435(a)(10)(A))

§ 303.3 Applicable regulations.

(a) The following regulations apply to this part:

(1) The regulations in this part 303.

(2) The Education Department General Administrative Regulations (EDGAR), including 34 CFR parts 76 (except for § 76.103), 77, 79, 80, 81, 82, 84, 85, and 86.

(b) In applying the regulations cited in paragraph (a)(2) of this section, any reference to—

(1) *State educational agency* means the lead agency under this part; and

(2) *Education records* or *records* means early intervention records.

(Authority: 20 U.S.C. 1221(b), 1221e–3, 1431–1444)

Definitions Used in This Part

§ 303.4 Act.

Act means the Individuals with Disabilities Education Act, as amended.

(Authority: 20 U.S.C. 1400(a))

§ 303.5 At-risk infant or toddler.

At-risk infant or toddler means an individual under three years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual. At the State's discretion, *at-risk infant or toddler* may include an infant or toddler who is at risk of experiencing developmental delays because of biological or environmental factors that can be identified (including low birth weight, respiratory distress as a newborn, lack of oxygen, brain hemorrhage, infection, nutritional deprivation, a history of abuse or neglect, and being directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure).

(Authority: 20 U.S.C. 1432(1), 1432(5)(B)(i) and 1437(a)(6))

§ 303.6 Child.

Child means an individual under the age of six and may include an *infant or toddler with a disability,* as that term is defined in § 303.21.

(Authority: 20 U.S.C. 1432(5))

§ 303.7 Consent.

Consent means that—

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language, as defined in § 303.25;

(b) The parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought, and the consent form describes that activity and lists the early intervention records (if any) that will be released and to whom they will be released; and

(c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(2) If a parent revokes consent, that revocation is not retroactive (*i.e.,* it does not apply to an action that occurred before the consent was revoked).

(Authority: 20 U.S.C. 1439)

§ 303.8 Council.

Council means the State Interagency Coordinating Council that meets the requirements of subpart G of this part.

(Authority: 20 U.S.C. 1432(2))

§ 303.9 Day.

Day means calendar day, unless otherwise indicated.

(Authority: 20 U.S.C. 1221e–3)

§ 303.10 Developmental delay.

Developmental delay, when used with respect to a child residing in a State, has the meaning given that term by the State under § 303.111.

(Authority: 20 U.S.C. 1432(3))

§ 303.11 Early intervention service program.

Early intervention service program or *EIS program* means an entity designated by the lead agency for reporting under §§ 303.700 through 303.702.

(Authority: 20 U.S.C. 1416, 1431–1444)

§ 303.12 Early intervention service provider.

(a) *Early intervention service provider* or *EIS provider* means an entity (whether public, private, or nonprofit) or an individual that provides early intervention services under part C of the Act, whether or not the entity or individual receives Federal funds under part C of the Act, and may include, where appropriate, the lead agency and a public agency responsible for providing early intervention services to infants and toddlers with disabilities in the State under part C of the Act.

(b) An EIS provider is responsible for—

(1) Participating in the multidisciplinary individualized family service plan (IFSP) Team's ongoing assessment of an infant or toddler with a disability and a family-directed assessment of the resources, priorities, and concerns of the infant's or toddler's family, as related to the needs of the infant or toddler, in the development of integrated goals and outcomes for the IFSP;

(2) Providing early intervention services in accordance with the IFSP of the infant or toddler with a disability; and

(3) Consulting with and training parents and others regarding the provision of the early intervention services described in the IFSP of the infant or toddler with a disability.

(Authority: 20 U.S.C. 1431–1444)

§ 303.13 Early intervention services.

(a) *General. Early intervention services* means developmental services that—

(1) Are provided under public supervision;

(2) Are selected in collaboration with the parents;

(3) Are provided at no cost, except, subject to §§ 303.520 and 303.521, where Federal or State law provides for a system of payments by families, including a schedule of sliding fees;

(4) Are designed to meet the developmental needs of an infant or toddler with a disability and the needs of the family to assist appropriately in the infant's or toddler's development, as identified by the IFSP Team, in any one or more of the following areas, including—

(i) Physical development;

(ii) Cognitive development;

(iii) Communication development;

(iv) Social or emotional development; or

(v) Adaptive development;

(5) Meet the standards of the State in which the early intervention services are provided, including the requirements of part C of the Act;

(6) Include services identified under paragraph (b) of this section;

(7) Are provided by *qualified personnel* (as that term is defined in § 303.31), including the types of personnel listed in paragraph (c) of this section;

(8) To the maximum extent appropriate, are provided in natural environments, as defined in § 303.26 and consistent with §§ 303.126 and 303.344(d); and

(9) Are provided in conformity with an IFSP adopted in accordance with section 636 of the Act and § 303.20.

(b) *Types of early intervention services.* Subject to paragraph (d) of this section, early intervention services include the following services defined in this paragraph:

(1) *Assistive technology device and service* are defined as follows:

(i) *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an infant or toddler with a disability. The term does not include a medical device that is surgically implanted, including a cochlear implant, or the optimization (*e.g.,* mapping), maintenance, or replacement of that device.

(ii) *Assistive technology service* means any service that directly assists an infant or toddler with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(A) The evaluation of the needs of an infant or toddler with a disability, including a functional evaluation of the infant or toddler with a disability in the child's customary environment;

(B) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by infants or toddlers with disabilities;

(C) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(D) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) Training or technical assistance for an infant or toddler with a disability or, if appropriate, that child's family; and

(F) Training or technical assistance for professionals (including individuals providing education or rehabilitation services) or other individuals who provide services to, or are otherwise substantially involved in the major life functions of, infants and toddlers with disabilities.

(2) *Audiology services* include—

(i) Identification of children with auditory impairments, using at-risk criteria and appropriate audiologic screening techniques;

(ii) Determination of the range, nature, and degree of hearing loss and

communication functions, by use of audiological evaluation procedures;

(iii) Referral for medical and other services necessary for the habilitation or rehabilitation of an infant or toddler with a disability who has an auditory impairment;

(iv) Provision of auditory training, aural rehabilitation, speech reading and listening devices, orientation and training, and other services;

(v) Provision of services for prevention of hearing loss; and

(vi) Determination of the child's individual amplification, including selecting, fitting, and dispensing appropriate listening and vibrotactile devices, and evaluating the effectiveness of those devices.

(3) *Family training, counseling, and home visits* means services provided, as appropriate, by social workers, psychologists, and other qualified personnel to assist the family of an infant or toddler with a disability in understanding the special needs of the child and enhancing the child's development.

(4) *Health services* has the meaning given the term in § 303.16.

(5) *Medical services* means services provided by a licensed physician for diagnostic or evaluation purposes to determine a child's developmental status and need for early intervention services.

(6) *Nursing services* include—

(i) The assessment of health status for the purpose of providing nursing care, including the identification of patterns of human response to actual or potential health problems;

(ii) The provision of nursing care to prevent health problems, restore or improve functioning, and promote optimal health and development; and

(iii) The administration of medications, treatments, and regimens prescribed by a licensed physician.

(7) *Nutrition services* include—

(i) Conducting individual assessments in—

(A) Nutritional history and dietary intake;

(B) Anthropometric, biochemical, and clinical variables;

(C) Feeding skills and feeding problems; and

(D) Food habits and food preferences;

(ii) Developing and monitoring appropriate plans to address the nutritional needs of children eligible under this part, based on the findings in paragraph (b)(7)(i) of this section; and

(iii) Making referrals to appropriate community resources to carry out nutrition goals.

(8) *Occupational therapy* includes services to address the functional needs of an infant or toddler with a disability related to adaptive development, adaptive behavior, and play, and sensory, motor, and postural development. These services are designed to improve the child's functional ability to perform tasks in home, school, and community settings, and include—

(i) Identification, assessment, and intervention;

(ii) Adaptation of the environment, and selection, design, and fabrication of assistive and orthotic devices to facilitate development and promote the acquisition of functional skills; and

(iii) Prevention or minimization of the impact of initial or future impairment, delay in development, or loss of functional ability.

(9) *Physical therapy* includes services to address the promotion of sensorimotor function through enhancement of musculoskeletal status, neurobehavioral organization, perceptual and motor development, cardiopulmonary status, and effective environmental adaptation. These services include—

(i) Screening, evaluation, and assessment of children to identify movement dysfunction;

(ii) Obtaining, interpreting, and integrating information appropriate to program planning to prevent, alleviate, or compensate for movement dysfunction and related functional problems; and

(iii) Providing individual and group services or treatment to prevent, alleviate, or compensate for, movement dysfunction and related functional problems.

(10) *Psychological services* include—

(i) Administering psychological and developmental tests and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and child and family conditions related to learning, mental health, and development; and

(iv) Planning and managing a program of psychological services, including psychological counseling for children and parents, family counseling, consultation on child development, parent training, and education programs.

(11) *Service coordination services* has the meaning given the term in § 303.34.

(12) *Sign language and cued language services* include teaching sign language, cued language, and auditory/oral language, providing oral transliteration services (such as amplification), and providing sign and cued language interpretation.

(13) *Social work services* include—

(i) Making home visits to evaluate a child's living conditions and patterns of parent-child interaction;

(ii) Preparing a social or emotional developmental assessment of the infant or toddler within the family context;

(iii) Providing individual and family-group counseling with parents and other family members, and appropriate social skill-building activities with the infant or toddler and parents;

(iv) Working with those problems in the living situation (home, community, and any center where early intervention services are provided) of an infant or toddler with a disability and the family of that child that affect the child's maximum utilization of early intervention services; and

(v) Identifying, mobilizing, and coordinating community resources and services to enable the infant or toddler with a disability and the family to receive maximum benefit from early intervention services.

(14) *Special instruction* includes—

(i) The design of learning environments and activities that promote the infant's or toddler's acquisition of skills in a variety of developmental areas, including cognitive processes and social interaction;

(ii) Curriculum planning, including the planned interaction of personnel, materials, and time and space, that leads to achieving the outcomes in the IFSP for the infant or toddler with a disability;

(iii) Providing families with information, skills, and support related to enhancing the skill development of the child; and

(iv) Working with the infant or toddler with a disability to enhance the child's development.

(15) *Speech-language pathology services* include—

(i) Identification of children with communication or language disorders and delays in development of communication skills, including the diagnosis and appraisal of specific disorders and delays in those skills;

(ii) Referral for medical or other professional services necessary for the habilitation or rehabilitation of children with communication or language disorders and delays in development of communication skills; and

(iii) Provision of services for the habilitation, rehabilitation, or prevention of communication or language disorders and delays in development of communication skills.

(16) *Transportation and related costs* include the cost of travel and other costs that are necessary to enable an infant or

toddler with a disability and the child's family to receive early intervention services.

(17) *Vision services* mean—

(i) Evaluation and assessment of visual functioning, including the diagnosis and appraisal of specific visual disorders, delays, and abilities that affect early childhood development;

(ii) Referral for medical or other professional services necessary for the habilitation or rehabilitation of visual functioning disorders, or both; and

(iii) Communication skills training, orientation and mobility training for all environments, visual training, and additional training necessary to activate visual motor abilities.

(c) *Qualified personnel.* The following are the types of qualified personnel who provide early intervention services under this part:

(1) Audiologists.

(2) Family therapists.

(3) Nurses.

(4) Occupational therapists.

(5) Orientation and mobility specialists.

(6) Pediatricians and other physicians for diagnostic and evaluation purposes.

(7) Physical therapists.

(8) Psychologists.

(9) Registered dieticians.

(10) Social workers.

(11) Special educators, including teachers of children with hearing impairments (including deafness) and teachers of children with visual impairments (including blindness).

(12) Speech and language pathologists.

(13) Vision specialists, including ophthalmologists and optometrists.

(d) *Other services.* The services and personnel identified and defined in paragraphs (b) and (c) of this section do not comprise exhaustive lists of the types of services that may constitute early intervention services or the types of qualified personnel that may provide early intervention services. Nothing in this section prohibits the identification in the IFSP of another type of service as an early intervention service provided that the service meets the criteria identified in paragraph (a) of this section or of another type of personnel that may provide early intervention services in accordance with this part, provided such personnel meet the requirements in § 303.31.

(Authority: 20 U.S.C. 1432(4))

§ 303.14 Elementary school.

Elementary school means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

(Authority: 20 U.S.C. 1401(6))

§ 303.15 Free appropriate public education.

Free appropriate public education or *FAPE,* as used in §§ 303.211, 303.501, and 303.521, means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the State educational agency (SEA), including the requirements of part B of the Act;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR 300.320 through 300.324.

(Authority: 20 U.S.C. 1401(9))

§ 303.16 Health services.

(a) *Health services* mean services necessary to enable an otherwise eligible child to benefit from the other early intervention services under this part during the time that the child is eligible to receive early intervention services.

(b) The term includes—

(1) Such services as clean intermittent catheterization, tracheostomy care, tube feeding, the changing of dressings or colostomy collection bags, and other health services; and

(2) Consultation by physicians with other service providers concerning the special health care needs of infants and toddlers with disabilities that will need to be addressed in the course of providing other early intervention services.

(c) The term does not include—

(1) Services that are—

(i) Surgical in nature (such as cleft palate surgery, surgery for club foot, or the shunting of hydrocephalus);

(ii) Purely medical in nature (such as hospitalization for management of congenital heart ailments, or the prescribing of medicine or drugs for any purpose); or

(iii) Related to the implementation, optimization (*e.g.,* mapping), maintenance, or replacement of a medical device that is surgically implanted, including a cochlear implant.

(A) Nothing in this part limits the right of an infant or toddler with a disability with a surgically implanted device (*e.g.,* cochlear implant) to receive the early intervention services that are identified in the child's IFSP as being needed to meet the child's developmental outcomes.

(B) Nothing in this part prevents the EIS provider from routinely checking that either the hearing aid or the external components of a surgically implanted device (*e.g.,* cochlear implant) of an infant or toddler with a disability are functioning properly;

(2) Devices (such as heart monitors, respirators and oxygen, and gastrointestinal feeding tubes and pumps) necessary to control or treat a medical condition; and

(3) Medical-health services (such as immunizations and regular ''well-baby'' care) that are routinely recommended for all children.

(Authority: 20 U.S.C. 1432(4))

§ 303.17 Homeless children.

Homeless children means children who meet the definition given the term *homeless children and youths* in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 *et seq.*

(Authority: 20 U.S.C. 1401(11))

§ 303.18 Include; including.

Include or *including* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e–3)

§ 303.19 Indian; Indian tribe.

(a) *Indian* means an individual who is a member of an Indian tribe.

(b) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*).

(c) Nothing in this definition is intended to indicate that the Secretary of the Interior is required to provide services or funding to a State Indian Tribe that is not listed in the **Federal Register** list of Indian entities recognized as eligible to receive services from the United States, published pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1.

(Authority: 20 U.S.C. 1401(12)–(13))

§ 303.20 Individualized family service plan.

Individualized family service plan or *IFSP* means a written plan for providing early intervention services to an infant or toddler with a disability under this part and the infant's or toddler's family that—

(a) Is based on the evaluation and assessment described in § 303.321;

(b) Includes the content specified in § 303.344;

(c) Is implemented as soon as possible once parental consent for the early

intervention services in the IFSP is obtained (consistent with § 303.420); and

(d) Is developed in accordance with the IFSP procedures in §§ 303.342, 303.343, and 303.345.

(Authority: 20 U.S.C. 1401(15), 1435(a)(4), 1436)

§ 303.21 Infant or toddler with a disability.

(a) *Infant or toddler with a disability* means an individual under three years of age who needs early intervention services because the individual—

(1) Is experiencing a developmental delay, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas:

(i) Cognitive development.

(ii) Physical development, including vision and hearing.

(iii) Communication development.

(iv) Social or emotional development.

(v) Adaptive development; or

(2) Has a diagnosed physical or mental condition that—

(i) Has a high probability of resulting in developmental delay; and

(ii) Includes conditions such as chromosomal abnormalities; genetic or congenital disorders; sensory impairments; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; severe attachment disorders; and disorders secondary to exposure to toxic substances, including fetal alcohol syndrome.

(b) *Infant or toddler with a disability* may include, at a State's discretion, an *at-risk infant or toddler* (as defined in § 303.5).

(c) *Infant or toddler with a disability* may include, at a State's discretion, a child with a disability who is eligible for services under section 619 of the Act and who previously received services under this part until the child enters, or is eligible under State law to enter, kindergarten or elementary school, as appropriate, provided that any programs under this part must include—

(1) An educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children ages three and older who receive part C services pursuant to § 303.211; and

(2) A written notification to parents of a child with a disability who is eligible for services under section 619 of the Act and who previously received services under this part of their rights and responsibilities in determining whether their child will continue to receive services under this part or participate in preschool programs under section 619 of the Act.

(Authority: 20 U.S.C. 1401(16), 1432(5))

§ 303.22 Lead agency.

Lead agency means the agency designated by the State's Governor under section 635(a)(10) of the Act and § 303.120 that receives funds under section 643 of the Act to administer the State's responsibilities under part C of the Act.

(Authority: 20 U.S.C. 1435(a)(10))

§ 303.23 Local educational agency.

(a) *General. Local educational agency* or *LEA* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) *Educational service agencies and other public institutions or agencies.* The term includes the following:

(1) *Educational service agency,* defined as a regional public multiservice agency—

(i) Authorized by State law to develop, manage, and provide services or programs to LEAs; and

(ii) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State.

(2) Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public charter school that is established as an LEA under State law.

(3) Entities that meet the definition of *intermediate educational unit* or *IEU* in section 602(23) of the Act, as in effect prior to June 4, 1997. Under that definition an *intermediate educational unit* or *IEU* means any public authority other than an LEA that—

(i) Is under the general supervision of a State educational agency;

(ii) Is established by State law for the purpose of providing FAPE on a regional basis; and

(iii) Provides special education and related services to children with disabilities within the State.

(c) *BIE-funded schools.* The term includes an elementary school or secondary school funded by the Bureau of Indian Education, and not subject to the jurisdiction of any SEA other than the Bureau of Indian Education, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the Act with the smallest student population.

(Authority: 20 U.S.C. 1401(5), 1401(19))

§ 303.24 Multidisciplinary.

Multidisciplinary means the involvement of two or more separate disciplines or professions and with respect to—

(a) Evaluation of the child in §§ 303.113 and 303.321(a)(1)(i) and assessments of the child and family in § 303.321(a)(1)(ii), may include one individual who is qualified in more than one discipline or profession; and

(b) The IFSP Team in § 303.340 must include the involvement of the parent and two or more individuals from separate disciplines or professions and one of these individuals must be the service coordinator (consistent with § 303.343(a)(1)(iv)).

(Authority: 20 U.S.C. 1221e–3, 1435(a)(3), 1436(a)(1), 1436(a)(3))

§ 303.25 Native language.

(a) *Native language,* when used with respect to an individual who is limited English proficient or LEP (as that term is defined in section 602(18) of the Act), means—

(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)(2) of this section; and

(2) For evaluations and assessments conducted pursuant to § 303.321(a)(5) and (a)(6), the language normally used by the child, if determined developmentally appropriate for the child by qualified personnel conducting the evaluation or assessment.

(b) *Native language,* when used with respect to an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, means the mode of communication that is normally used by the individual (such as sign language, braille, or oral communication).

(Authority: 20 U.S.C. 1401(20))

§ 303.26 Natural environments.

Natural environments means settings that are natural or typical for a same-aged infant or toddler without a disability, may include the home or

community settings, and must be consistent with the provisions of § 303.126.

(Authority: 20 U.S.C. 1432, 1435, 1436)

§ 303.27 Parent.

(a) *Parent* means—

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make early intervention, educational, health or developmental decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with § 303.422 or section 639(a)(5) of the Act.

(b)(1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational or early intervention service decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (a)(4) of this section to act as the ''parent'' of a child or to make educational or early intervention service decisions on behalf of a child, then the person or persons must be determined to be the ''parent'' for purposes of part C of the Act, except that if an EIS provider or a public agency provides any services to a child or any family member of that child, that EIS provider or public agency may not act as the parent for that child.

(Authority: 20 U.S.C. 1401(23), 1439(a)(5))

§ 303.28 Parent training and information center.

Parent training and information center means a center assisted under section 671 or 672 of the Act.

(Authority: 20 U.S.C. 1401(25))

§ 303.29 Personally identifiable information.

Personally identifiable information means personally identifiable information as defined in 34 CFR 99.3, as amended, except that the term ''student'' in the definition of personally identifiable information in 34 CFR 99.3 means ''child'' as used in this part and any reference to ''school'' means ''EIS provider'' as used in this part.

(Authority: 20 U.S.C. 1415, 1439)

§ 303.30 Public agency.

As used in this part, *public agency* means the lead agency and any other agency or political subdivision of the State.

(Authority: 20 U.S.C. 1435(a)(10))

§ 303.31 Qualified personnel.

Qualified personnel means personnel who have met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the areas in which the individuals are conducting evaluations or assessments or providing early intervention services.

(Authority: 20 U.S.C. 1432(4)(F))

§ 303.32 Scientifically based research.

Scientifically based research has the meaning given the term in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). In applying the ESEA to the regulations under part C of the Act, any reference to ''education activities and programs'' refers to ''early intervention services.''

(Authority: 20 U.S.C. 1435(a)(2))

§ 303.33 Secretary.

Secretary means the Secretary of Education.

(Authority: 20 U.S.C. 1401(28))

§ 303.34 Service coordination services (case management).

(a) *General.* (1) As used in this part, *service coordination services* mean services provided by a service coordinator to assist and enable an infant or toddler with a disability and the child's family to receive the services and rights, including procedural safeguards, required under this part.

(2) Each infant or toddler with a disability and the child's family must be provided with one service coordinator who is responsible for—

(i) Coordinating all services required under this part across agency lines; and

(ii) Serving as the single point of contact for carrying out the activities described in paragraphs (a)(3) and (b) of this section.

(3) Service coordination is an active, ongoing process that involves—

(i) Assisting parents of infants and toddlers with disabilities in gaining access to, and coordinating the provision of, the early intervention services required under this part; and

(ii) Coordinating the other services identified in the IFSP under § 303.344(e) that are needed by, or are being provided to, the infant or toddler with a disability and that child's family.

(b) *Specific service coordination services.* Service coordination services include—

(1) Assisting parents of infants and toddlers with disabilities in obtaining access to needed early intervention services and other services identified in the IFSP, including making referrals to providers for needed services and scheduling appointments for infants and toddlers with disabilities and their families;

(2) Coordinating the provision of early intervention services and other services (such as educational, social, and medical services that are not provided for diagnostic or evaluative purposes) that the child needs or is being provided;

(3) Coordinating evaluations and assessments;

(4) Facilitating and participating in the development, review, and evaluation of IFSPs;

(5) Conducting referral and other activities to assist families in identifying available EIS providers;

(6) Coordinating, facilitating, and monitoring the delivery of services required under this part to ensure that the services are provided in a timely manner;

(7) Conducting follow-up activities to determine that appropriate part C services are being provided;

(8) Informing families of their rights and procedural safeguards, as set forth in subpart E of this part and related resources;

(9) Coordinating the funding sources for services required under this part; and

(10) Facilitating the development of a transition plan to preschool, school, or, if appropriate, to other services.

(c) *Use of the term service coordination or service coordination services.* The lead agency's or an EIS provider's use of the term *service coordination* or *service coordination services* does not preclude characterization of the services as case management or any other service that is covered by another payor of last resort (including Title XIX of the Social Security Act—Medicaid), for purposes of claims in compliance with the requirements of §§ 303.501 through 303.521 (Payor of last resort provisions).

(Authority: 20 U.S.C. 1432(4), 1435(a)(4), 1436(d)(7), 1440)

§ 303.35 State.

Except as provided in § 303.732(d)(3) (regarding State allotments under this part), *State* means each of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, and the four outlying areas and jurisdictions of Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1401(31))

§ 303.36 State educational agency.

(a) *State educational agency* or *SEA* means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(b) The term includes the agency that receives funds under sections 611 and 619 of the Act to administer the State's responsibilities under part B of the Act.

(Authority: 20 U.S.C. 1401(32))

§ 303.37 Ward of the State.

(a) *General.* Subject to paragraph (b) of this section, *ward of the State* means a child who, as determined by the State where the child resides, is—

(1) A foster child;

(2) A ward of the State; or

(3) In the custody of a public child welfare agency.

(b) *Exception. Ward of the State* does not include a foster child who has a foster parent who meets the definition of a *parent* in § 303.27.

(Authority: 20 U.S.C. 1401(36))

Subpart B—State Eligibility for a Grant and Requirements for a Statewide System

General Authority and Eligibility

§ 303.100 General authority.

The Secretary, in accordance with part C of the Act, makes grants to States (from their allotments under section 643 of the Act) to assist each State to maintain and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide early intervention services for infants and toddlers with disabilities and their families.

(Authority: 20 U.S.C. 1433)

§ 303.101 State eligibility—requirements for a grant under this part.

In order to be eligible for a grant under part C of the Act for any fiscal year, a State must meet the following conditions:

(a) *Assurances regarding early intervention services and a statewide system.* The State must provide assurances to the Secretary that—

(1) The State has adopted a policy that appropriate early intervention services, as defined in § 303.13, are available to all infants and toddlers with disabilities in the State and their families, including—

(i) Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State;

(ii) Infants and toddlers with disabilities who are homeless children and their families; and

(iii) Infants and toddlers with disabilities who are wards of the State; and

(2) The State has in effect a statewide system of early intervention services that meets the requirements of section 635 of the Act, including policies and procedures that address, at a minimum, the components required in §§ 303.111 through 303.126.

(b) *State application and assurances.* The State must provide information and assurances to the Secretary, in accordance with subpart C of this part, including—

(1) Information that shows that the State meets the State application requirements in §§ 303.200 through 303.212; and

(2) Assurances that the State also meets the requirements in §§ 303.221 through 303.227.

(c) *Approval before implementation.* The State must obtain approval by the Secretary before implementing any policy or procedure required to be submitted as part of the State's application in §§ 303.203, 303.204, 303.206, 303.207, 303.208, 303.209, and 303.211.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1434, 1435, 1437)

State Conformity With Part C of the Act and Abrogation of State Sovereign Immunity

§ 303.102 State conformity with Part C of the Act.

Each State that receives funds under part C of the Act must ensure that any State rules, regulations, and policies relating to this part conform to the purposes and requirements of this part.

(Authority: 20 U.S.C. 1407(a)(1))

§ 303.103 Abrogation of State sovereign immunity.

(a) *General.* A State is not immune under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of part C of the Act.

(b) *Remedies.* In a suit against a State for a violation of part C of the Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in a suit against any public entity other than a State.

(c) *Effective date.* Paragraphs (a) and (b) of this section apply with respect to violations that occur in whole or part after October 30, 1990, the date of enactment of the Education of the Handicapped Act Amendments of 1990.

(Authority: 20 U.S.C. 1403)

Equipment and Construction

§ 303.104 Acquisition of equipment and construction or alteration of facilities.

(a) *General.* If the Secretary determines that a program authorized under part C of the Act will be improved by permitting program funds to be used to acquire appropriate equipment or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.

(b) *Compliance with certain regulations.* Any construction of new facilities or alteration of existing facilities under paragraph (a) of this section must comply with the requirements of—

(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the ''Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities''); or

(2) Appendix A of subpart 101–19.6 of title 41, Code of Federal Regulations (commonly known as the ''Uniform Federal Accessibility Standards'').

(Authority: 20 U.S.C. 1404)

Positive Efforts To Employ and Advance Qualified Individuals With Disabilities

§ 303.105 Positive efforts to employ and advance qualified individuals with disabilities.

Each recipient of assistance under part C of the Act must make positive efforts to employ and advance in employment, qualified individuals with disabilities in programs assisted under part C of the Act.

(Authority: 20 U.S.C. 1405)

Minimum Components of a Statewide System

§ 303.110 Minimum components of a statewide system.

Each statewide system (system) must include, at a minimum, the components

described in §§ 303.111 through 303.126.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a))

§ 303.111 State definition of developmental delay.

Each system must include the State's rigorous definition of *developmental delay,* consistent with §§ 303.10 and 303.203(c), that will be used by the State in carrying out programs under part C of the Act in order to appropriately identify infants and toddlers with disabilities who are in need of services under part C of the Act. The definition must—

(a) Describe, for each of the areas listed in § 303.21(a)(1), the evaluation and assessment procedures, consistent with § 303.321, that will be used to measure a child's development; and

(b) Specify the level of developmental delay in functioning or other comparable criteria that constitute a developmental delay in one or more of the developmental areas identified in § 303.21(a)(1).

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(1))

§ 303.112 Availability of early intervention services.

Each system must include a State policy that is in effect and that ensures that appropriate early intervention services are based on scientifically based research, to the extent practicable, and are available to all infants and toddlers with disabilities and their families, including—

(a) Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State; and

(b) Infants and toddlers with disabilities who are homeless children and their families.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(2))

§ 303.113 Evaluation, assessment, and nondiscriminatory procedures.

(a) Subject to paragraph (b) of this section, each system must ensure the performance of—

(1) A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler with a disability in the State; and

(2) A family-directed identification of the needs of the family of the infant or toddler to assist appropriately in the development of the infant or toddler.

(b) The evaluation and family-directed identification required in paragraph (a) of this section must meet the requirements of § 303.321.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(3))

§ 303.114 Individualized family service plan (IFSP).

Each system must ensure, for each infant or toddler with a disability and his or her family in the State, that an IFSP, as defined in § 303.20, is developed and implemented that meets the requirements of §§ 303.340 through 303.345, and that includes service coordination services, as defined in § 303.34.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(4))

§ 303.115 Comprehensive child find system.

Each system must include a comprehensive child find system that meets the requirements in §§ 303.302 and 303.303.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(5))

§ 303.116 Public awareness program.

Each system must include a public awareness program that—

(a) Focuses on the early identification of infants and toddlers with disabilities; and

(b) Provides information to parents of infants and toddlers through primary referral sources in accordance with § 303.301.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(6))

§ 303.117 Central directory.

Each system must include a central directory that is accessible to the general public (*i.e.,* through the lead agency's Web site and other appropriate means) and includes accurate, up-to-date information about—

(a) Public and private early intervention services, resources, and experts available in the State;

(b) Professional and other groups (including parent support, and training and information centers, such as those funded under the Act) that provide assistance to infants and toddlers with disabilities eligible under part C of the Act and their families; and

(c) Research and demonstration projects being conducted in the State relating to infants and toddlers with disabilities.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(7))

§ 303.118 Comprehensive system of personnel development (CSPD).

Each system must include a comprehensive system of personnel development, including the training of paraprofessionals and the training of primary referral sources with respect to the basic components of early intervention services available in the State. A comprehensive system of personnel development—

(a) Must include—

(1) Training personnel to implement innovative strategies and activities for the recruitment and retention of EIS providers;

(2) Promoting the preparation of EIS providers who are fully and appropriately qualified to provide early intervention services under this part; and

(3) Training personnel to coordinate transition services for infants and toddlers with disabilities who are transitioning from an early intervention service program under part C of the Act to a preschool program under section 619 of the Act, Head Start, Early Head Start, an elementary school program under part B of the Act, or another appropriate program.

(b) May include—

(1) Training personnel to work in rural and inner-city areas;

(2) Training personnel in the emotional and social development of young children; and

(3) Training personnel to support families in participating fully in the development and implementation of the child's IFSP; and

(4) Training personnel who provide services under this part using standards that are consistent with early learning personnel development standards funded under the State Advisory Council on Early Childhood Education and Care established under the Head Start Act, if applicable.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(8))

§ 303.119 Personnel standards.

(a) *General.* Each system must include policies and procedures relating to the establishment and maintenance of qualification standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(b) *Qualification standards.* The policies and procedures required in paragraph (a) of this section must provide for the establishment and maintenance of qualification standards that are consistent with any State-

approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the profession, discipline, or area in which personnel are providing early intervention services.

(c) *Use of paraprofessionals and assistants.* Nothing in part C of the Act may be construed to prohibit the use of paraprofessionals and assistants who are appropriately trained and supervised in accordance with State law, regulation, or written policy to assist in the provision of early intervention services under part C of the Act to infants and toddlers with disabilities.

(d) *Policy to address shortage of personnel.* A State may adopt a policy that includes making ongoing good-faith efforts to recruit and hire appropriately and adequately trained personnel to provide early intervention services to infants and toddlers with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in paragraphs (a) and (b) of this section.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(9), 1435(b))

§ 303.120 Lead agency role in supervision, monitoring, funding, interagency coordination, and other responsibilities.

Each system must include a single line of responsibility in a lead agency designated or established by the Governor that is responsible for the following:

(a)(1) The general administration and supervision of programs and activities administered by agencies, institutions, organizations, and EIS providers receiving assistance under part C of the Act.

(2) The monitoring of programs and activities used by the State to carry out part C of the Act (whether or not the programs or activities are administered by agencies, institutions, organizations, and EIS providers that are receiving assistance under part C of the Act), to ensure that the State complies with part C of the Act, including—

(i) Monitoring agencies, institutions, organizations, and EIS providers used by the State to carry out part C of the Act;

(ii) Enforcing any obligations imposed on those agencies, institutions, organizations, and EIS providers under part C of the Act and these regulations;

(iii) Providing technical assistance, if necessary, to those agencies, institutions, organizations, and EIS providers;

(iv) Correcting any noncompliance identified through monitoring as soon as possible and in no case later than one year after the lead agency's identification of the noncompliance; and

(v) Conducting the activities in paragraphs (a)(2)(i) through (a)(2)(iv) of this section, consistent with §§ 303.700 through 303.707, and any other activities required by the State under those sections.

(b) The identification and coordination of all available resources for early intervention services within the State, including those from Federal, State, local, and private sources, consistent with subpart F of this part.

(c) The assignment of financial responsibility in accordance with subpart F of this part.

(d) The development of procedures in accordance with subpart F of this part to ensure that early intervention services are provided to infants and toddlers with disabilities and their families under part C of the Act in a timely manner, pending the resolution of any disputes among public agencies or EIS providers.

(e) The resolution of intra- and interagency disputes in accordance with subpart F of this part.

(f) The entry into formal interagency agreements or other written methods of establishing financial responsibility, consistent with § 303.511, that define the financial responsibility of each agency for paying for early intervention services (consistent with State law) and procedures for resolving disputes and that include all additional components necessary to ensure meaningful cooperation and coordination as set forth in subpart F of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1416, 1435(a)(10), 1442)

§ 303.121 Policy for contracting or otherwise arranging for services.

Each system must include a policy pertaining to the contracting or making of other arrangements with public or private individuals or agency service providers to provide early intervention services in the State, consistent with the provisions of part C of the Act, including the contents of the application, and the conditions of the contract or other arrangements. The policy must—

(a) Include a requirement that all early intervention services must meet State standards and be consistent with the provisions of this part; and

(b) Be consistent with the Education Department General Administrative Regulations in 34 CFR part 80.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(11))

§ 303.122 Reimbursement procedures.

Each system must include procedures for securing the timely reimbursement of funds used under part C of the Act, in accordance with subpart F of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(12), 1440(a))

§ 303.123 Procedural safeguards.

Each system must include procedural safeguards that meet the requirements of subpart E of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(13), 1439)

§ 303.124 Data collection.

(a) Each statewide system must include a system for compiling and reporting timely and accurate data that meets the requirements in paragraph (b) of this section and §§ 303.700 through 303.702 and 303.720 through 303.724.

(b) The data system required in paragraph (a) of this section must include a description of the process that the State uses, or will use, to compile data on infants or toddlers with disabilities receiving early intervention services under this part, including a description of the State's sampling methods, if sampling is used, for reporting the data required by the Secretary under sections 616 and 618 of the Act and §§ 303.700 through 303.707 and 303.720 through 303.724.

(Approved by Office of Management and Budget under control number 1820–0550, 1820–0557 and 1820–0578)

(Authority: 20 U.S.C. 1416, 1418(a)-(c), 1435(a)(14), 1442)

§ 303.125 State interagency coordinating council.

Each system must include a State Interagency Coordinating Council (Council) that meets the requirements of subpart G of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(15))

§ 303.126 Early intervention services in natural environments.

Each system must include policies and procedures to ensure, consistent with §§ 303.13(a)(8) (early intervention services), 303.26 (natural environments), and 303.344(d)(1)(ii)

(content of an IFSP), that early intervention services for infants and toddlers with disabilities are provided—

(a) To the maximum extent appropriate, in natural environments; and

(b) In settings other than the natural environment that are most appropriate, as determined by the parent and the IFSP Team, only when early intervention services cannot be achieved satisfactorily in a natural environment.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(16))

Subpart C—State Application and Assurances

General

§ 303.200 State application and assurances.

Each application must contain—

(a) The specific State application requirements (including certifications, descriptions, methods, and policies and procedures) required in §§ 303.201 through 303.212; and

(b) The assurances required in §§ 303.221 through 303.227.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437)

Application Requirements

§ 303.201 Designation of lead agency.

Each application must include the name of the State lead agency, as designated under § 303.120, that will be responsible for the administration of funds provided under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(1))

§ 303.202 Certification regarding financial responsibility.

Each application must include a certification to the Secretary that the arrangements to establish financial responsibility for the provision of part C services among appropriate public agencies under § 303.511 and the lead agency's contracts with EIS providers regarding financial responsibility for the provision of part C services both meet the requirements in subpart F of this part (§§ 303.500 through 303.521) and are current as of the date of submission of the certification.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(2))

§ 303.203 Statewide system and description of services.

Each application must include —

(a) A description of services to be provided under this part to infants and toddlers with disabilities and their families through the State's system;

(b) The State's policies and procedures regarding the identification and coordination of all available resources within the State from Federal, State, local, and private sources as required under subpart F of this part and including—

(1) Policies or procedures adopted by the State as its system of payments that meet the requirements in §§ 303.510, 303.520 and 303.521 (regarding the use of public insurance or benefits, private insurance, or family costs or fees); and

(2) Methods used by the State to implement the requirements in § 303.511(b)(2) and (b)(3); and

(c) The State's rigorous definition of developmental delay as required under §§ 303.10 and 303.111.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1432(3), 1432(4)(B), 1432(4)(C), 1435(a)(1), 1435(a)(10)(B), 1437(a)(3), 1440)

§ 303.204 Application's definition of at-risk infants and toddlers and description of services.

If the State provides services under this part to at-risk infants and toddlers through the statewide system, the application must include—

(a) The State's definition of at-risk infants and toddlers with disabilities who are eligible in the State for services under part C of the Act (consistent with §§ 303.5 and 303.21(b)); and

(b) A description of the early intervention services provided under this part to at-risk infants and toddlers with disabilities who meet the State's definition described in paragraph (a) of this section.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(4))

§ 303.205 Description of use of funds.

(a) *General.* Each State application must include a description of the uses for funds under this part for the fiscal year or years covered by the application. The description must be presented separately for the lead agency and the Council and include the information required in paragraphs (b) through (e) of this section.

(b) *State administration funds including administrative positions.* For lead agencies other than State educational agencies (SEAs), each application must include the total—

(1) Amount of funds retained by the lead agency for administration purposes, including the amount in paragraph (b)(2) of this section; and

(2) Number of full-time equivalent administrative positions to be used to implement part C of the Act, and the total amount of salaries (including benefits) for those positions.

(c) *Maintenance and implementation activities.* Each application must include a description of the nature and scope of each major activity to be carried out under this part, consistent with § 303.501, and the approximate amount of funds to be spent for each activity.

(d) *Direct services.* Each application must include a description of any direct services that the State expects to provide to infants and toddlers with disabilities and their families with funds under this part, consistent with § 303.501, and the approximate amount of funds under this part to be used for the provision of each direct service.

(e) *Activities by other public agencies.* If other public agencies are to receive funds under this part, the application must include—

(1) The name of each agency expected to receive funds;

(2) The approximate amount of funds each agency will receive; and

(3) A summary of the purposes for which the funds will be used.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(a)(10)(B), 1435(a)(10)(F), 1437(a)(3), 1437(a)(5))

§ 303.206 Referral policies for specific children.

Each application must include the State's policies and procedures that require the referral for early intervention services under this part of specific children under the age of three, as described in § 303.303(b).

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1412(a)(3)(A), 1431, 1434(1), 1435(a)(2), 1435(a)(5), 1435(c)(2)(G), 1437(a)(6), 1437(a)(10), 1441)

§ 303.207 Availability of resources.

Each application must include a description of the procedure used by the State to ensure that resources are made available under this part for all geographic areas within the State.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(a)(7))

§ 303.208 Public participation policies and procedures.

(a) *Application.* At least 60 days prior to being submitted to the Department,

each application for funds under this part (including any policies, procedures, descriptions, methods, certifications, assurances and other information required in the application) must be published in a manner that will ensure circulation throughout the State for at least a 60-day period, with an opportunity for public comment on the application for at least 30 days during that period.

(b) *State Policies and Procedures.* Each application must include a description of the policies and procedures used by the State to ensure that, before adopting any new policy or procedure (including any revision to an existing policy or procedure) needed to comply with part C of the Act and these regulations, the lead agency—

(1) Holds public hearings on the new policy or procedure (including any revision to an existing policy or procedure);

(2) Provides notice of the hearings held in accordance with paragraph (b)(1) of this section at least 30 days before the hearings are conducted to enable public participation; and

(3) Provides an opportunity for the general public, including individuals with disabilities, parents of infants and toddlers with disabilities, EIS providers, and the members of the Council, to comment for at least 30 days on the new policy or procedure (including any revision to an existing policy or procedure) needed to comply with part C of the Act and these regulations.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1231d, 1221e–3, 1437(a)(8))

§ 303.209 Transition to preschool and other programs.

(a) *Application requirements.* Each State must include the following in its application:

(1) A description of the policies and procedures it will use to ensure a smooth transition for infants and toddlers with disabilities under the age of three and their families from receiving early intervention services under this part to—

(i) Preschool or other appropriate services (for toddlers with disabilities); or

(ii) Exiting the program for infants and toddlers with disabilities.

(2) A description of how the State will meet each of the requirements in paragraphs (b) through (f) of this section.

(3)(i)(A) If the lead agency is not the SEA, an interagency agreement between the lead agency and the SEA; or

(B) If the lead agency is the SEA, an intra-agency agreement between the program within that agency that administers part C of the Act and the program within the agency that administers section 619 of the Act.

(ii) To ensure a seamless transition between services under this part and under part B of the Act, an interagency agreement under paragraph (a)(3)(i)(A) of this section or an intra-agency agreement under paragraph (a)(3)(i)(B) of this section must address how the lead agency and the SEA will meet the requirements of paragraphs (b) through (f) of this section (including any policies adopted by the lead agency under § 303.401(d) and (e)), § 303.344(h), and 34 CFR 300.101(b), 300.124, 300.321(f), and 300.323(b).

(4) Any policy the lead agency has adopted under § 303.401(d) and (e).

(b) *Notification to the SEA and appropriate LEA.* (1) The State lead agency must ensure that—

(i) Subject to paragraph (b)(2) of this section, not fewer than 90 days before the third birthday of the toddler with a disability if that toddler may be eligible for preschool services under part B of the Act, the lead agency notifies the SEA and the LEA for the area in which the toddler resides that the toddler on his or her third birthday will reach the age of eligibility for services under part B of the Act, as determined in accordance with State law;

(ii) Subject to paragraph (b)(2) of this section, if the lead agency determines that the toddler is eligible for early intervention services under part C of the Act more than 45 but less than 90 days before that toddler's third birthday and if that toddler may be eligible for preschool services under part B of the Act, the lead agency, as soon as possible after determining the child's eligibility, notifies the SEA and the LEA for the area in which the toddler with a disability resides that the toddler on his or her third birthday will reach the age of eligibility for services under part B of the Act, as determined in accordance with State law; or

(iii) Subject to paragraph (b)(2) of this section, if a toddler is referred to the lead agency fewer than 45 days before that toddler's third birthday and that toddler may be eligible for preschool services under part B of the Act, the lead agency, with parental consent required under § 303.414, refers the toddler to the SEA and the LEA for the area in which the toddler resides; but, the lead agency is not required to conduct an evaluation, assessment, or an initial IFSP meeting under these circumstances.

(2) The State must ensure that the notification required under paragraphs (b)(1)(i) and (b)(1)(ii) of this section is consistent with any policy that the State has adopted, under § 303.401(e), permitting a parent to object to disclosure of personally identifiable information.

(c) *Conference to discuss services.* The State lead agency must ensure that—

(1) If a toddler with a disability may be eligible for preschool services under part B of the Act, the lead agency, with the approval of the family of the toddler, convenes a conference, among the lead agency, the family, and the LEA not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the toddler's third birthday to discuss any services the toddler may receive under part B of the Act; and.

(2) If the lead agency determines that a toddler with a disability is not potentially eligible for preschool services under part B of the Act, the lead agency, with the approval of the family of that toddler, makes reasonable efforts to convene a conference among the lead agency, the family, and providers of other appropriate services for the toddler to discuss appropriate services that the toddler may receive.

(d) *Transition plan.* The State lead agency must ensure that for all toddlers with disabilities—

(1)(i) It reviews the program options for the toddler with a disability for the period from the toddler's third birthday through the remainder of the school year; and

(ii) Each family of a toddler with a disability who is served under this part is included in the development of the transition plan required under this section and § 303.344(h);

(2) It establishes a transition plan in the IFSP not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the toddler's third birthday; and

(3) The transition plan in the IFSP includes, consistent with § 303.344(h), as appropriate—

(i) Steps for the toddler with a disability and his or her family to exit from the part C program; and

(ii) Any transition services that the IFSP Team identifies as needed by that toddler and his or her family.

(e) *Transition conference and meeting to develop transition plan.* Any conference conducted under paragraph (c) of this section or meeting to develop the transition plan under paragraph (d) of this section (which conference and meeting may be combined into one meeting) must meet the requirements in §§ 303.342(d) and (e) and 303.343(a).

(f) *Applicability of transition requirements.* (1) The transition requirements in paragraphs (b)(1)(i) and (b)(1)(ii), (c)(1), and (d) of this section apply to all toddlers with disabilities receiving services under this part before those toddlers turn age three, including any toddler with a disability under the age of three who is served by a State that offers services under § 303.211.

(2) In a State that offers services under § 303.211, for toddlers with disabilities identified in § 303.209(b)(1)(i), the parent must be provided at the transition conference conducted under paragraph (c)(1) of this section:

(i) An explanation, consistent with § 303.211(b)(1)(ii), of the toddler's options to continue to receive early intervention services under this part or preschool services under section 619 of the Act.

(ii) The initial annual notice referenced in § 303.211(b)(1).

(3) For children with disabilities age three and older who receive services pursuant to § 303.211, the State must ensure that it satisfies the separate transition requirements in § 303.211(b)(6)(ii).

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1412(a)(3) and (a)(9), 1436(a)(3), 1437(a)(9))

§ 303.210 Coordination with Head Start and Early Head Start, early education, and child care programs.

(a) Each application must contain a description of State efforts to promote collaboration among Head Start and Early Head Start programs under the Head Start Act (42 U.S.C. 9801, *et seq.,* as amended), early education and child care programs, and services under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(b) The State lead agency must participate, consistent with section 642B(b)(1)(C)(viii) of the Head Start Act, on the State Advisory Council on Early Childhood Education and Care established under the Head Start Act.

(Authority: 20 U.S.C. 1437(a)(10))

§ 303.211 State option to make services under this part available to children ages three and older.

(a) *General.* (1) Subject to paragraphs (a)(2) and (b) of this section, a State may elect to include in its application for a grant under this part a State policy, developed and implemented jointly by the lead agency and the SEA, under which a parent of a child with a disability who is eligible for preschool services under section 619 of the Act and who previously received early intervention services under this part, may choose the continuation of early intervention services under this part for his or her child after the child turns three until the child enters, or is eligible under State law to enter, kindergarten or elementary school.

(2) A State that adopts the policy described in paragraph (a)(1) of this section may determine whether it applies to children with disabilities—

(i) From age three until the beginning of the school year following the child's third birthday;

(ii) From age three until the beginning of the school year following the child's fourth birthday; or

(iii) From age three until the beginning of the school year following the child's fifth birthday.

(3) In no case may a State provide services under this section beyond the age at which the child actually enters, or is eligible under State law to enter, kindergarten or elementary school in the State.

(b) *Requirements.* If a State's application for a grant under this part includes the State policy described in paragraph (a) of this section, the system must ensure the following:

(1) Parents of children with disabilities who are eligible for services under section 619 of the Act and who previously received early intervention services under this part will be provided an annual notice that contains—

(i) A description of the rights of the parents to elect to receive services pursuant to this section or under part B of the Act; and

(ii) An explanation of the differences between services provided pursuant to this section and services provided under part B of the Act, including—

(A) The types of services and the locations at which the services are provided;

(B) The procedural safeguards that apply; and

(C) Possible costs (including the costs or fees to be charged to families as described in §§ 303.520 and 303.521), if any, to parents of children eligible under this part.

(2) Consistent with § 303.344(d), services provided pursuant to this section will include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills.

(3) The State policy ensures that any child served pursuant to this section has the right, at any time, to receive FAPE (as that term is defined at § 303.15) under part B of the Act instead of early intervention services under part C of the Act.

(4) The lead agency must continue to provide all early intervention services identified in the toddler with a disability's IFSP under § 303.344 (and consented to by the parent under § 303.342(e)) beyond age three until that toddler's initial eligibility determination under part B of the Act is made under 34 CFR 300.306. This provision does not apply if the LEA has requested parental consent for the initial evaluation under 34 CFR 300.300(a) and the parent has not provided that consent.

(5) The lead agency must obtain informed consent from the parent of any child with a disability for the continuation of early intervention services pursuant to this section for that child. Consent must be obtained before the child reaches three years of age, where practicable.

(6)(i) For toddlers with disabilities under the age of three in a State that offers services under this section, the lead agency ensures that the transition requirements in § 303.209(b)(1)(i) and (b)(1)(ii), (c)(1), and (d) are met.

(ii) For toddlers with disabilities age three and older in a State that offers services under this section, the lead agency ensures a smooth transition from services under this section to preschool, kindergarten or elementary school by—

(A) Providing the SEA and LEA where the child resides, consistent with any State policy adopted under § 303.401(e), the information listed in § 303.401(d)(1) not fewer than 90 days before the child will no longer be eligible under paragraph (a)(2) of this section to receive, or will no longer receive, early intervention services under this section;

(B) With the approval of the parents of the child, convening a transition conference, among the lead agency, the parents, and the LEA, not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the child will no longer be eligible under paragraph (a)(2) of this section to receive, or no longer receives, early intervention services under this section, to discuss any services that the child may receive under part B of the Act; and

(C) Establishing a transition plan in the IFSP not fewer than 90 days—and, at the discretion of all parties, not more than 9 months—before the child will no longer be eligible under paragraph (a)(2) of this section to receive, or no longer receives, early intervention services under this section.

(7) In States that adopt the option to make services under this part available to children ages three and older pursuant to this section, there will be a referral to the part C system, dependent upon parental consent, of a child under the age of three who directly

experiences a substantiated case of trauma due to exposure to family violence, as defined in section 320 of the Family Violence Prevention and Services Act, 42 U.S.C. 10401, *et seq.*

(c) *Reporting requirement.* If a State includes in its application a State policy described in paragraph (a) of this section, the State must submit to the Secretary, in the State's report under § 303.124, the number and percentage of children with disabilities who are eligible for services under section 619 of the Act but whose parents choose for their children to continue to receive early intervention services under this part.

(d) *Available funds.* The State policy described in paragraph (a) of this section must describe the funds—including an identification as Federal, State, or local funds—that will be used to ensure that the option described in paragraph (a) of this section is available to eligible children and families who provide the consent described in paragraph (b)(5) of this section, including fees, if any, to be charged to families as described in §§ 303.520 and 303.521.

(e) *Rules of construction.* (1) If a statewide system includes a State policy described in paragraph (a) of this section, a State that provides services in accordance with this section to a child with a disability who is eligible for services under section 619 of the Act will not be required to provide the child FAPE under part B of the Act for the period of time in which the child is receiving services under this part.

(2) Nothing in this section may be construed to require a provider of services under this part to provide a child served under this part with FAPE.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1435(c), 1437(a)(11))

§ 303.212 Additional information and assurances.

Each application must contain—

(a) A description of the steps the State is taking to ensure equitable access to, and equitable participation in, the part C statewide system as required by section 427(b) of GEPA; and

(b) Other information and assurances as the Secretary may reasonably require.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1228a(b), 1437(a)(11))

Assurances

§ 303.220 Assurances satisfactory to the Secretary.

Each application must contain assurances satisfactory to the Secretary that the State has met the requirements in §§ 303.221 through 303.227.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b))

§ 303.221 Expenditure of funds.

The State must ensure that Federal funds made available to the State under section 643 of the Act will be expended in accordance with the provisions of this part, including §§ 303.500 and 303.501.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(1))

§ 303.222 Payor of last resort.

The State must ensure that it will comply with the requirements in §§ 303.510 and 303.511 in subpart F of this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(2))

§ 303.223 Control of funds and property.

The State must ensure that—

(a) The control of funds provided under this part, and title to property acquired with those funds, will be in a public agency for the uses and purposes provided in this part; and

(b) A public agency will administer the funds and property.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(3))

§ 303.224 Reports and records.

The State must ensure that it will—

(a) Make reports in the form and containing the information that the Secretary may require; and

(b) Keep records and afford access to those records as the Secretary may find necessary to ensure compliance with the requirements of this part, the correctness and verification of reports, and the proper disbursement of funds provided under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(4))

§ 303.225 Prohibition against supplanting; indirect costs.

(a) Each application must provide satisfactory assurance that the Federal funds made available under section 643 of the Act to the State:

(1) Will not be commingled with State funds; and

(2) Will be used so as to supplement the level of State and local funds expended for infants and toddlers with disabilities and their families and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section, the total amount of State and local funds budgeted for expenditures in the current fiscal year for early intervention services for children eligible under this part and their families must be at least equal to the total amount of State and local funds actually expended for early intervention services for these children and their families in the most recent preceding fiscal year for which the information is available. Allowance may be made for—

(1) A decrease in the number of infants and toddlers who are eligible to receive early intervention services under this part; and

(2)) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of facilities.

(c) *Requirement regarding indirect costs.* (1) Except as provided in paragraph (c)(2) of this section, a lead agency under this part may not charge indirect costs to its part C grant.

(2) If approved by the lead agency's cognizant Federal agency or by the Secretary, the lead agency must charge indirect costs through either—

(i) A restricted indirect cost rate that meets the requirements in 34 CFR 76.560 through 76.569; or

(ii) A cost allocation plan that meets the non-supplanting requirements in paragraph (b) of this section and 34 CFR part 76 of EDGAR.

(3) In charging indirect costs under paragraph (c)(2)(i) and (c)(2)(ii) of this section, the lead agency may not charge rent, occupancy, or space maintenance costs directly to the part C grant, unless those costs are specifically approved in advance by the Secretary.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(5))

§ 303.226 Fiscal control.

The State must ensure that fiscal control and fund accounting procedures will be adopted as necessary to ensure proper disbursement of, and accounting for, Federal funds paid under this part.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1437(b)(6))

§ 303.227 Traditionally underserved groups.

The State must ensure that policies and practices have been adopted to ensure—

(a) That traditionally underserved groups, including minority, low-income, homeless, and rural families and

children with disabilities who are wards of the State, are meaningfully involved in the planning and implementation of all the requirements of this part; and

(b) That these families have access to culturally competent services within their local geographical areas.

(Approved by Office of Management and Budget under control number 1820–0550)

(Authority: 20 U.S.C. 1231d, 1437(b)(7))

Subsequent Applications and Modifications, Eligibility Determinations, and Standard of Disapproval

§ 303.228 Subsequent State application and modifications of application.

(a) *Subsequent State application.* If a State has on file with the Secretary a policy, procedure, method, or assurance that demonstrates that the State meets an application requirement in this part, including any policy, procedure, method, or assurance filed under this part (as in effect before the date of enactment of the Act, December 3, 2004), the Secretary considers the State to have met that requirement for purposes of receiving a grant under this part.

(b) *Modification of application.* An application submitted by a State that meets the requirements of this part remains in effect until the State submits to the Secretary such modifications as the State determines necessary. This section applies to a modification of an application to the same extent and in the same manner as this paragraph applies to the original application.

(c) *Modifications required by the Secretary.* The Secretary may require a State to modify its application under this part to the extent necessary to ensure the State's compliance with this part if—

(1) An amendment is made to the Act or to a Federal regulation issued under the Act;

(2) A new interpretation of the Act is made by a Federal court or the State's highest court; or

(3) An official finding of noncompliance with Federal law or regulations is made with respect to the State.

(Authority: 20 U.S.C. 1437(d)–(f))

§ 303.229 Determination by the Secretary that a State is eligible.

If the Secretary determines that a State is eligible to receive a grant under part C of the Act, the Secretary notifies the State of that determination.

(Authority: 20 U.S.C. 1437)

§ 303.230 Standard for disapproval of an application.

The Secretary does not disapprove an application under this part unless the Secretary determines, after notice and opportunity for a hearing in accordance with the procedures in §§ 303.231 through 303.236, that the application fails to comply with the requirements of this part.

(Authority: 20 U.S.C. 1437(c))

Department Procedures

§ 303.231 Notice and hearing before determining that a State is not eligible.

(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under part C of the Act until providing the State—

(i) Reasonable notice; and

(ii) An opportunity for a hearing.

(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the lead agency by certified mail with a return receipt requested.

(b) *Content of notice.* In the written notice described in paragraph (a)(2) of this section, the Secretary—

(1) States the basis on which the Secretary proposes to make a final determination that the State is not eligible;

(2) May describe possible options for resolving the issues;

(3) Advises the lead agency that it may request a hearing and that the request for a hearing must be made not later than 30 days after it receives the notice of the proposed final determination that the State is not eligible; and

(4) Provides the lead agency with information about the hearing procedures that will be followed.

(Authority: 20 U.S.C. 1437(c))

§ 303.232 Hearing Official or Panel.

(a) If the lead agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. 1437(c))

§ 303.233 Hearing procedures.

(a) As used in §§ 303.231 through 303.235, the term *party* or *parties* means any of the following:

(1) A lead agency that requests a hearing regarding the proposed disapproval of the State's eligibility under this part.

(2) The Department official who administers the program of financial assistance under this part.

(3) A person, group, or agency with an interest in, and having relevant information about, the case that has applied for and been granted leave to intervene by the Hearing Official or Hearing Panel.

(b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Hearing Panel and notifies the parties.

(c) The Hearing Official or Hearing Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Hearing Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Hearing Panel may schedule a prehearing conference with the Hearing Official or Hearing Panel and the parties.

(3) Any party may request the Hearing Official or Hearing Panel to schedule a prehearing or other conference. The Hearing Official or Hearing Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Hearing Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or an evidentiary hearing;

(C) Further proceedings before the Hearing Official or Hearing Panel, including an evidentiary hearing or oral argument, if either is scheduled;

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and an estimation of time for each presentation; and

(E) Completion of the review and the initial decision of the Hearing Official or Hearing Panel.

(5) A prehearing or other conference held under paragraph (c)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties must be prepared to discuss the subjects listed in paragraph (c)(4) of this section.

(7) Following a prehearing or other conference, the Hearing Official or Hearing Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Hearing Panel may require the parties to state their positions and to provide all or part of their evidence in writing.

(e) The Hearing Official or Hearing Panel may require the parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Hearing Panel may direct the parties to exchange relevant documents, information, and lists of witnesses, and to send copies to the Hearing Official or Hearing Panel.

(g) The Hearing Official or Hearing Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Hearing Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Hearing Panel may examine witnesses.

(j) The Hearing Official or Hearing Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Hearing Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Hearing Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties must present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Hearing Panel must determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Hearing Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Hearing Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Hearing Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Hearing Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Hearing Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party must file with the Hearing Official or Hearing Panel all written motions, briefs, and other documents and must at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. 1437(c))

§ 303.234 Initial decision; final decision.

(a) The Hearing Official or Hearing Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the lead agency under § 303.231, including any amendments to or further clarification of the issues under § 303.233(c).

(b) The initial decision of a Hearing Panel is made by a majority of Hearing Panel members.

(c) The Hearing Official or Hearing Panel mails, by certified mail with return receipt requested, a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Hearing Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or Hearing Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Hearing Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Hearing Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Hearing Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Hearing Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the transcript of the Hearing Official's or Hearing Panel's proceedings, and written comments.

(j) The Secretary may remand the matter to the Hearing Official or Hearing Panel for further proceedings.

(k) Unless the Secretary remands the matter as provided in paragraph (j) of this section, the Secretary issues the final decision, with any necessary modifications, within 30 days after notifying the Hearing Official or Hearing Panel that the initial decision is being further reviewed.

(Authority: 20 U.S.C. 1437(c))

§ 303.235 Filing requirements.

(a) Any written submission by a party under §§ 303.230 through 303.236 must be filed with the Secretary by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Panel, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1437(c))

§ 303.236 Judicial review.

If a State is dissatisfied with the Secretary's final decision with respect to the eligibility of the State under part C of the Act, the State may, not later than 60 days after notice of that decision, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that decision. A copy of the petition must be transmitted by the clerk of the court to the Secretary. The Secretary then files in the court the record of the proceedings upon which the Secretary's action was based, as provided in 28 U.S.C. 2112.

(Authority: 20 U.S.C. 1437(c))

Subpart D—Child Find, Evaluations and Assessments, and Individualized Family Service Plans

§ 303.300 General.

The statewide comprehensive, coordinated, multidisciplinary interagency system to provide early intervention services for infants and toddlers with disabilities and their families referenced in § 303.100 must include the following components:

(a) Pre-referral policies and procedures that include—

(1) A public awareness program as described in § 303.301; and

(2) A comprehensive child find system as described in § 303.302.

(b) Referral policies and procedures as described in § 303.303.

(c) Post-referral policies and procedures that ensure compliance with the timeline requirements in § 303.310 and include—

(1) Screening, if applicable, as described in § 303.320;

(2) Evaluations and assessments as described in §§ 303.321 and 303.322; and

(3) Development, review, and implementation of IFSPs as described in §§ 303.340 through 303.346.

Pre-Referral Procedures—Public Awareness Program and Child Find System

§ 303.301 Public awareness program—information for parents.

(a) *Preparation and dissemination.* In accordance with § 303.116, each system must include a public awareness program that requires the lead agency to—

(1)(i) Prepare information on the availability of early intervention services under this part, and other services, as described in paragraph (b) of this section; and

(ii) Disseminate to all primary referral sources (especially hospitals and physicians) the information to be given to parents of infants and toddlers, especially parents with premature infants or infants with other physical risk factors associated with learning or developmental complications; and

(2) Adopt procedures for assisting the primary referral sources described in § 303.303(c) in disseminating the information described in paragraph (b) of this section to parents of infants and toddlers with disabilities.

(b) *Information to be provided.* The information required to be prepared and disseminated under paragraph (a) of this section must include—

(1) A description of the availability of early intervention services under this part;

(2) A description of the child find system and how to refer a child under the age of three for an evaluation or early intervention services; and

(3) A central directory, as described in § 303.117.

(c) *Information specific to toddlers with disabilities.* Each public awareness program also must include a requirement that the lead agency provide for informing parents of toddlers with disabilities of the availability of services under section 619 of the Act not fewer than 90 days prior to the toddler's third birthday.

(Authority: 20 U.S.C. 1435(a)(6), 1437(a)(9))

§ 303.302 Comprehensive child find system.

(a) *General.* Each system must include a comprehensive child find system that—

(1) Is consistent with part B of the Act (see 34 CFR 300.111);

(2) Includes a system for making referrals to lead agencies or EIS providers under this part that—

(i) Includes timelines; and

(ii) Provides for participation by the primary referral sources described in § 303.303(c);

(3) Ensures rigorous standards for appropriately identifying infants and toddlers with disabilities for early intervention services under this part that will reduce the need for future services; and

(4) Meets the requirements in paragraphs (b) and (c) of this section and §§ 303.303, 303.310, 303.320, and 303.321.

(b) *Scope of child find.* The lead agency, as part of the child find system, must ensure that—

(1) All infants and toddlers with disabilities in the State who are eligible for early intervention services under this part are identified, located, and evaluated, including—

(i) Indian infants and toddlers with disabilities residing on a reservation geographically located in the State (including coordination, as necessary, with tribes, tribal organizations, and consortia to identify infants and toddlers with disabilities in the State based, in part, on the information provided by them to the lead agency under § 303.731(e)(1)); and

(ii) Infants and toddlers with disabilities who are homeless, in foster care, and wards of the State; and

(iii) Infants and toddlers with disabilities that are referenced in § 303.303(b); and

(2) An effective method is developed and implemented to identify children who are in need of early intervention services.

(c) *Coordination.* (1) The lead agency, with the assistance of the Council, as defined in § 303.8, must ensure that the child find system under this part—

(i) Is coordinated with all other major efforts to locate and identify children by other State agencies responsible for administering the various education, health, and social service programs relevant to this part, including Indian tribes that receive payments under this part, and other Indian tribes, as appropriate; and

(ii) Is coordinated with the efforts of the—

(A) Program authorized under part B of the Act;

(B) Maternal and Child Health program, including the Maternal, Infant, and Early Childhood Home Visiting Program, under Title V of the Social Security Act, as amended, (MCHB or Title V) (42 U.S.C. 701(a));

(C) Early Periodic Screening, Diagnosis, and Treatment (EPSDT) under Title XIX of the Social Security Act (42 U.S.C. 1396(a)(43) and 1396(a)(4)(B));

(D) Programs under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*);

(E) Head Start Act (including Early Head Start programs under section 645A of the Head Start Act) (42 U.S.C. 9801 *et seq.*);

(F) Supplemental Security Income program under Title XVI of the Social Security Act (42 U.S.C. 1381);

(G) Child protection and child welfare programs, including programs administered by, and services provided through, the foster care agency and the State agency responsible for administering the Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. 5106(a));

(H) Child care programs in the State;

(I) The programs that provide services under the Family Violence Prevention

and Services Act (42 U.S.C. 10401 *et seq.*);

(J) Early Hearing Detection and Intervention (EHDI) systems (42 U.S.C. 280g–1) administered by the Centers for Disease Control (CDC); and

(K) Children's Health Insurance Program (CHIP) authorized under Title XXI of the Social Security Act (42 U.S.C. 1397aa *et seq.*).

(2) The lead agency, with the advice and assistance of the Council, must take steps to ensure that—

(i) There will not be unnecessary duplication of effort by the programs identified in paragraph (c)(1)(ii) of this section; and

(ii) The State will make use of the resources available through each public agency and EIS provider in the State to implement the child find system in an effective manner.

(Authority: 20 U.S.C. 1412(a)(3)(A), 1431, 1434(1), 1435(a)(2), 1435(a)(5), 1435(c)(2)(G), 1437(a)(6), 1437(a)(10), 1441)

Referral Procedures

§ 303.303 Referral procedures.

(a) *General.* (1) The lead agency's child find system described in § 303.302 must include the State's procedures for use by primary referral sources for referring a child under the age of three to the part C program.

(2) The procedures required in paragraph (a)(1) of this section must—

(i) Provide for referring a child as soon as possible, but in no case more than seven days, after the child has been identified; and

(ii) Meet the requirements in paragraphs (b) and (c) of this section.

(b) *Referral of specific at-risk infants and toddlers.* The procedures required in paragraph (a) of this section must provide for requiring the referral of a child under the age of three who—

(1) Is the subject of a substantiated case of child abuse or neglect; or

(2) Is identified as directly affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.

(c) *Primary referral sources.* As used in this subpart, primary referral sources include—

(1) Hospitals, including prenatal and postnatal care facilities;

(2) Physicians;

(3) Parents, including parents of infants and toddlers;

(4) Child care programs and early learning programs;

(5) LEAs and schools;

(6) Public health facilities;

(7) Other public health or social service agencies;

(8) Other clinics and health care providers;

(9) Public agencies and staff in the child welfare system, including child protective service and foster care;

(10) Homeless family shelters; and

(11) Domestic violence shelters and agencies.

(Authority: 20 U.S.C. 1412(a)(3)(A), 1431, 1434(1), 1435(a)(2), 1435(a)(5), 1435(a)(6), 1435(c)(2)(G), 1437(a)(6), 1437(a)(10), 1441)

§§ 303.304–303.309 [Reserved]

Post-Referral Procedures—Screenings, Evaluations, and Assessments

§ 303.310 Post-referral timeline (45 days).

(a) Except as provided in paragraph (b) of this section, any screening under § 303.320 (if the State has adopted a policy and elects, and the parent consents, to conduct a screening of a child); the initial evaluation and the initial assessments of the child and family under § 303.321; and the initial IFSP meeting under § 303.342 must be completed within 45 days from the date the lead agency or EIS provider receives the referral of the child.

(b) Subject to paragraph (c) of this section, the 45-day timeline described in paragraph (a) of this section does not apply for any period when—

(1) The child or parent is unavailable to complete the screening (if applicable), the initial evaluation, the initial assessments of the child and family, or the initial IFSP meeting due to exceptional family circumstances that are documented in the child's early intervention records; or

(2) The parent has not provided consent for the screening (if applicable), the initial evaluation, or the initial assessment of the child, despite documented, repeated attempts by the lead agency or EIS provider to obtain parental consent.

(c) The lead agency must develop procedures to ensure that in the event the circumstances described in (b)(1) or (b)(2) of this section exist, the lead agency or EIS provider must—

(1) Document in the child's early intervention records the exceptional family circumstances or repeated attempts by the lead agency or EIS provider to obtain parental consent;

(2) Complete the screening (if applicable), the initial evaluation, the initial assessments (of the child and family), and the initial IFSP meeting as soon as possible after the documented exceptional family circumstances described in paragraph (b)(1) of this section no longer exist or parental consent is obtained for the screening (if applicable), the initial evaluation, and the initial assessment of the child; and

(3) Develop and implement an interim IFSP, to the extent appropriate and consistent with § 303.345.

(d) The initial family assessment must be conducted within the 45-day timeline in paragraph (a) of this section if the parent concurs and even if other family members are unavailable.

(Authority: 20 U.S.C. 1433, 1435(a), 1436(c))

§§ 303.311–303.319 [Reserved]

§ 303.320 Screening procedures (optional).

(a) *General.* (1) The lead agency may adopt procedures, consistent with the requirements of this section, to screen children under the age of three who have been referred to the part C program to determine whether they are suspected of having a disability under this part. If the lead agency or EIS provider proposes to screen a child, it must—

(i) Provide the parent notice under § 303.421 of its intent to screen the child to identify whether the child is suspected of having a disability and include in that notice a description of the parent's right to request an evaluation under § 303.321 at any time during the screening process; and

(ii) Obtain parental consent as required in § 303.420(a)(1) before conducting the screening procedures.

(2) If the parent consents to the screening and the screening or other available information indicates that the child is—

(i) Suspected of having a disability, after notice is provided under § 303.421 and once parental consent is obtained as required in § 303.420, an evaluation and assessment of the child must be conducted under § 303.321; or

(ii) Not suspected of having a disability, the lead agency or EIS provider must ensure that notice of that determination is provided to the parent under § 303.421, and that the notice describes the parent's right to request an evaluation.

(3) If the parent of the child requests and consents to an evaluation at any time during the screening process, evaluation of the child must be conducted under § 303.321, even if the lead agency or EIS provider has determined under paragraph (a)(2)(ii) of this section that the child is not suspected of having a disability.

(b) *Definition of screening procedures. Screening procedures*—

(1) Means activities under paragraphs (a)(1) and (a)(2) of this section that are carried out by, or under the supervision of, the lead agency or EIS provider to identify, at the earliest possible age, infants and toddlers suspected of having a disability and in need of early intervention services; and

(2) Includes the administration of appropriate instruments by personnel trained to administer those instruments.

(c) *Condition for evaluation or early intervention services.* For every child under the age of three who is referred to the part C program or screened in accordance with paragraph (a) of this section, the lead agency is not required to—

(1) Provide an evaluation of the child under § 303.321 unless the child is suspected of having a disability or the parent requests an evaluation under paragraph (a)(3) of this section; or

(2) Make early intervention services available under this part to the child unless a determination is made that the child meets the definition of *infant or toddler with a disability* under § 303.21.

(Authority: 20 U.S.C. 1432(4)(E)(ix), 1434(1), 1435(a)(2), 1435(a)(5) and (a)(6), 1435(c)(2)(G), 1437(a)(6), 1439(a)(6))

§ 303.321 Evaluation of the child and assessment of the child and family.

(a) *General.* (1) The lead agency must ensure that, subject to obtaining parental consent in accordance with § 303.420(a)(2), each child under the age of three who is referred for evaluation or early intervention services under this part and suspected of having a disability, receives—

(i) A timely, comprehensive, multidisciplinary evaluation of the child in accordance with paragraph (b) of this section unless eligibility is established under paragraph (a)(3)(i) of this section; and

(ii) If the child is determined eligible as an infant or toddler with a disability as defined in § 303.21-–

(A) A multidisciplinary assessment of the unique strengths and needs of that infant or toddler and the identification of services appropriate to meet those needs;

(B) A family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of that infant or toddler. The assessments of the child and family are described in paragraph (c) of this section and these assessments may occur simultaneously with the evaluation, provided that the requirements of paragraph (b) of this section are met.

(2) As used in this part—

(i) *Evaluation* means the procedures used by qualified personnel to determine a child's initial and continuing eligibility under this part, consistent with the definition of *infant or toddler with a disability* in § 303.21. An *initial evaluation* refers to the child's evaluation to determine his or her initial eligibility under this part;

(ii) *Assessment* means the ongoing procedures used by qualified personnel to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs throughout the period of the child's eligibility under this part and includes the assessment of the child, consistent with paragraph (c)(1) of this section and the assessment of the child's family, consistent with paragraph (c)(2) of this section; and

(iii) *Initial assessment* refers to the assessment of the child and the family assessment conducted prior to the child's first IFSP meeting.

(3)(i) A child's medical and other records may be used to establish eligibility (without conducting an evaluation of the child) under this part if those records indicate that the child's level of functioning in one or more of the developmental areas identified in § 303.21(a)(1) constitutes a developmental delay or that the child otherwise meets the criteria for an infant or toddler with a disability under § 303.21. If the child's part C eligibility is established under this paragraph, the lead agency or EIS provider must conduct assessments of the child and family in accordance with paragraph (c) of this section.

(ii) Qualified personnel must use informed clinical opinion when conducting an evaluation and assessment of the child. In addition, the lead agency must ensure that informed clinical opinion may be used as an independent basis to establish a child's eligibility under this part even when other instruments do not establish eligibility; however, in no event may informed clinical opinion be used to negate the results of evaluation instruments used to establish eligibility under paragraph (b) of this section.

(4) All evaluations and assessments of the child and family must be conducted by qualified personnel, in a nondiscriminatory manner, and selected and administered so as not to be racially or culturally discriminatory.

(5) Unless clearly not feasible to do so, all evaluations and assessments of a child must be conducted in the native language of the child, in accordance with the definition of *native language* in § 303.25.

(6) Unless clearly not feasible to do so, family assessments must be conducted in the native language of the family members being assessed, in accordance with the definition of *native language* in § 303.25.

(b) *Procedures for evaluation of the child.* In conducting an evaluation, no single procedure may be used as the sole criterion for determining a child's eligibility under this part. Procedures must include—

(1) Administering an evaluation instrument;

(2) Taking the child's history (including interviewing the parent);

(3) Identifying the child's level of functioning in each of the developmental areas in § 303.21(a)(1);

(4) Gathering information from other sources such as family members, other care-givers, medical providers, social workers, and educators, if necessary, to understand the full scope of the child's unique strengths and needs; and

(5) Reviewing medical, educational, or other records.

(c) *Procedures for assessment of the child and family.* (1) An assessment of each infant or toddler with a disability must be conducted by qualified personnel in order to identify the child's unique strengths and needs and the early intervention services appropriate to meet those needs. The assessment of the child must include the following—

(i) A review of the results of the evaluation conducted under paragraph (b) of this section;

(ii) Personal observations of the child; and

(iii) The identification of the child's needs in each of the developmental areas in § 303.21(a)(1).

(2) A family-directed assessment must be conducted by qualified personnel in order to identify the family's resources, priorities, and concerns and the supports and services necessary to enhance the family's capacity to meet the developmental needs of the family's infant or toddler with a disability. The family-directed assessment must—

(i) Be voluntary on the part of each family member participating in the assessment;

(ii) Be based on information obtained through an assessment tool and also through an interview with those family members who elect to participate in the assessment; and

(iii) Include the family's description of its resources, priorities, and concerns related to enhancing the child's development.

(Authority: 20 U.S.C. 1435(a)(3), 1435(a)(5), 1436(a)(1)–(2))

§ 303.322 Determination that a child is not eligible.

If, based on the evaluation conducted under § 303.321, the lead agency determines that a child is not eligible under this part, the lead agency must provide the parent with prior written notice required in § 303.421, and include in the notice information about

the parent's right to dispute the eligibility determination through dispute resolution mechanisms under § 303.430, such as requesting a due process hearing or mediation or filing a State complaint.

(Authority: 20 U.S.C. 1439(a)(6))

Individualized Family Service Plan (IFSP)

§ 303.340 Individualized family service plan—general.

For each infant or toddler with a disability, the lead agency must ensure the development, review, and implementation of an individualized family service plan or IFSP developed by a multidisciplinary team, which includes the parent, that—

(a) Is consistent with the definition of that term in § 303.20; and

(b) Meets the requirements in §§ 303.342 through 303.346 of this subpart.

(Authority: 20 U.S.C. 1435(a)(4), 1436)

§ 303.341 [Reserved]

§ 303.342 Procedures for IFSP development, review, and evaluation.

(a) *Meeting to develop initial IFSP—timelines.* For a child referred to the part C program and determined to be eligible under this part as an infant or toddler with a disability, a meeting to develop the initial IFSP must be conducted within the 45-day time period described in § 303.310.

(b) *Periodic review.* (1) A review of the IFSP for a child and the child's family must be conducted every six months, or more frequently if conditions warrant, or if the family requests such a review. The purpose of the periodic review is to determine—

(i) The degree to which progress toward achieving the results or outcomes identified in the IFSP is being made; and

(ii) Whether modification or revision of the results, outcomes, or early intervention services identified in the IFSP is necessary.

(2) The review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

(c) *Annual meeting to evaluate the IFSP.* A meeting must be conducted on at least an annual basis to evaluate and revise, as appropriate, the IFSP for a child and the child's family. The results of any current evaluations and other information available from the assessments of the child and family conducted under § 303.321 must be used in determining the early intervention services that are needed and will be provided.

(d) *Accessibility and convenience of meetings.* (1) IFSP meetings must be conducted—

(i) In settings and at times that are convenient for the family; and

(ii) In the native language of the family or other mode of communication used by the family, unless it is clearly not feasible to do so.

(2) Meeting arrangements must be made with, and written notice provided to, the family and other participants early enough before the meeting date to ensure that they will be able to attend.

(e) *Parental consent.* The contents of the IFSP must be fully explained to the parents and informed written consent, as described in § 303.7, must be obtained, as required in § 303.420(a)(3), prior to the provision of early intervention services described in the IFSP. Each early intervention service must be provided as soon as possible after the parent provides consent for that service, as required in § 303.344(f)(1).

(Authority: 20 U.S.C. 1435(a)(4), 1436)

§ 303.343 IFSP Team meeting and periodic review.

(a) *Initial and annual IFSP Team meeting.* (1) Each initial meeting and each annual IFSP Team meeting to evaluate the IFSP must include the following participants:

(i) The parent or parents of the child.

(ii) Other family members, as requested by the parent, if feasible to do so.

(iii) An advocate or person outside of the family, if the parent requests that the person participate.

(iv) The service coordinator designated by the public agency to be responsible for implementing the IFSP.

(v) A person or persons directly involved in conducting the evaluations and assessments in § 303.321.

(vi) As appropriate, persons who will be providing early intervention services under this part to the child or family.

(2) If a person listed in paragraph (a)(1)(v) of this section is unable to attend a meeting, arrangements must be made for the person's involvement through other means, including one of the following:

(i) Participating in a telephone conference call.

(ii) Having a knowledgeable authorized representative attend the meeting.

(iii) Making pertinent records available at the meeting.

(b) *Periodic review.* Each periodic review under § 303.342(b) must provide for the participation of persons in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. If conditions warrant, provisions must be made for the participation of other representatives identified in paragraph (a) of this section.

(Authority: 20 U.S.C. 1435(a)(4), 1436)

§ 303.344 Content of an IFSP.

(a) *Information about the child's status.* The IFSP must include a statement of the infant or toddler with a disability's present levels of physical development (including vision, hearing, and health status), cognitive development, communication development, social or emotional development, and adaptive development based on the information from that child's evaluation and assessments conducted under § 303.321.

(b) *Family information.* With the concurrence of the family, the IFSP must include a statement of the family's resources, priorities, and concerns related to enhancing the development of the child as identified through the assessment of the family under § 303.321(c)(2).

(c) *Results or outcomes.* The IFSP must include a statement of the measurable results or measurable outcomes expected to be achieved for the child (including pre-literacy and language skills, as developmentally appropriate for the child) and family, and the criteria, procedures, and timelines used to determine—

(1) The degree to which progress toward achieving the results or outcomes identified in the IFSP is being made; and

(2) Whether modifications or revisions of the expected results or outcomes, or early intervention services identified in the IFSP are necessary.

(d) *Early intervention services.* (1) The IFSP must include a statement of the specific early intervention services, based on peer-reviewed research (to the extent practicable), that are necessary to meet the unique needs of the child and the family to achieve the results or outcomes identified in paragraph (c) of this section, including—

(i) The length, duration, frequency, intensity, and method of delivering the early intervention services;

(ii)(A) A statement that each early intervention service is provided in the natural environment for that child or service to the maximum extent appropriate, consistent with §§ 303.13(a)(8), 303.26 and 303.126, or, subject to paragraph (d)(1)(ii)(B) of this section, a justification as to why an early intervention service will not be provided in the natural environment.

(B) The determination of the appropriate setting for providing early intervention services to an infant or

toddler with a disability, including any justification for not providing a particular early intervention service in the natural environment for that infant or toddler with a disability and service, must be—

(1) Made by the IFSP Team (which includes the parent and other team members);

(2) Consistent with the provisions in §§ 303.13(a)(8), 303.26, and 303.126; and

(3) Based on the child's outcomes that are identified by the IFSP Team in paragraph (c) of this section;

(iii) The location of the early intervention services; and

(iv) The payment arrangements, if any.

(2) As used in paragraph (d)(1)(i) of this section—

(i) *Frequency and intensity* mean the number of days or sessions that a service will be provided, and whether the service is provided on an individual or group basis;

(ii) *Method* means how a service is provided;

(iii) *Length* means the length of time the service is provided during each session of that service (such as an hour or other specified time period); and

(iv) *Duration* means projecting when a given service will no longer be provided (such as when the child is expected to achieve the results or outcomes in his or her IFSP).

(3) As used in paragraph (d)(1)(iii) of this section, *location* means the actual place or places where a service will be provided.

(4) For children who are at least three years of age, the IFSP must include an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills.

(e) *Other services.* To the extent appropriate, the IFSP also must—

(1) Identify medical and other services that the child or family needs or is receiving through other sources, but that are neither required nor funded under this part; and

(2) If those services are not currently being provided, include a description of the steps the service coordinator or family may take to assist the child and family in securing those other services.

(f) *Dates and duration of services.* The IFSP must include—

(1) The projected date for the initiation of each early intervention service in paragraph (d)(1) of this section, which date must be as soon as possible after the parent consents to the service, as required in §§ 303.342(e) and 303.420(a)(3); and

(2) The anticipated duration of each service.

(g) *Service coordinator.* (1) The IFSP must include the name of the service coordinator from the profession most relevant to the child's or family's needs (or who is otherwise qualified to carry out all applicable responsibilities under this part), who will be responsible for implementing the early intervention services identified in a child's IFSP, including transition services, and coordination with other agencies and persons.

(2) In meeting the requirements in paragraph (g)(1) of this section, the term ''profession'' includes ''service coordination.''

(h) *Transition from Part C services.* (1) The IFSP must include the steps and services to be taken to support the smooth transition of the child, in accordance with §§ 303.209 and 303.211(b)(6), from part C services to—

(i) Preschool services under part B of the Act, to the extent that those services are appropriate;

(ii) Part C services under § 303.211; or

(iii) Other appropriate services.

(2) The steps required in paragraph (h)(1) of this section must include—

(i) Discussions with, and training of, parents, as appropriate, regarding future placements and other matters related to the child's transition;

(ii) Procedures to prepare the child for changes in service delivery, including steps to help the child adjust to, and function in, a new setting;

(iii) Confirmation that child find information about the child has been transmitted to the LEA or other relevant agency, in accordance with § 303.209(b) (and any policy adopted by the State under § 303.401(e)) and, with parental consent if required under § 303.414, transmission of additional information needed by the LEA to ensure continuity of services from the part C program to the part B program, including a copy of the most recent evaluation and assessments of the child and the family and most recent IFSP developed in accordance with §§ 303.340 through 303.345; and

(iv) Identification of transition services and other activities that the IFSP Team determines are necessary to support the transition of the child.

(Authority: 20 U.S.C. 1435(a)(10)(B), 1435(a)(16), 1436(a)(3), 1436(d), 1437(a)(9)–(10), 1440)

§ 303.345 Interim IFSPs—provision of services before evaluations and assessments are completed.

Early intervention services for an eligible child and the child's family may commence before the completion of the evaluation and assessments in § 303.321, if the following conditions are met:

(a) Parental consent is obtained.

(b) An interim IFSP is developed that includes—

(1) The name of the service coordinator who will be responsible, consistent with § 303.344(g), for implementing the interim IFSP and coordinating with other agencies and persons; and

(2) The early intervention services that have been determined to be needed immediately by the child and the child's family.

(c) Evaluations and assessments are completed within the 45-day timeline in § 303.310.

(Authority: 20 U.S.C. 1436(c))

§ 303.346 Responsibility and accountability.

Each public agency or EIS provider who has a direct role in the provision of early intervention services is responsible for making a good faith effort to assist each eligible child in achieving the outcomes in the child's IFSP. However, part C of the Act does not require that any public agency or EIS provider be held accountable if an eligible child does not achieve the growth projected in the child's IFSP.

(Authority: 20 U.S.C. 1436)

Subpart E—Procedural Safeguards

General

§ 303.400 General responsibility of lead agency for procedural safeguards.

Subject to paragraph (c) of this section, each lead agency must—

(a) Establish or adopt the procedural safeguards that meet the requirements of this subpart, including the provisions on confidentiality in §§ 303.401 through 303.417, parental consent and notice in §§ 303.420 and 303.421, surrogate parents in § 303.422, and dispute resolution procedures in § 303.430;

(b) Ensure the effective implementation of the safeguards by each participating agency (including the lead agency and EIS providers) in the statewide system that is involved in the provision of early intervention services under this part; and

(c) Make available to parents an initial copy of the child's early intervention record, at no cost to the parents.

(Authority: 20 U.S.C. 1439(a))

Confidentiality of Personally Identifiable Information and Early Intervention Records

§ 303.401 Confidentiality and opportunity to examine records.

(a) *General.* Each State must ensure that the parents of a child referred under this part are afforded the right to confidentiality of personally identifiable information, including the right to written notice of, and written consent to, the exchange of that information among agencies, consistent with Federal and State laws.

(b) *Confidentiality procedures.* As required under sections 617(c) and 642 of the Act, the regulations in §§ 303.401 through 303.417 ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained pursuant to this part by the Secretary and by participating agencies, including the State lead agency and EIS providers, in accordance with the protections under the Family Educational Rights and Privacy Act (FERPA) in 20 U.S.C. 1232g and 34 CFR part 99. Each State must have procedures in effect to ensure that—

(1) Participating agencies (including the lead agency and EIS providers) comply with the part C confidentiality procedures in §§ 303.401 through 303.417; and

(2) The parents of infants or toddlers who are referred to, or receive services under this part, are afforded the opportunity to inspect and review all part C early intervention records about the child and the child's family that are collected, maintained, or used under this part, including records related to evaluations and assessments, screening, eligibility determinations, development and implementation of IFSPs, provision of early intervention services, individual complaints involving the child, or any part of the child's early intervention record under this part.

(c) *Applicability and timeframe of procedures.* The confidentiality procedures described in paragraph (b) of this section apply to the personally identifiable information of a child and the child's family that—

(1) Is contained in early intervention records collected, used, or maintained under this part by the lead agency or an EIS provider; and

(2) Applies from the point in time when the child is referred for early intervention services under this part until the later of when the participating agency is no longer required to maintain or no longer maintains that information under applicable Federal and State laws.

(d) *Disclosure of information.* (1) Subject to paragraph (e) of this section, the lead agency must disclose to the SEA and the LEA where the child resides, in accordance with § 303.209(b)(1)(i) and (b)(1)(ii), the following personally identifiable information under the Act:

(i) A child's name.

(ii) A child's date of birth.

(iii) Parent contact information (including parents' names, addresses, and telephone numbers).

(2) The information described in paragraph (d)(1) of this section is needed to enable the lead agency, as well as LEAs and SEAs under part B of the Act, to identify all children potentially eligible for services under § 303.211 and part B of the Act.

(e) *Option to inform a parent about intended disclosure.* (1) A lead agency, through its policies and procedures, may require EIS providers, prior to making the limited disclosure described in paragraph (d)(1) of this section, to inform parents of a toddler with a disability of the intended disclosure and allow the parents a specified time period to object to the disclosure in writing.

(2) If a parent (in a State that has adopted the policy described in paragraph (e)(1) of this section) objects during the time period provided by the State, the lead agency and EIS provider are not permitted to make such a disclosure under paragraph (d) of this section and § 303.209(b)(1)(i) and (b)(1)(ii).

(Authority: 20 U.S.C. 1412(a)(8), 1412(a)(9), 1417(c), 1435(a)(5), 1437(a)(9), 1439(a)(2), 1439(a)(4), 1439(a)(6), 1442)

§ 303.402 Confidentiality.

The Secretary takes appropriate action, in accordance with section 444 of GEPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected, maintained, or used by the Secretary and by lead agencies and EIS providers pursuant to part C of the Act, and consistent with §§ 303.401 through 303.417. The regulations in §§ 303.401 through 303.417 ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained pursuant to this part by the Secretary and by participating agencies, including the State lead agency and EIS providers, in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and 34 CFR part 99.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1442)

§ 303.403 Definitions.

The following definitions apply to §§ 303.402 through 303.417 in addition to the definition of personally identifiable information in § 303.29 and disclosure in 34 CFR 99.3:

(a) *Destruction* means physical destruction of the record or ensuring that personal identifiers are removed from a record so that the record is no longer personally identifiable under § 303.29.

(b) *Early intervention records* mean all records regarding a child that are required to be collected, maintained, or used under part C of the Act and the regulations in this part.

(c) *Participating agency* means any individual, agency, entity, or institution that collects, maintains, or uses personally identifiable information to implement the requirements in part C of the Act and the regulations in this part with respect to a particular child. A participating agency includes the lead agency and EIS providers and any individual or entity that provides any part C services (including service coordination, evaluations and assessments, and other part C services), but does not include primary referral sources, or public agencies (such as the State Medicaid or CHIP program) or private entities (such as private insurance companies) that act solely as funding sources for part C services.

(Authority: 20 U.S.C. 1221e–3, 1417(c), 1435(a)(5), 1439(a)(2), 1442)

§ 303.404 Notice to parents.

The lead agency must give notice when a child is referred under part C of the Act that is adequate to fully inform parents about the requirements in § 303.402, including—

(a) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(b) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information;

(c) A description of all the rights of parents and children regarding this information, including their rights under the part C confidentiality provisions in §§ 303.401 through 303.417; and

(d) A description of the extent that the notice is provided in the native languages of the various population groups in the State.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1442)

§ 303.405 Access rights.

(a) Each participating agency must permit parents to inspect and review any early intervention records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a parent's request to inspect and review records without unnecessary delay and before any meeting regarding an IFSP, or any hearing pursuant to §§ 303.430(d) and 303.435 through 303.439, and in no case more than 10 days after the request has been made.

(b) The right to inspect and review early intervention records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the early intervention records;

(2) The right to request that the participating agency provide copies of the early intervention records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the early intervention records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been provided documentation that the parent does not have the authority under applicable State laws governing such matters as custody, foster care, guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.406 Record of access.

Each participating agency must keep a record of parties obtaining access to early intervention records collected, maintained, or used under part C of the Act (except access by parents and authorized representatives and employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the early intervention records.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

§ 303.407 Records on more than one child.

If any early intervention record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.408 List of types and locations of information.

Each participating agency must provide parents, on request, a list of the types and locations of early intervention records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.409 Fees for records.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records, except as provided in paragraph (c) of this section.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(c) A participating agency must provide at no cost to parents, a copy of each evaluation, assessment of the child, family assessment, and IFSP as soon as possible after each IFSP meeting.

(Authority: 20 U.S.C. 1417(c), 1432(4)(B), 1439(a)(2), 1439(a)(4), 1442)

§ 303.410 Amendment of records at a parent's request.

(a) A parent who believes that information in the early intervention records collected, maintained, or used under this part is inaccurate, misleading, or violates the privacy or other rights of the child or parent may request that the participating agency that maintains the information amend the information.

(b) The participating agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the participating agency refuses to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under § 303.411.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.411 Opportunity for a hearing.

The participating agency must, on request, provide parents with the opportunity for a hearing to challenge information in their child's early intervention records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child or parents. A parent may request a due process hearing under the procedures in § 303.430(d)(1) provided that such hearing procedures meet the requirements of the hearing procedures in § 303.413 or may request a hearing directly under the State's procedures in § 303.413 (*i.e.,* procedures that are consistent with the FERPA hearing requirements in 34 CFR 99.22).

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.412 Result of hearing.

(a) If, as a result of the hearing, the participating agency decides that the information is inaccurate, misleading or in violation of the privacy or other rights of the child or parent, it must amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or in violation of the privacy or other rights of the child or parent, it must inform the parent of the right to place in the early intervention records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the early intervention records of the child under this section must—

(1) Be maintained by the agency as part of the early intervention records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the early intervention records of the child or the contested portion are disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.413 Hearing procedures.

A hearing held under § 303.411 must be conducted according to the procedures under 34 CFR 99.22.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.414 Consent prior to disclosure or use.

(a) Except as provided in paragraph (b) of this section, prior parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than authorized representatives, officials, or employees of participating agencies collecting, maintaining, or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) A lead agency or other participating agency may not disclose personally identifiable information, as defined in § 303.29, to any party except participating agencies (including the lead agency and EIS providers) that are part of the State's part C system without parental consent unless authorized to do so under—

(1) Sections 303.401(d), 303.209(b)(1)(i) and (b)(1)(ii), and 303.211(b)(6)(ii)(A); or

(2) One of the exceptions enumerated in 34 CFR 99.31 (where applicable to part C), which are expressly adopted to apply to part C through this reference. In applying the exceptions in 34 CFR 99.31 to this part, participating agencies must also comply with the pertinent conditions in 34 CFR 99.32, 99.33, 99.34, 99.35, 99.36, 99.38, and 99.39; in applying these provisions in 34 CFR part 99 to part C, the reference to—

(i) 34 CFR 99.30 means § 303.414(a);

(ii) ''Education records'' means early intervention records under § 303.403(b);

(iii) ''Educational'' means early intervention under this part;

(iv) ''Educational agency or institution'' means the participating agency under § 303.404(c);

(v) ''School officials and officials of another school or school system'' means qualified personnel or service coordinators under this part;

(vi) ''State and local educational authorities'' means the lead agency under § 303.22; and

(vii) ''Student'' means child under this part.

(c) The lead agency must provide policies and procedures to be used when a parent refuses to provide consent under this section (such as a meeting to explain to parents how their failure to consent affects the ability of their child to receive services under this part), provided that those procedures do not override a parent's right to refuse consent under § 303.420.

(Authority: 20 U.S.C. 1417(c), 1439(a)(2), 1439(a)(4), 1442)

§ 303.415 Safeguards.

(a) Each participating agency must protect the confidentiality of personally identifiable information at the collection, maintenance, use, storage, disclosure, and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under §§ 303.401 through 303.417 and 34 CFR part 99.

(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

§ 303.416 Destruction of information.

(a) The participating agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide services to the child under part C of the Act, the GEPA provisions in 20 U.S.C. 1232f, and EDGAR, 34 CFR parts 76 and 80.

(b) Subject to paragraph (a) of this section, the information must be destroyed at the request of the parents. However, a permanent record of a child's name, date of birth, parent contact information (including address and phone number), names of service coordinator(s) and EIS provider(s), and exit data (including year and age upon exit, and any programs entered into upon exiting) may be maintained without time limitation.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

§ 303.417 Enforcement.

The lead agency must have in effect the policies and procedures, including sanctions and the right to file a complaint under §§ 303.432 through 303.434, that the State uses to ensure that its policies and procedures, consistent with §§ 303.401 through 303.417, are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1417(c), 1435(a)(5), 1439(a)(2), 1439(a)(4), 1442)

Parental Consent and Notice

§ 303.420 Parental consent and ability to decline services.

(a) The lead agency must ensure parental consent is obtained before—

(1) Administering screening procedures under § 303.320 that are used to determine whether a child is suspected of having a disability;

(2) All evaluations and assessments of a child are conducted under § 303.321;

(3) Early intervention services are provided to the child under this part;

(4) Public benefits or insurance or private insurance is used if such consent is required under § 303.520; and

(5) Disclosure of personally identifiable information consistent with § 303.414.

(b) If a parent does not give consent under paragraph (a)(1), (a)(2), or (a)(3) of this section, the lead agency must make reasonable efforts to ensure that the parent—

(1) Is fully aware of the nature of the evaluation and assessment of the child or early intervention services that would be available; and

(2) Understands that the child will not be able to receive the evaluation, assessment, or early intervention service unless consent is given.

(c) The lead agency may not use the due process hearing procedures under this part or part B of the Act to challenge a parent's refusal to provide any consent that is required under paragraph (a) of this section.

(d) The parents of an infant or toddler with a disability—

(1) Determine whether they, their infant or toddler with a disability, or other family members will accept or decline any early intervention service under this part at any time, in accordance with State law; and

(2) May decline a service after first accepting it, without jeopardizing other early intervention services under this part.

(Authority: 20 U.S.C. 1436(e), 1439(a)(3))

§ 303.421 Prior written notice and procedural safeguards notice.

(a) *General.* Prior written notice must be provided to parents a reasonable time before the lead agency or an EIS provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of their infant or toddler, or the provision of early intervention services to the infant or toddler with a disability and that infant's or toddler's family.

(b) *Content of notice.* The notice must be in sufficient detail to inform parents about—

(1) The action that is being proposed or refused;

(2) The reasons for taking the action; and

(3) All procedural safeguards that are available under this subpart, including a description of mediation in § 303.431, how to file a State complaint in §§ 303.432 through 303.434 and a due process complaint in the provisions adopted under § 303.430(d), and any timelines under those procedures.

(c) *Native language.* (1) The notice must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language, as defined in § 303.25, of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency or designated EIS provider must take steps to ensure that—

(i) The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

(ii) The parent understands the notice; and

(iii) There is written evidence that the requirements of this paragraph have been met.

(Authority: 20 U.S.C. 1439(a)(6)–(7))

Surrogate Parents

§ 303.422 Surrogate parents.

(a) *General.* Each lead agency or other public agency must ensure that the rights of a child are protected when—

(1) No parent (as defined in § 303.27) can be identified;

(2) The lead agency or other public agency, after reasonable efforts, cannot locate a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of lead agency and other public agencies.* (1) The duty of the lead agency, or other public agency under paragraph (a) of this section, includes the assignment of an individual to act as a surrogate for the parent. This assignment process must include a method for—

(i) Determining whether a child needs a surrogate parent; and

(ii) Assigning a surrogate parent to the child.

(2) In implementing the provisions under this section for children who are wards of the State or placed in foster care, the lead agency must consult with the public agency that has been assigned care of the child.

(c) *Wards of the State.* In the case of a child who is a ward of the State, the surrogate parent, instead of being appointed by the lead agency under paragraph (b)(1) of this section, may be appointed by the judge overseeing the infant or toddler's case provided that the surrogate parent meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) *Criteria for selection of surrogate parents.* (1) The lead agency or other public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent—

(i) Is not an employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to the child or any family member of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child he or she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(e) *Non-employee requirement; compensation.* A person who is otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(f) *Surrogate parent responsibilities.* The surrogate parent has the same rights as a parent for all purposes under this part.

(g) *Lead agency responsibility.* The lead agency must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

(Authority: 20 U.S.C. 1439(a)(5))

Dispute Resolution Options

§ 303.430 State dispute resolution options.

(a) *General.* Each statewide system must include written procedures for the timely administrative resolution of complaints through mediation, State complaint procedures, and due process hearing procedures, described in paragraphs (b) through (e) of this section.

(b) *Mediation.* Each lead agency must make available to parties to disputes involving any matter under this part the opportunity for mediation that meets the requirements in § 303.431.

(c) *State complaint procedures.* Each lead agency must adopt written State complaint procedures to resolve any State complaints filed by any party regarding any violation of this part that meet the requirements in §§ 303.432 through 303.434.

(d) *Due process hearing procedures.* Each lead agency must adopt written due process hearing procedures to resolve complaints with respect to a particular child regarding any matter identified in § 303.421(a), by either adopting—

(1) The part C due process hearing procedures under section 639 of the Act that—

(i) Meet the requirements in §§ 303.435 through 303.438; and

(ii) Provide a means of filing a due process complaint regarding any matter listed in § 303.421(a); or

(2) The part B due process hearing procedures under section 615 of the Act and §§ 303.440 through 303.449 (with either a 30-day or 45-day timeline for resolving due process complaints, as provided in § 303.440(c)).

(e) *Status of a child during the pendency of a due process complaint.* (1) During the pendency of any proceeding involving a due process complaint under paragraph (d) of this section, unless the lead agency and parents of an infant or toddler with a disability otherwise agree, the child must continue to receive the appropriate early intervention services in the setting identified in the IFSP that is consented to by the parents.

(2) If the due process complaint under paragraph (d) of this section involves an application for initial services under part C of the Act, the child must receive those services that are not in dispute.

(Approved by Office of Management and Budget under control number 1820–0678 and 1820–NEW)

(Authority: 20 U.S.C. 1415(e), 1415(f)(1)(A), 1415(f)(3)(A)–(D), 1439)

Mediation

§ 303.431 Mediation.

(a) *General.* Each lead agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process at any time.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under part C of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2)(i) The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of early intervention services.

(ii) The lead agency must select mediators on a random, rotational, or other impartial basis.

(3) The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (d) of this section.

(4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(5) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that—

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

(ii) Is signed by both the parent and a representative of the lead agency who has the authority to bind such agency.

(6) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(7) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part.

(c) *Impartiality of mediator.* (1) An individual who serves as a mediator under this part—

(i) May not be an employee of the lead agency or an EIS provider that is involved in the provision of early intervention services or other services to the child; and

(ii) Must not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of a lead agency or an early intervention provider solely because he or she is paid by the agency or provider to serve as a mediator.

(d) *Meeting to encourage mediation.* A lead agency may establish procedures to offer to parents and EIS providers that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party—

(1) Who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and

(2) Who would explain the benefits of, and encourage the use of, the mediation process to the parents.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1415(e), 1439(a)(8))

State Complaint Procedures

§ 303.432 Adoption of State complaint procedures.

(a) *General.* Each lead agency must adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements in § 303.434 by providing for the filing of a complaint with the lead agency; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, Protection and Advocacy (P&A) agencies, and other appropriate entities, the State procedures under §§ 303.432 through 303.434.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which the lead agency has found a failure to provide appropriate services, the lead agency, pursuant to its general supervisory authority under part C of the Act, must address—

(1) The failure to provide appropriate services, including corrective actions appropriate to address the needs of the infant or toddler with a disability who is the subject of the complaint and the infant's or toddler's family (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all infants and toddlers with disabilities and their families.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.433 Minimum State complaint procedures.

(a) *Time limit; minimum procedures.* Each lead agency must include in its complaint procedures a time limit of 60 days after a complaint is filed under § 303.434 to—

(1) Carry out an independent on-site investigation, if the lead agency determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the lead agency, public agency, or EIS provider with an opportunity to respond to the complaint, including, at a minimum—

(i) At the discretion of the lead agency, a proposal to resolve the complaint; and

(ii) An opportunity for a parent who has filed a complaint and the lead agency, public agency, or EIS provider to voluntarily engage in mediation, consistent with §§ 303.430(b) and 303.431;

(4) Review all relevant information and make an independent determination as to whether the lead agency, public agency, or EIS provider is violating a requirement of part C of the Act or of this part; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the lead agency's final decision.

(b) *Time extension; final decision; implementation.* The lead agency's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if—

(i) Exceptional circumstances exist with respect to a particular complaint; or

(ii) The parent (or individual or organization, if mediation is available to the individual or organization under State procedures) and the lead agency, public agency or EIS provider involved agree to extend the time to engage in mediation pursuant to paragraph (a)(3)(ii) of this section; and

(2) Include procedures for effective implementation of the lead agency's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section and due process hearings under § 303.430(d).* (1) If a written complaint is received that is also the subject of a due process hearing under § 303.430(d), or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process hearing must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.

(2) If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties—

(i) The due process hearing decision is binding on that issue; and

(ii) The lead agency must inform the complainant to that effect.

(3) A complaint alleging a lead agency, public agency, or EIS provider's failure to implement a due process hearing decision must be resolved by the lead agency.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.434 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 303.432 and 303.433.

(b) The complaint must include—

(1) A statement that the lead agency, public agency, or EIS provider has violated a requirement of part C of the Act;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific child—

(i) The name and address of the residence of the child;

(ii) The name of the EIS provider serving the child;

(iii) A description of the nature of the problem of the child, including facts relating to the problem; and

(iv) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 303.432.

(d) The party filing the complaint must forward a copy of the complaint to the public agency or EIS provider serving the child at the same time the party files the complaint with the lead agency.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1439(a)(1))

States That Choose To Adopt the Part C Due Process Hearing Procedures Under Section 639 of the Act

§ 303.435 Appointment of an impartial due process hearing officer.

(a) *Qualifications and duties.* Whenever a due process complaint is received under § 303.430(d), a due process hearing officer must be appointed to implement the complaint resolution process in this subpart. The person must—

(1) Have knowledge about the provisions of this part and the needs of, and early intervention services available for, infants and toddlers with disabilities and their families; and

(2) Perform the following duties:

(i)(A) Listen to the presentation of relevant viewpoints about the due process complaint.

(B) Examine all information relevant to the issues.

(C) Seek to reach a timely resolution of the due process complaint.

(ii) Provide a record of the proceedings, including a written decision.

(b) *Definition of impartial.* (1) *Impartial* means that the due process hearing officer appointed to implement the due process hearing under this part—

(i) Is not an employee of the lead agency or an EIS provider involved in the provision of early intervention services or care of the child; and

(ii) Does not have a personal or professional interest that would conflict with his or her objectivity in implementing the process.

(2) A person who otherwise qualifies under paragraph (b)(1) of this section is not an employee of an agency solely because the person is paid by the agency to implement the due process hearing procedures or mediation procedures under this part.

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.436 Parental rights in due process hearing proceedings.

(a) *General.* Each lead agency must ensure that the parents of a child referred to part C are afforded the rights in paragraph (b) of this section in the due process hearing carried out under § 303.430(d).

(b) *Rights.* Any parent involved in a due process hearing has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early intervention services for infants and toddlers with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to the parent at least five days before the hearing;

(4) Obtain a written or electronic verbatim transcription of the hearing at no cost to the parent; and

(5) Receive a written copy of the findings of fact and decisions at no cost to the parent.

(Authority: 20 U.S.C. 1439(a))

§ 303.437 Convenience of hearings and timelines.

(a) Any due process hearing conducted under this subpart must be carried out at a time and place that is reasonably convenient to the parents.

(b) Each lead agency must ensure that, not later than 30 days after the receipt of a parent's due process complaint, the due process hearing required under this subpart is completed and a written decision mailed to each of the parties.

(c) A hearing officer may grant specific extensions of time beyond the period set out in paragraph (b) of this section at the request of either party.

(Authority: 20 U.S.C. 1439(a)(1))

§ 303.438 Civil action.

Any party aggrieved by the findings and decision issued pursuant to a due process complaint has the right to bring a civil action in State or Federal court under section 639(a)(1) of the Act.

(Authority: 20 U.S.C. 1439(a)(1))

States That Choose To Adopt the Part B Due Process Hearing Procedures Under Section 615 of the Act

§ 303.440 Filing a due process complaint.

(a) *General.* (1) A parent, EIS provider, or a lead agency may file a due process complaint on any of the matters described in § 303.421(a), relating to the identification, evaluation, or placement of a child, or the provision of early intervention services to the infant or toddler with a disability and his or her family under part C of the Act.

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or EIS provider knew, or should have known, about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 303.443(f) apply to the timeline in this section.

(b) *Information for parents.* The lead agency must inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or EIS provider files a due process complaint under this section.

(c) *Timeline for Resolution.* The lead agency may adopt a 30- or 45-day timeline, subject to § 303.447(a), for the resolution of due process complaints and must specify in its written policies and procedures under § 303.123 and in its prior written notice under § 303.421, the specific timeline it has adopted.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1415(b)(6), 1439)

§ 303.441 Due process complaint.

(a) *General.* (1) The lead agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the lead agency.

(b) *Content of complaint.* The due process complaint required in paragraph (a)(1) of this section must include—

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the EIS provider serving the child;

(4) In the case of a homeless child (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the EIS provider serving the child;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) *Notice required before a hearing on a due process complaint.* A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(d) *Sufficiency of complaint.* (1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements in paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if—

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to § 303.442; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in § 303.442(a) and the time period to resolve in § 303.442(b) begin again with the filing of the amended due process complaint.

(e) *Lead agency response to a due process complaint.* (1) If the lead agency has not sent a prior written notice under § 303.421 to the parent regarding the subject matter contained in the parent's due process complaint, the lead agency or EIS provider must, within 10 days of receiving the due process complaint, send to the parent a response that includes—

(i) An explanation of why the lead agency or EIS provider proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IFSP Team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the lead agency or EIS provider used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's or EIS provider's proposed or refused action.

(2) A response by the lead agency under paragraph (e)(1) of this section does not preclude the lead agency from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) *Other party response to a due process complaint.* Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2), 1439)

§ 303.442 Resolution process.

(a) *Resolution meeting.* (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under § 303.443, the lead agency must convene a meeting with the parent and the relevant member or members of the IFSP Team who have specific knowledge of the facts identified in the due process complaint that—

(i) Includes a representative of the lead agency who has decision-making authority on behalf of that agency; and

(ii) May not include an attorney of the lead agency unless the parent is accompanied by an attorney.

(2) The purpose of the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the lead agency has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraphs (a)(1) and (a)(2) of this section need not be held if—

(i) The parent and lead agency agree in writing to waive the meeting; or

(ii) The parent and lead agency agree to use the mediation process described in § 303.431.

(4) The parent and the lead agency must determine the relevant members of the IFSP Team to attend the meeting.

(b) *Resolution period.* (1) If the lead agency has not resolved the due process complaint to the satisfaction of the parties within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 303.447 begins at the expiration of the 30-day period in paragraph (b)(1) of this section.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (b)(2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the lead agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, including documenting its efforts, the lead agency may, at the conclusion of the 30-day period, request that the hearing officer dismiss the parent's due process complaint.

(5) If the lead agency fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

(c) *Adjustments to 30-day resolution period.* The 30- or 45-day timeline adopted by the lead agency under § 303.440(c) for the due process hearing described in § 303.447(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting.

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible.

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or lead agency withdraws from the mediation process.

(d) *Written settlement agreement.* If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (a)(2) of this section, the parties must execute a legally binding agreement that is—

(1) Signed by both the parent and a representative of the lead agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the lead agency, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements pursuant to this section.

(e) *Agreement review period.* If the parties execute an agreement pursuant to paragraph (d) of this section, a party may void the agreement within three business days of the agreement's execution.

(Authority: 20 U.S.C. 1415(f)(1)(B), 1439)

§ 303.443 Impartial due process hearing.

(a) *General.* Whenever a due process complaint is received consistent with § 303.440, the parents or the EIS provider involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§ 303.440 through 303.442.

(b) *Agency responsible for conducting the due process hearing.* The hearing described in paragraph (a) of this section must be conducted by the lead agency directly responsible for the early intervention services of the infant or toddler, as determined under State statute, State regulation, or a written policy of the lead agency.

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the lead agency or the EIS provider that is involved in the early intervention services or care of the infant or toddler; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each lead agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 303.441(b), unless the other party agrees otherwise.

(e) *Timeline for requesting a hearing.* A parent, lead agency, or EIS provider must request an impartial hearing on their due process complaint within two years of the date the parent, lead agency, or EIS provider knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—

(1) Specific misrepresentations by the lead agency or EIS provider that it had resolved the problem forming the basis of the due process complaint; or

(2) The lead agency's or EIS provider's failure to provide the parent information that was required under this part to be provided to the parent.

(Approved by Office of Management and Budget under control number 1820–NEW)

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)–(D), 1439)

§ 303.444 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 303.440 through 303.445, or an appeal conducted pursuant to § 303.446, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of infants or toddlers with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information.* (1) At least five business days prior to a hearing conducted pursuant to § 303.443(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) *Parental rights at hearings.* Parents involved in hearings must—

(1) Be given the right to open the hearing to the public; and

(2) Receive a copy of the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section at no cost.

(Authority: 20 U.S.C. 1415(f)(2), 1415(h), 1439)

§ 303.445 Hearing decisions.

(a) *Decision of hearing officer.* (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether an infant or toddler was appropriately identified, evaluated, or placed, or whether the infant or toddler with a disability and his or her family were appropriately provided early intervention services under part C of the Act, must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child was not appropriately identified, evaluated, placed, or provided early intervention services under part C of the Act only if the procedural inadequacies—

(i) Impeded the child's right to identification, evaluation, and placement or provision of early intervention services for the child and that child's family under part C of the Act;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding identification, evaluation, placement or provision of early intervention services for the child and that child's family under part C of the Act; or

(iii) Caused a deprivation of educational or developmental benefit.

(3) Nothing in paragraph (a) of this section precludes a hearing officer from ordering the lead agency or EIS provider to comply with procedural requirements under §§ 303.400 through 303.449.

(b) *Construction clause.* Nothing in §§ 303.440 through 303.445 affects the right of a parent to file an appeal of the due process hearing decision with the lead agency under § 303.446(b), if the lead agency level appeal is available.

(c) *Separate due process complaint.* Nothing in §§ 303.440 through 303.449 precludes a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(d) *Findings and decisions to general public.* The lead agency, after deleting any personally identifiable information, must make the findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(3)(E)–(F), 1415(h)(4), 1415(o), 1439)

§ 303.446 Finality of decision; appeal; impartial review.

(a) *Finality of hearing decision.* A decision made in a hearing conducted pursuant to §§ 303.440 through 303.445 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 303.448.

(b) *Appeal of decisions; impartial review.* (1) The lead agency may provide for procedures to allow any party aggrieved by the findings and decision in the hearing to appeal to the lead agency.

(2) If there is an appeal, the lead agency must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 303.444 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) *Findings of fact and decision to the general public.* The lead agency, after deleting any personally identifiable information, must make the findings of fact and decisions described in paragraph (b)(2)(vi) of this section available to the general public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under § 303.448.

(Authority: 20 U.S.C. 1415(g), 1415(h)(4), 1415(i)(1)(A), 1415(i)(2), 1439)

§ 303.447 Timelines and convenience of hearings and reviews.

(a) The lead agency must ensure that not later than either 30 days or 45 days (consistent with the lead agency's written policies and procedures adopted under § 303.440(c)) after the expiration of the 30-day period in § 303.442(b), or the adjusted 30-day time periods described in § 303.442(c))—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The lead agency must ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1), 1439)

§ 303.448 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§ 303.440 through 303.445 who does not have the right to an appeal under § 303.446(b), and any party aggrieved by the findings and decision under § 303.446(b), has the right to bring a civil action with respect to the due process complaint under § 303.440. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Time limitation.* The party bringing the action has 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under part C of the Act, in the time allowed by that State law.

(c) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 303.440 and 303.446 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2), 1415(i)(3)(A), 1415(l), 1439)

§ 303.449 State enforcement mechanisms.

Notwithstanding §§ 303.431(b)(6) and 303.442(d)(2), which provide for judicial enforcement of a written agreement reached as a result of a mediation or a resolution meeting, there is nothing in this part that would prevent the State from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court or competent jurisdiction or in a district court of the United States.

(Authority: 20 U.S.C. 1415(e)(2)(F), 1415(f)(1)(B), 1439)

Subpart F—Use of Funds and Payor of Last Resort

General

§ 303.500 Use of funds, payor of last resort, and system of payments.

(a) *Statewide system.* Each statewide system must include written policies and procedures that meet the requirements of the—

(1) Use of funds provisions in § 303.501; and

(2) Payor of last resort provisions in §§ 303.510 through 303.521 (regarding the identification and coordination of funding resources for, and the provision of, early intervention services under part C of the Act within the State).

(b) *System of Payments.* A State may establish, consistent with §§ 303.13(a)(3) and 303.203(b), a system of payments for early intervention services under part C of the Act, including a schedule

of sliding fees or cost participation fees (such as co-payments, premiums, or deductibles) required to be paid under Federal, State, local, or private programs of insurance or benefits for which the infant or toddler with a disability or the child's family is enrolled, that meets the requirements of §§ 303.520 and 303.521.

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10)–(12), 1437(b), 1438, 1439(a), 1440)

Use of Funds

§ 303.501 Permissive use of funds by the lead agency.

Consistent with §§ 303.120 through 303.122 and §§ 303.220 through 303.226, a lead agency may use funds under this part for activities or expenses that are reasonable and necessary for implementing the State's early intervention program for infants and toddlers with disabilities including funds—

(a) For direct early intervention services for infants and toddlers with disabilities and their families under this part that are not otherwise funded through other public or private sources (subject to §§ 303.510 through 303.521);

(b) To expand and improve services for infants and toddlers with disabilities and their families under this part that are otherwise available;

(c)(1) To provide FAPE as that term is defined in § 303.15, in accordance with part B of the Act, to children with disabilities from their third birthday to the beginning of the following school year;

(2) The provision of FAPE under paragraph (c)(1) of this section does not apply to children who continue to receive early intervention services under this part in accordance with paragraph (d) of this section and § 303.211;

(d) With the written consent of the parents, to continue to provide early intervention services under this part, in lieu of FAPE provided in accordance with part B of the Act, to children with disabilities from their third birthday (pursuant to § 303.211) until those children enter, or are eligible under State law to enter, kindergarten; and

(e) In any State that does not provide services under § 303.204 for at-risk infants and toddlers, as defined in § 303.5, to strengthen the statewide system by initiating, expanding, or improving collaborative efforts related to at-risk infants and toddlers, including establishing linkages with appropriate public and private community-based organizations, services, and personnel for the purposes of—

(1) Identifying and evaluating at-risk infants and toddlers;

(2) Making referrals for the infants and toddlers identified and evaluated under paragraph (e)(1) of this section; and

(3) Conducting periodic follow-up on each referral, to determine if the status of the infant or toddler involved has changed with respect to the eligibility of the infant or toddler for services under this part.

(Authority: 20 U.S.C. 1435(a)(10)–(12), 1437(b), 1438)

Payor of Last Resort—General Provisions

§ 303.510 Payor of last resort.

(a) *Nonsubstitution of funds.* Except as provided in paragraph (b) of this section, funds under this part may not be used to satisfy a financial commitment for services that would otherwise have been paid for from another public or private source, including any medical program administered by the Department of Defense, but for the enactment of part C of the Act. Therefore, funds under this part may be used only for early intervention services that an infant or toddler with a disability needs but is not currently entitled to receive or have payment made from any other Federal, State, local, or private source (subject to §§ 303.520 and 303.521).

(b) *Interim payments—reimbursement.* If necessary to prevent a delay in the timely provision of appropriate early intervention services to a child or the child's family, funds under this part may be used to pay the provider of services (for services and functions authorized under this part, including health services, as defined in § 303.16 (but not medical services), functions of the child find system described in §§ 303.115 through 303.117 and §§ 303.301 through 303.320, and evaluations and assessments in § 303.321), pending reimbursement from the agency or entity that has ultimate responsibility for the payment.

(c) *Non-reduction of benefits.* Nothing in this part may be construed to permit a State to reduce medical or other assistance available in the State or to alter eligibility under Title V of the Social Security Act, 42 U.S.C. 701, *et seq.* (SSA) (relating to maternal and child health) or Title XIX of the SSA, 42 U.S.C. 1396 (relating to Medicaid), including section 1903(a) of the SSA regarding medical assistance for services furnished to an infant or toddler with a disability when those services are included in the child's IFSP adopted pursuant to part C of the Act.

(Authority: 20 U.S.C. 1435(a)(10)(B), 1437(a)(2), 1440(a), 1440(c))

§ 303.511 Methods to ensure the provision of, and financial responsibility for, Part C services.

(a) *General.* Each State must ensure that it has in place methods for State interagency coordination. Under these methods, the Chief Executive Officer of a State or designee of the Officer must ensure that the interagency agreement or other method for interagency coordination is in effect between each State public agency and the designated lead agency in order to ensure—

(1) The provision of, and establishing financial responsibility for, early intervention services provided under this part; and

(2) Such services are consistent with the requirement in section 635 of the Act and the State's application under section 637 of the Act, including the provision of such services during the pendency of any dispute between State agencies.

(b) The methods in paragraph (a) of this section must meet all requirements in this section and be set forth in one of the following:

(1) State law or regulation;

(2) Signed interagency and intra-agency agreements between respective agency officials that clearly identify the financial and service provision responsibilities of each agency (or entity within the agency); or

(3) Other appropriate written methods determined by the Governor of the State, or the Governor's designee, and approved by the Secretary through the review and approval of the State's application.

(c) *Procedures for resolving disputes.* (1) Each method must include procedures for achieving a timely resolution of intra-agency and interagency disputes about payments for a given service, or disputes about other matters related to the State's early intervention service program. Those procedures must include a mechanism for resolution of disputes within agencies and for the Governor, Governor's designee, or the lead agency to make a final determination for interagency disputes, which determination must be binding upon the agencies involved.

(2) The method must—

(i) Permit the agency to resolve its own internal disputes (based on the agency's procedures that are included in the agreement), so long as the agency acts in a timely manner; and

(ii) Include the process that the lead agency will follow in achieving resolution of intra-agency disputes, if a given agency is unable to resolve its own internal disputes in a timely manner.

(3) If, during the lead agency's resolution of the dispute, the Governor, Governor's designee, or lead agency determines that the assignment of financial responsibility under this section was inappropriately made—

(i) The Governor, Governor's designee, or lead agency must reassign the financial responsibility to the appropriate agency; and

(ii) The lead agency must make arrangements for reimbursement of any expenditures incurred by the agency originally assigned financial responsibility.

(d) *Delivery of services in a timely manner.* The methods adopted by the State under this section must—

(1) Include a mechanism to ensure that no services that a child is entitled to receive under this part are delayed or denied because of disputes between agencies regarding financial or other responsibilities; and

(2) Be consistent with the written funding policies adopted by the State under this subpart and include any provisions the State has adopted under § 303.520 regarding the use of insurance to pay for part C services.

(e) *Additional components.* Each method must include any additional components necessary to ensure effective cooperation and coordination among, and the lead agency's general supervision (including monitoring) of, EIS providers (including all public agencies) involved in the State's early intervention service programs.

(Authority: 20 U.S.C. 1435(a)(10), 1437(a)(2), 1440(b))

Payor of Last Resort & System of Payments Provisions—Use of Insurance, Benefits, Systems of Payments, and Fees

§ 303.520 Policies related to use of public benefits or insurance or private insurance to pay for Part C services.

(a) *Use of public benefits or public insurance to pay for Part C services.*

(1) A State may not use the public benefits or insurance of a child or parent to pay for part C services unless the State provides written notification, consistent with § 303.520(a)(3), to the child's parents, and the State meets the no-cost protections identified in paragraph (a)(2) of this section.

(2) With regard to using the public benefits or insurance of a child or parent to pay for part C services, the State—

(i) May not require a parent to sign up for or enroll in public benefits or insurance programs as a condition of receiving part C services and must obtain consent prior to using the public benefits or insurance of a child or parent if that child or parent is not already enrolled in such a program;

(ii) Must obtain consent, consistent with §§ 303.7 and 303.420(a)(4), to use a child's or parent's public benefits or insurance to pay for part C services if that use would—

(A) Decrease available lifetime coverage or any other insured benefit for that child or parent under that program;

(B) Result in the child's parents paying for services that would otherwise be covered by the public benefits or insurance program;

(C) Result in any increase in premiums or discontinuation of public benefits or insurance for that child or that child's parents; or

(D) Risk loss of eligibility for the child or that child's parents for home and community-based waivers based on aggregate health-related expenditures.

(iii) If the parent does not provide consent under paragraphs (a)(2)(i) or (a)(2)(ii) of this section, the State must still make available those part C services on the IFSP to which the parent has provided consent.

(3) Prior to using a child's or parent's public benefits or insurance to pay for part C services, the State must provide written notification to the child's parents. The notification must include—

(i) A statement that parental consent must be obtained under § 303.414, if that provision applies, before the State lead agency or EIS provider discloses, for billing purposes, a child's personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid);

(ii) A statement of the no-cost protection provisions in § 303.520(a)(2) and that if the parent does not provide the consent under § 303.520(a)(2), the State lead agency must still make available those part C services on the IFSP for which the parent has provided consent;

(iii) A statement that the parents have the right under § 303.414, if that provision applies, to withdraw their consent to disclosure of personally identifiable information to the State public agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time; and

(iv) A statement of the general categories of costs that the parent would incur as a result of participating in a public benefits or insurance program (such as co-payments or deductibles, or the required use of private insurance as the primary insurance).

(4) If a State requires a parent to pay any costs that the parent would incur as a result of the State's using a child's or parent's public benefits or insurance to pay for part C services (such as co-payments or deductibles, or the required use of private insurance as the primary insurance), those costs must be identified in the State's system of payments policies under § 303.521 and included in the notification provided to the parent under paragraph (a)(3) of this section; otherwise, the State cannot charge those costs to the parent.

(b) *Use of private insurance to pay for Part C services.* (1)(i) The State may not use the private insurance of a parent of an infant or toddler with a disability to pay for part C services unless the parent provides parental consent, consistent with §§ 303.7 and 303.420(a)(4), to use private insurance to pay for part C services for his or her child or the State meets one of the exceptions in paragraph (b)(2) of this section. This includes the use of private insurance when such use is a prerequisite for the use of public benefits or insurance. Parental consent must be obtained—

(A) When the lead agency or EIS provider seeks to use the parent's private insurance or benefits to pay for the initial provision of an early intervention service in the IFSP; and

(B) Each time consent for services is required under § 303.420(a)(3) due to an increase (in frequency, length, duration, or intensity) in the provision of services in the child's IFSP.

(ii) If a State requires a parent to pay any costs that the parent would incur as a result of the State's use of private insurance to pay for early intervention services (such as co-payments, premiums, or deductibles), those costs must be identified in the State's system of payments policies under § 303.521; otherwise, the State may not charge those costs to the parent.

(iii) When obtaining parental consent required under paragraph (b)(1)(i) of this section or initially using benefits under a child or parent's private insurance policy to pay for an early intervention service under paragraph (b)(2) of this section, the State must provide to the parent a copy of the State's system of payments policies that identifies the potential costs that the parent may incur when their private insurance is used to pay for early intervention services under this part (such as co-payments, premiums, or deductibles or other long-term costs such as the loss of benefits because of annual or lifetime health insurance coverage caps under the insurance policy).

(2) The parental consent requirements in paragraph (b)(1) of this section do not apply if the State has enacted a State statute regarding private health

insurance coverage for early intervention services under part C of the Act, that expressly provides that—

(i) The use of private health insurance to pay for part C services cannot count towards or result in a loss of benefits due to the annual or lifetime health insurance coverage caps for the infant or toddler with a disability, the parent, or the child's family members who are covered under that health insurance policy;

(ii) The use of private health insurance to pay for part C services cannot negatively affect the availability of health insurance to the infant or toddler with a disability, the parent, or the child's family members who are covered under that health insurance policy, and health insurance coverage may not be discontinued for these individuals due to the use of the health insurance to pay for services under part C of the Act; and

(iii) The use of private health insurance to pay for part C services cannot be the basis for increasing the health insurance premiums of the infant or toddler with a disability, the parent, or the child's family members covered under that health insurance policy.

(3) If a State has enacted a State statute that meets the requirements in paragraph (b)(2) of this section, regarding the use of private health insurance coverage to pay for early intervention services under part C of the Act, the State may reestablish a new baseline of State and local expenditures under § 303.225(b) in the next Federal fiscal year following the effective date of the statute.

(c) *Inability to pay.* If a parent or family of an infant or toddler with a disability is determined unable to pay under the State's definition of inability to pay under § 303.521(a)(3) and does not provide consent under paragraph (b)(1), the lack of consent may not be used to delay or deny any services under this part to that child or family.

(d) *Proceeds or funds from public insurance or benefits or from private insurance.* (1) Proceeds or funds from public insurance or benefits or from private insurance are not treated as program income for purposes of 34 CFR 80.25.

(2) If the State receives reimbursements from Federal funds (*e.g.,* Medicaid reimbursements attributable directly to Federal funds) for services under part C of the Act, those funds are considered neither State nor local funds under § 303.225(b).

(3) If the State spends funds from private insurance for services under this part, those funds are considered neither State nor local funds under § 303.225.

(e) *Funds received from a parent or family member under a State's system of payments.* Funds received by the State from a parent or family member under the State's system of payments established under § 303.521 are considered program income under 34 CFR 80.25. These funds—

(1) Are not deducted from the total allowable costs charged under part C of the Act (as set forth in 34 CFR 80.25(g)(1));

(2) Must be used for the State's part C early intervention services program, consistent with 34 CFR 80.25(g)(2); and

(3) Are considered neither State nor local funds under § 303.225(b).

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10), 1439(a))

§ 303.521 System of payments and fees.

(a) *General.* If a State elects to adopt a system of payments in § 303.500(b), the State's system of payments policies must be in writing and specify which functions or services, if any, are subject to the system of payments (including any fees charged to the family as a result of using one or more of the family's public insurance or benefits or private insurance), and include—

(1) The payment system and schedule of sliding or cost participation fees that may be charged to the parent for early intervention services under this part;

(2) The basis and amount of payments or fees;

(3) The State's definition of ability to pay (including its definition of income and family expenses, such as extraordinary medical expenses), its definition of inability to pay, and when and how the State makes its determination of the ability or inability to pay;

(4) An assurance that—

(i) Fees will not be charged to parents for the services that a child is otherwise entitled to receive at no cost (including those services identified under paragraphs (a)(4)(ii), (b), and (c) of this section);

(ii) The inability of the parents of an infant or toddler with a disability to pay for services will not result in a delay or denial of services under this part to the child or the child's family such that, if the parent or family meets the State's definition of inability to pay, the infant or toddler with a disability must be provided all part C services at no cost.

(iii) Families will not be charged any more than the actual cost of the part C service (factoring in any amount received from other sources for payment for that service); and

(iv) Families with public insurance or benefits or private insurance will not be charged disproportionately more than families who do not have public insurance or benefits or private insurance;

(5) Provisions stating that the failure to provide the requisite income information and documentation may result in a charge of a fee on the fee schedule and specify the fee to be charged; and

(6) Provisions that permit, but do not require, the lead agency to use part C or other funds to pay for costs such as the premiums, deductibles, or co-payments.

(b) *Functions not subject to fees.* The following are required functions that must be carried out at public expense, and for which no fees may be charged to parents:

(1) Implementing the child find requirements in §§ 303.301 through 303.303.

(2) Evaluation and assessment, in accordance with § 303.320, and the functions related to evaluation and assessment in § 303.13(b).

(3) Service coordination services, as defined in §§ 303.13(b)(11) and 303.33.

(4) Administrative and coordinative activities related to—

(i) The development, review, and evaluation of IFSPs and interim IFSPs in accordance with §§ 303.342 through 303.345; and

(ii) Implementation of the procedural safeguards in subpart E of this part and the other components of the statewide system of early intervention services in subpart D of this part and this subpart.

(c) *States with FAPE mandates, or that use funds under Part B of the Act to serve children under age three.* If a State has in effect a State law requiring the provision of FAPE for, or uses part B funds to serve, an infant or toddler with a disability under the age of three (or any subset of infants and toddlers with disabilities under the age of three), the State may not charge the parents of the infant or toddler with a disability for any services (*e.g.,* physical or occupational therapy) under this part that are part of FAPE for that infant or toddler and the child's family, and those FAPE services must meet the requirements of both parts B and C of the Act.

(d) *Family fees.* (1) Fees or costs collected from a parent or the child's family to pay for early intervention services under a State's system of payments are program income under 34 CFR 80.25. A State may add this program income to its part C grant funds, rather than deducting the program income from the amount of the State's part C grant. Any fees collected must be used for the purposes of the grant under part C of the Act.

(2) Fees collected under a system of payments are considered neither State nor local funds under § 303.225(b).

(e) *Procedural Safeguards.* (1) Each State system of payments must include written policies to inform parents that a parent who wishes to contest the imposition of a fee, or the State's determination of the parent's ability to pay, may do one of the following:

(i) Participate in mediation in accordance with § 303.431.

(ii) Request a due process hearing under § 303.436 or 303.441, whichever is applicable.

(iii) File a State complaint under § 303.434.

(iv) Use any other procedure established by the State for speedy resolution of financial claims, provided that such use does not delay or deny the parent's procedural rights under this part, including the right to pursue, in a timely manner, the redress options described in paragraphs (e)(2)(i) through (e)(2)(iii) of this section.

(2) A State must inform parents of these procedural safeguard options by either—

(i) Providing parents with a copy of the State's system of payments policies when obtaining consent for provision of early intervention services under § 303.420(a)(3); or

(ii) Including this information with the notice provided to parents under § 303.421.

(Authority: 20 U.S.C. 1432(4)(B), 1439(a), 1440)

Subpart G—State Interagency Coordinating Council

§ 303.600 Establishment of Council.

(a) A State that desires to receive financial assistance under part C of the Act must establish a State Interagency Coordinating Council (Council) as defined in § 303.8.

(b) The Council must be appointed by the Governor. The Governor must ensure that the membership of the Council reasonably represents the population of the State.

(c) The Governor must designate a member of the Council to serve as the chairperson of the Council or require the Council to do so. Any member of the Council who is a representative of the lead agency designated under § 303.201 may not serve as the chairperson of the Council.

(Authority: 20 U.S.C. 1441(a))

§ 303.601 Composition.

(a) The Council must be composed as follows:

(1)(i) At least 20 percent of the members must be parents, including minority parents, of infants or toddlers with disabilities or children with disabilities aged 12 years or younger, with knowledge of, or experience with, programs for infants and toddlers with disabilities.

(ii) At least one parent member must be a parent of an infant or toddler with a disability or a child with a disability aged six years or younger.

(2) At least 20 percent of the members must be public or private providers of early intervention services.

(3) At least one member must be from the State legislature.

(4) At least one member must be involved in personnel preparation.

(5) At least one member must—

(i) Be from each of the State agencies involved in the provision of, or payment for, early intervention services to infants and toddlers with disabilities and their families; and

(ii) Have sufficient authority to engage in policy planning and implementation on behalf of these agencies.

(6) At least one member must—

(i) Be from the SEA responsible for preschool services to children with disabilities; and

(ii) Have sufficient authority to engage in policy planning and implementation on behalf of the SEA.

(7) At least one member must be from the agency responsible for the State Medicaid and CHIP program.

(8) At least one member must be from a Head Start or Early Head Start agency or program in the State.

(9) At least one member must be from a State agency responsible for child care.

(10) At least one member must be from the agency responsible for the State regulation of private health insurance.

(11) At least one member must be a representative designated by the Office of the Coordination of Education of Homeless Children and Youth.

(12) At least one member must be a representative from the State child welfare agency responsible for foster care.

(13) At least one member must be from the State agency responsible for children's mental health.

(b) The Governor may appoint one member to represent more than one program or agency listed in paragraphs (a)(7) through (a)(13) of this section.

(c) The Council may include other members selected by the Governor, including a representative from the Bureau of Indian Education (BIE) or, where there is no school operated or funded by the BIE in the State, from the Indian Health Service or the tribe or tribal council.

(d) No member of the Council may cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

(Authority: 20 U.S.C. 1231d, 1441(b), 1441(f))

§ 303.602 Meetings.

(a) The Council must meet, at a minimum, on a quarterly basis, and in such places as it determines necessary.

(b) The meetings must—

(1) Be publicly announced sufficiently in advance of the dates they are to be held to ensure that all interested parties have an opportunity to attend;

(2) To the extent appropriate, be open and accessible to the general public; and

(3) As needed, provide for interpreters for persons who are deaf and other necessary services for Council members and participants. The Council may use funds under this part to pay for those services.

(Authority: 20 U.S.C. 1441(c))

§ 303.603 Use of funds by the Council.

(a) Subject to the approval by the Governor, the Council may use funds under this part to—

(1) Conduct hearings and forums;

(2) Reimburse members of the Council for reasonable and necessary expenses for attending Council meetings and performing Council duties (including child care for parent representatives);

(3) Pay compensation to a member of the Council if the member is not employed or must forfeit wages from other employment when performing official Council business;

(4) Hire staff; and

(5) Obtain the services of professional, technical, and clerical personnel as may be necessary to carry out the performance of its functions under part C of the Act.

(b) Except as provided in paragraph (a) of this section, Council members must serve without compensation from funds available under part C of the Act.

(Authority: 20 U.S.C. 1441(d))

§ 303.604 Functions of the Council—required duties.

(a) *Advising and assisting the lead agency.* The Council must advise and assist the lead agency in the performance of its responsibilities in section 635(a)(10) of the Act, including—

(1) Identification of sources of fiscal and other support for services for early intervention service programs under part C of the Act;

(2) Assignment of financial responsibility to the appropriate agency;

(3) Promotion of methods (including use of intra-agency and interagency agreements) for intra-agency and interagency collaboration regarding child find under §§ 303.115 and 303.302, monitoring under § 303.120 and §§ 303.700 through 303.708, financial responsibility and provision of early intervention services under §§ 303.202 and 303.511, and transition under § 303.209; and

(4) Preparation of applications under this part and amendments to those applications.

(b) *Advising and assisting on transition.* The Council must advise and assist the SEA and the lead agency regarding the transition of toddlers with disabilities to preschool and other appropriate services.

(c) *Annual report to the Governor and to the Secretary.* (1) The Council must—

(i) Prepare and submit an annual report to the Governor and to the Secretary on the status of early intervention service programs for infants and toddlers with disabilities and their families under part C of the Act operated within the State; and

(ii) Submit the report to the Secretary by a date that the Secretary establishes.

(2) Each annual report must contain the information required by the Secretary for the year for which the report is made.

(Authority: 20 U.S.C. 1441(e)(1))

§ 303.605 Authorized activities by the Council.

The Council may carry out the following activities:

(a) Advise and assist the lead agency and the SEA regarding the provision of appropriate services for children with disabilities from birth through age five.

(b) Advise appropriate agencies in the State with respect to the integration of services for infants and toddlers with disabilities and at-risk infants and toddlers and their families, regardless of whether at-risk infants and toddlers are eligible for early intervention services in the State.

(c) Coordinate and collaborate with the State Advisory Council on Early Childhood Education and Care for children, as described in section 642B(b)(1)(A)(i) of the Head Start Act, 42 U.S.C. 9837b(b)(1)(A)(i), if applicable, and other State interagency early learning initiatives, as appropriate.

(Authority: 20 U.S.C. 1435(a)(10), 1441(e)(2))

Subpart H—State Monitoring and Enforcement; Federal Monitoring and Enforcement; Reporting; and Allocation of Funds

Federal and State Monitoring and Enforcement

§ 303.700 State monitoring and enforcement.

(a) The lead agency must—

(1) Monitor the implementation of this part;

(2) Make determinations annually about the performance of each EIS program using the categories identified in § 303.703(b);

(3) Enforce this part consistent with § 303.704, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 303.704(a)(1) (technical assistance) and § 303.704(a)(2) (imposing conditions on the lead agency's funding of an EIS program or, if the lead agency does not provide part C funds to the EIS program, an EIS provider), § 303.704(b)(2)(i) (corrective action or improvement plan) and § 303.704(b)(2)(iv) (withholding of funds, in whole or in part by the lead agency), and § 303.704(c)(2) (withholding of funds, in whole or in part by the lead agency); and

(4) Report annually on the performance of the State and of each EIS program under this part as provided in § 303.702.

(b) The primary focus of the State's monitoring activities must be on—

(1) Improving early intervention results and functional outcomes for all infants and toddlers with disabilities; and

(2) Ensuring that EIS programs meet the program requirements under part C of the Act, with a particular emphasis on those requirements that are most closely related to improving early intervention results for infants and toddlers with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.

(d) The lead agency must monitor each EIS program located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

(1) Early intervention services in natural environments.

(2) State exercise of general supervision, including child find, effective monitoring, the use of resolution sessions (if the State adopts part B due process hearing procedures under § 303.430(d)(2)), mediation, and a system of transition services as defined in section 637(a)(9) of the Act.

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by EIS programs and providers, the noncompliance is corrected as soon as possible and in no case later than one year after the State's identification of the noncompliance.

(Approved by Office of Management and Budget under control number 1820–0578)

(Authority: 20 U.S.C. 1416(a), 1442)

§ 303.701 State performance plans and data collection.

(a) *General.* Each State must have in place a performance plan that meets the requirements described in section 616 of the Act; is approved by the Secretary; and includes an evaluation of the State's efforts to implement the requirements and purposes of part C of the Act, a description of how the State will improve implementation, and measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in § 303.700(d).

(b) *Review of State performance plan.* Each State must review its State performance plan at least once every six years and submit any amendments to the Secretary.

(c) *Data collection.* (1) Each State must collect valid and reliable information as needed to report annually to the Secretary under § 303.702(b)(2) on the indicators established by the Secretary for the State performance plans.

(2) If the Secretary permits States to collect data on specific indicators through State monitoring or sampling, and the State collects data for a particular indicator through State monitoring or sampling, the State must collect and report data on those indicators for each EIS program at least once during the six-year period of a State performance plan.

(3) Nothing in part C of the Act or these regulations may be construed to authorize the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under part C of the Act.

(Approved by Office of Management and Budget under control number 1820–0578)

(Authority: 20 U.S.C. 1416(b), 1442)

§ 303.702 State use of targets and reporting.

(a) *General.* Each State must use the targets established in the State's performance plan under § 303.701 and the priority areas described in § 303.700(d) to analyze the performance of each EIS program in implementing part C of the Act.

(b) *Public reporting and privacy.* (1) *Public report.* (i) Subject to paragraph (b)(1)(ii) of this section, the State must—

(A) Report annually to the public on the performance of each EIS program located in the State on the targets in the State's performance plan as soon as practicable but no later than 120 days following the State's submission of its annual performance report to the Secretary under paragraph (b)(2) of this section; and

(B) Make the State's performance plan under § 303.701(a), annual performance reports under paragraph (b)(2) of this section, and the State's annual reports on the performance of each EIS program under paragraph (b)(1)(i)(A) of this section available through public means, including by posting on the Web site of the lead agency, distribution to the media, and distribution to EIS programs.

(ii) If the State, in meeting the requirements of paragraph (b)(1)(i)(A) of this section, collects data through State monitoring or sampling, the State must include in its public report on EIS programs under paragraph (b)(1)(i)(A) of this section the most recently available performance data on each EIS program and the date the data were collected.

(2) *State performance report.* The State must report annually to the Secretary on the performance of the State under the State's performance plan.

(3) *Privacy.* The State must not report to the public or the Secretary any information on performance that would result in the disclosure of personally identifiable information about individual children, or where the available data are insufficient to yield statistically reliable information.

(Approved by Office of Management and Budget under control number 1820–0578)

(Authority: 20 U.S.C. 1416(b)(2)(B)–(C), 1442)

§ 303.703 Secretary's review and determination regarding State performance.

(a) *Review.* The Secretary annually reviews the State's performance report submitted pursuant to § 303.702(b)(2).

(b) *Determination.* (1) *General.* Based on the information provided by the State in the State's annual performance report, information obtained through monitoring visits, and any other public information made available, the Secretary determines if the State—

(i) Meets the requirements and purposes of part C of the Act;

(ii) Needs assistance in implementing the requirements of part C of the Act;

(iii) Needs intervention in implementing the requirements of part C of the Act; or

(iv) Needs substantial intervention in implementing the requirements of part C of the Act.

(2) *Notice and opportunity for a hearing.* (i) For determinations made under paragraphs (b)(1)(iii) and (b)(1)(iv) of this section, the Secretary provides reasonable notice and an opportunity for a hearing on those determinations.

(ii) The hearing described in paragraph (b)(2)(i) of this section consists of an opportunity to meet with the Assistant Secretary for Special Education and Rehabilitative Services to demonstrate why the Secretary should not make the determination described in paragraph (b)(1)(iii) or (b)(1)(iv) of this section.

(Authority: 20 U.S.C. 1416(d), 1442)

§ 303.704 Enforcement.

(a) *Needs assistance.* If the Secretary determines, for two consecutive years, that a State needs assistance under § 303.703(b)(1)(ii) in implementing the requirements of part C of the Act, the Secretary takes one or more of the following actions:

(1) Advises the State of available sources of technical assistance that may help the State address the areas in which the State needs assistance, which may include assistance from the Office of Special Education Programs, other offices of the Department of Education, other Federal agencies, technical assistance providers approved by the Secretary, and other federally funded nonprofit agencies, and requires the State to work with appropriate entities. This technical assistance may include—

(i) The provision of advice by experts to address the areas in which the State needs assistance, including explicit plans for addressing the areas of concern within a specified period of time;

(ii) Assistance in identifying and implementing professional development, early intervention service provision strategies, and methods of early intervention service provision that are based on scientifically based research;

(iii) Designating and using administrators, service coordinators, service providers, and other personnel from the EIS program to provide advice, technical assistance, and support; and

(iv) Devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service agencies, national centers of technical assistance supported under part D of the Act, and private providers of scientifically based technical assistance.

(2) Identifies the State as a high-risk grantee and imposes special conditions on the State's grant under part C of the Act.

(b) *Needs intervention.* If the Secretary determines, for three or more consecutive years, that a State needs intervention under § 303.703(b)(1)(iii) in implementing the requirements of part C of the Act, the following apply:

(1) The Secretary may take any of the actions described in paragraph (a) of this section.

(2) The Secretary takes one or more of the following actions:

(i) Requires the State to prepare a corrective action plan or improvement plan if the Secretary determines that the State should be able to correct the problem within one year.

(ii) Requires the State to enter into a compliance agreement under section 457 of the General Education Provisions Act, as amended (GEPA), 20 U.S.C. 1234f, if the Secretary has reason to believe that the State cannot correct the problem within one year.

(iii) Seeks to recover funds under section 452 of GEPA, 20 U.S.C. 1234a.

(iv) Withholds, in whole or in part, any further payments to the State under part C of the Act.

(v) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(c) *Needs substantial intervention.* Notwithstanding paragraph (a) or (b) of this section, at any time that the Secretary determines that a State needs substantial intervention in implementing the requirements of part C of the Act or that there is a substantial failure to comply with any requirement under part C of the Act by the lead agency or an EIS program in the State, the Secretary takes one or more of the following actions:

(1) Recovers funds under section 452 of GEPA, 20 U.S.C. 1234a.

(2) Withholds, in whole or in part, any further payments to the State under part C of the Act.

(3) Refers the case to the Office of Inspector General of the Department of Education.

(4) Refers the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(d) *Report to Congress.* The Secretary reports to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate within 30 days of taking enforcement action pursuant to paragraph (a), (b), or (c) of this section, on the specific action taken and the reasons why enforcement action was taken.

(Authority: 20 U.S.C. 1416(e)(1)–(3), 1416(e)(5), 1442)

§ 303.705 Withholding funds.

(a) *Opportunity for hearing.* Prior to withholding any funds under part C of the Act, the Secretary provides reasonable notice and an opportunity for a hearing to the lead agency involved, pursuant to the procedures in §§ 303.231 through 303.236.

(b) *Suspension.* Pending the outcome of any hearing to withhold payments under paragraph (a) of this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate funds under part C of the Act, or both, after the recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate funds under part C of the Act should not be suspended.

(c) *Nature of withholding.* (1) *Limitation.* If the Secretary determines that it is appropriate to withhold further payments under section 616(e)(2) or (e)(3) of the Act, the Secretary may determine—

(i) That such withholding will be limited to programs or projects, or portions of programs or projects, that affected the Secretary's determination under § 303.703(b)(1); or

(ii) That the lead agency must not make further payments of funds under part C of the Act to specified State agencies, EIS programs or, if the lead agency does not provide part C funds to the EIS program, EIS providers that caused or were involved in the Secretary's determination under § 303.703(b)(1).

(2) *Withholding until rectified.* Until the Secretary is satisfied that the condition that caused the initial withholding has been substantially rectified—

(i) Payments to the State under part C of the Act must be withheld in whole or in part; and

(ii) Payments by the lead agency under part C of the Act must be limited to State agencies and EIS providers whose actions did not cause or were not involved in the Secretary's determination under § 303.703(b)(1).

(Authority: 20 U.S.C. 1416(e)(4), 1416(e)(6), 1442)

§ 303.706 Public attention.

Whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action pursuant to § 303.704, the State must, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to section 616(e) of the Act and § 303.704 of the regulations to the attention of the public within the State, including by posting the notice on the Web site of the lead agency and distributing the notice to the media and to EIS programs.

(Authority: 20 U.S.C. 1416(e)(7), 1442)

§ 303.707 Rule of construction.

Nothing in this subpart may be construed to restrict the Secretary from utilizing any authority under GEPA, 20 U.S.C. 1221 *et seq.,* and its regulations in 34 CFR parts 76, 77, 80, and 81, including the imposition of special conditions under 34 CFR 80.12, to monitor and enforce the requirements of the Act.

(Authority: 20 U.S.C. 1416(g), 1442)

§ 303.708 State enforcement.

Nothing in this subpart may be construed to restrict a State from utilizing any other authority available to it to monitor and enforce the requirements of the Act.

(Authority: 20 U.S.C. 1416(a)(1)(C), 1442)

Reports—Program Information

§ 303.720 Data requirements—general.

(a) The lead agency must annually report to the Secretary and to the public on the information required by section 618 of the Act at the times specified by the Secretary.

(b) The lead agency must submit the report to the Secretary in the manner prescribed by the Secretary.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418, 1435(a)(14), 1442)

§ 303.721 Annual report of children served—report requirement.

(a) For the purposes of the annual report required by section 618 of the Act and § 303.720, the lead agency must count and report the number of infants and toddlers receiving early intervention services on any date between October 1 and December 1 of each year. The report must include—

(1) The number and percentage of infants and toddlers with disabilities in the State, by race, gender, and ethnicity, who are receiving early intervention services (and include in this number any children reported to it by tribes, tribal organizations, and consortia under § 303.731(e)(1));

(2) The number and percentage of infants and toddlers with disabilities, by race, gender, and ethnicity, who, from birth through age two, stopped receiving early intervention services because of program completion or for other reasons; and

(3) The number and percentage of at-risk infants and toddlers (as defined in section 632(1) of the Act), by race and ethnicity, who are receiving early intervention services under part C of the Act.

(b) If a State adopts the option under section 635(c) of the Act and § 303.211 to make services under this part available to children ages three and older, the State must submit to the Secretary a report on the number and percentage of children with disabilities who are eligible for services under section 619 of the Act but whose parents choose for those children to continue to receive early intervention services.

(c) The number of due process complaints filed under section 615 of the Act, the number of hearings conducted and the number of mediations held, and the number of settlement agreements reached through such mediations.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(a)(1)(B), (C), (F), (G), and (H), 1435(a)(14), 1435(c)(3), 1442)

§ 303.722 Data reporting.

(a) *Protection of identifiable data.* The data described in section 618(a) of the Act and in § 303.721 must be publicly reported by each State in a manner that does not result in disclosure of data identifiable to individual children.

(b) *Sampling.* The Secretary may permit States and outlying areas to obtain data in section 618(a) of the Act through sampling.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(b), 1435(a)(14), 1442)

§ 303.723 Annual report of children served—certification.

The lead agency must include in its report a certification signed by an authorized official of the agency that the information provided under § 303.721 is an accurate and unduplicated count of infants and toddlers with disabilities receiving early intervention services.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(a)(3), 1435(a)(14), 1442)

§ 303.724 Annual report of children served—other responsibilities of the lead agency.

In addition to meeting the requirements of §§ 303.721 through 303.723, the lead agency must conduct its own child count or use EIS providers to complete its child count. If the lead agency uses EIS providers to complete its child count, then the lead agency must—

(a) Establish procedures to be used by EIS providers in counting the number of children with disabilities receiving early intervention services;

(b) Establish dates by which those EIS providers must report to the lead agency to ensure that the State complies with § 303.721(a);

(c) Obtain certification from each EIS provider that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each EIS provider and prepare the report required under §§ 303.721 through 303.723; and

(e) Ensure that documentation is maintained to enable the State and the Secretary to audit the accuracy of the count.

(Approved by Office of Management and Budget under control number 1820–0557)

(Authority: 20 U.S.C. 1418(a), 1435(a)(14), 1442)

Allocation of Funds

§ 303.730 Formula for State allocations.

(a) *Reservation of funds for outlying areas.* From the sums appropriated to carry out part C of the Act for any fiscal year, the Secretary may reserve not more than one percent for payments to American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the United States Virgin Islands in accordance with their respective needs for assistance under part C of the Act.

(b) *Consolidation of funds.* The provisions of the Omnibus Territories Act of 1977, Pub. L. 95–134, permitting the consolidation of grants to the outlying areas, do not apply to the funds provided under part C of the Act.

(Authority: 20 U.S.C. 1443(a))

§ 303.731 Payments to Indians.

(a) *General.* (1) The Secretary makes payments to the Secretary of the Interior under part C of the Act, which the Secretary of the Interior must distribute to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450b), or consortia of those entities, for the coordination of assistance in the provision of early intervention services by States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(2) A tribe, tribal organization, or consortium of those entities is eligible to receive a payment under this section if the tribe, tribal organization, or consortium of those entities is on a reservation that is served by an elementary or secondary school operated or funded by the Secretary of the Interior.

(3) The amount of the payment to the Secretary of the Interior under this section for any fiscal year is 1.25 percent of the aggregate amount available to all States under part C of the Act.

(b) *Allocation.* For each fiscal year, the Secretary of the Interior must distribute the entire payment received under paragraph (a)(1) of this section by providing to each tribe, tribal organization, or consortium an amount based on the number of infants and toddlers residing on the reservation, as determined annually, divided by the total number of those children served by all tribes, tribal organizations, or consortia.

(c) *Information.* To receive a payment under this section, the tribe, tribal organization, or consortium must submit the appropriate information to the Secretary of the Interior to determine the amounts to be distributed under paragraph (b) of this section.

(d) *Use of funds.* (1) The funds received by a tribe, tribal organization, or consortium must be used to assist States in child find, screening, and other procedures for the early identification of Indian children under three years of age and for parent training. The funds also may be used to provide early intervention services in accordance with part C of the Act. These activities may be carried out directly or through contracts or cooperative agreements with the Bureau of Indian Education, local educational agencies, and other public or private nonprofit organizations. The tribe, tribal organization, or consortium is encouraged to involve Indian parents in the development and implementation of these activities.

(2) The tribe, tribal organization, or consortium must, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(e) *Reports.* (1) To be eligible to receive a payment under paragraph (b) of this section, a tribe, tribal organization, or consortium must make a biennial report to the Secretary of the Interior of activities undertaken under this section, including the number of contracts and cooperative agreements entered into, the number of infants and toddlers contacted and receiving services for each year, and the estimated number of infants and toddlers needing services during the two years following the year in which the report is made. This report must include an assurance that the tribe, tribal organization, or consortium has provided the lead agency in the State child find information (including the names and dates of birth and parent contact information) for infants or toddlers with disabilities who are included in the report in order to meet the child find coordination and child count requirements in sections 618 and 643 of the Act.

(2) The Secretary of the Interior must provide a summary of this information (including confirmation that each tribe, tribal organization, or consortium has provided to the Secretary of the Interior the assurance required under paragraph (e)(1) of this section) on a biennial basis to the Secretary along with such other information as required of the Secretary of the Interior under part C of the Act. The Secretary may require additional information from the Secretary of the Interior.

(3) Within 90 days after the end of each fiscal year the Secretary of the Interior must provide the Secretary with a report on the payments distributed under this section. The report must include—

(i) The name of each tribe, tribal organization, or combination of those entities that received a payment for the fiscal year;

(ii) The amount of each payment; and

(iii) The date of each payment.

(f) *Prohibited uses of funds.* None of the funds under this section may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(Authority: 20 U.S.C. 1443(b))

§ 303.732 State allotments.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, for each fiscal year, from the aggregate amount of funds available under part C of the Act for distribution to the States, the Secretary allots to each State an amount that bears the same ratio to the aggregate amount as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States.

(b) *Minimum allocations.* Except as provided in paragraph (c) of this section, no State may receive less than

0.5 percent of the aggregate amount available under this section or $500,000, whichever is greater.

(c) *Ratable reduction.* (1) If the sums made available under part C of the Act for any fiscal year are insufficient to pay the full amount that all States are eligible to receive under this section for that year, the Secretary ratably reduces the allotments to those States for such year.

(2) If additional funds become available for making payments under this section, allotments that were reduced under paragraph (c)(1) of this section will be increased on the same basis the allotments were reduced.

(d) *Definitions.* For the purpose of allotting funds to the States under this section—

(1) *Aggregate amount* means the amount available for distribution to the States after the Secretary determines the amount of payments to be made to the Secretary of the Interior under § 303.731, to the outlying areas under § 303.730, and any amount to be reserved for State incentive grants under § 303.734;

(2) *Infants and toddlers* means children from birth through age two in the general population, based on the most recent satisfactory data as determined by the Secretary; and

(3) *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1443(c))

§ 303.733 Reallotment of funds.

If a State (as defined in § 303.35) elects not to receive its allotment, the Secretary reallots those funds among the remaining States (as defined in § 303.732(d)(3)), in accordance with § 303.732(c)(2).

(Authority: 20 U.S.C. 1443(d))

§ 303.734 Reservation for State incentive grants.

(a) *General.* For any fiscal year for which the amount appropriated pursuant to the authorization of appropriations under section 644 of the Act exceeds $460,000,000, the Secretary reserves 15 percent of the appropriated amount exceeding $460,000,000 to provide grants to States that are carrying out the policy described in section 635(c) of the Act and in § 303.211 (including a State that makes part C services available under § 303.211(a)(2)), in order to facilitate the implementation of that policy.

(b) *Amount of grant.* (1) *General.* Notwithstanding section 643(c)(2) and (c)(3) of the Act, the Secretary provides a grant to each State under this section in an amount that bears the same ratio to the amount reserved under paragraph (a) of this section as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States receiving grants under paragraph (a) of this section.

(2) *Maximum amount.* No State may receive a grant under paragraph (a) of this section for any fiscal year in an amount that is greater than 20 percent of the amount reserved under that paragraph for the fiscal year.

(c) *Carryover of amounts pursuant to section 643(e)(3) of the Act.* (1) *First succeeding fiscal year.* Pursuant to section 421(b) of GEPA, 20 U.S.C. 1221 *et seq.,* amounts under a grant provided under paragraph (a) of this section that are not obligated and expended prior to the beginning of the first fiscal year succeeding the fiscal year for which those amounts were appropriated must remain available for obligation and expenditure during the first succeeding fiscal year.

(2) *Second succeeding fiscal year.* Amounts under a grant provided under paragraph (a) of this section that are not obligated and expended prior to the beginning of the second fiscal year succeeding the fiscal year for which those amounts were appropriated must be returned to the Secretary and used to make grants to States under section 633 of the Act (from their allotments identified in §§ 303.731 through 303.733) during the second succeeding fiscal year.

(Authority: 20 U.S.C. 1443)

Appendix A to Part 303—Index for IDEA Part C Regulations

[FR Doc. 2011–22783 Filed 9–27–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

34 CFR Part 300

[Docket ID ED–2011–OSERS–0012]

RIN 1820–AB64

Assistance to States for the Education of Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend regulations under Part B of the Individuals with Disabilities Education Act (IDEA or Act). These regulations govern the Assistance to States for the Education of Children with Disabilities program, including the Preschool Grants program. The Secretary seeks public comment on these proposed amendments regarding the use of public benefits or insurance in which a child participates to provide or pay for services required under Part B of IDEA.

Since the Part B regulations were amended in 2006, our experience with implementing the provisions on obtaining parental consent for the use of public benefits or insurance has raised two important issues. First, the current regulations do not require that public agencies inform parents specifically of all of the protections regarding access to public benefits or insurance, including their rights under the Family Educational Rights and Privacy Act (FERPA) and IDEA confidentiality provisions. Second, State educational agencies (SEAs) and local educational agencies (LEAs) have expressed concerns about the overall costs and administrative burdens imposed by requiring parental consent to access public benefits or insurance, in addition to the parental consent required by FERPA.

DATES: We must receive your comments on or before December 12, 2011.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to *http://www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under ''How To Use This Site.''

• *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Jennifer Sheehy, U.S. Department of Education, 400 Maryland Avenue, SW., room 5103, Potomac Center Plaza, Washington, DC 20202–2600.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Jennifer Sheehy, U.S. Department of Education, 400 Maryland Avenue, SW., room 5103, Potomac Center Plaza, Washington, DC 20202–2600. Telephone: (202) 245–7605.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting Jennifer Sheehy, U.S. Department of Education, 400 Maryland Avenue, SW., room 5103, Potomac Center Plaza, Washington, DC 20202–2600. Telephone: (202) 245–7605.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866; Executive Order 13563; and the Presidential Memorandum on Administrative Flexibility, Lower Costs and Better Results for State, Local, and Tribal Governments and their overall direction to Federal agencies to reduce regulatory burden where possible. Please let us know of any further opportunities we should provide to reduce the potential costs or increase potential benefits while preserving the effective and efficient administration of the IDEA Part B program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You also may inspect the comments, in person, in room 5104, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

34 CFR Part 300 (Part B)

The regulations in 34 CFR part 300 implement Part B of IDEA. The Department provides grants to States, outlying areas, and freely associated States, as well as funds to the Department of the Interior, to assist them in providing special education and related services to children with disabilities. There are four key purposes of the Part B regulations: (1) To ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (2) to ensure that the rights of children with disabilities and their parents are protected; (3) to assist States, localities, educational service agencies, and Federal agencies in providing for the education of all children with disabilities; and (4) to assess and ensure the effectiveness of efforts to educate children with disabilities.

The Part B regulations allow public agencies to use public benefits or insurance (*e.g.,* Medicaid) to provide or pay for services required under Part B with the consent of the parent of a child who is enrolled under the public benefits or insurance program. Public insurance is an important source of

financial support for services required under Part B. With respect to the use of public insurance, § 300.154(d)(2)(iv)(A) specifically provides that a public agency must obtain parental consent, consistent with § 300.9, ''each time that access to public benefits or insurance is sought.''

We included this requirement when we amended the Part B regulations in 2006 in recognition of two principles affecting the rights of parents and children under Part B of IDEA. First, Part B of IDEA requires that public agencies make available FAPE to all children with disabilities. The definition of *FAPE* includes a requirement that required services must be provided at no cost to the parent or child. However, using public benefits or insurance could, in some cases, result in costs to a parent or child. Accordingly, § 300.154(d)(2)(i), (ii), and (iii) specify certain limitations on the circumstances in which a public agency may use public benefits or insurance to pay for special education and related services.

Second, in order to access a child's or parent's public benefits or insurance, a public agency must disclose personally identifiable information from the child's education records to the public benefits or insurance program. These disclosures are protected by FERPA, and section 617(c) of IDEA. Under FERPA, section 617(c) of IDEA, and § 300.622, a child's education records cannot be released to a public benefits or insurance program without parental consent, except for a few specified exceptions. These exceptions do not include the release of education records for billing purposes.

The ''confidentiality'' and ''no cost'' principles of FERPA and IDEA continue to be of paramount importance, and we believe our Part B regulations must continue to protect these important rights in the context of permitting public agencies access to public benefits or insurance in order to pay for services required by Part B. However, since the adoption of § 300.154(d)(2)(iv) in 2006, our experience with implementing this provision suggests that we could improve this regulation to protect parents' and children's interests.

First, while § 300.154(d)(2) identifies the specific parameters for public agencies regarding access to public benefits or insurance, the regulations do not require that public agencies inform parents specifically of most of these protections. The regulations also do not require that parents be informed of their rights under FERPA and § 300.622 in the context of a public agency's use of public benefits or insurance. Yet information about the circumstances under which public agencies can access public benefits or insurance to provide services required under Part B and about parents' right to consent to, refuse to consent to, or withdraw consent to disclosures of personally identifiable information from their child's education records could be very valuable to parents as they assess how a public agency may be using their child's or their own public benefits or insurance.

Second, public agencies have continuing concerns about the meaning of the phrase ''each time'' in § 300.154(d)(2)(iv)(A). They also have concerns about the overall costs and administrative burdens imposed by requiring parental consent to access public benefits or insurance in addition to the parental consent required by FERPA and the parental consent required by IDEA for the initial evaluation of a child with a disability and the initial provision of special education and related services. On May 3, 2007, in response to several queries about the meaning of the requirement that parental consent be obtained ''each time that access to public benefits or insurance is sought,'' the Office of Special Education Programs (OSEP) issued a memorandum to State Directors of Special Education to clarify the parental consent requirement in § 300.154(d)(2)(iv)(A). OSEP Memorandum 07–10 (May 3, 2007). In that memorandum, OSEP clarified that obtaining informed written consent from parents for billing a public benefits or insurance program for a specified amount of services for a specified period of time complies with the regulation. However, notwithstanding this flexibility, SEAs and LEAs have continued to express concerns about the significant administrative and financial burdens that they believe § 300.154(d)(2)(iv) imposes.

Significant Proposed Regulations

Methods of Ensuring Services (§ 300.154)

We propose to amend current § 300.154(d)(2)(iv). Under the proposed change, the public agency responsible for providing special education and related services to a child would be required, before accessing a child's or parent's public benefits or insurance, to provide to the child's parents written notification consistent with current § 300.503(c). The notification would include: (1) A statement that parental consent must be obtained under 34 CFR part 99 and § 300.622 before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid); (2) a statement repeating the no cost provisions in current § 300.154(d)(2)(i) through (iii); (3) a statement that the parents have the right under 34 CFR part 99 to withdraw their consent to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time; and (4) a statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and § 300.622 to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

Thus, under these proposed regulations, the public agency would no longer be required to obtain parental consent each time that it seeks access to public benefits or insurance in order to provide a service to a child. Public agencies would provide the written notification to parents of children who receive special education and related services prior to seeking access to the child's or parent's public benefits or insurance. The exact timing and frequency of a public agency's provision of the one-time written notification to the parent would be at the discretion of the public agency, so long as the public agency provides the notification before the public agency seeks access to the child's or parent's public benefits or insurance.

We believe that this proposed amendment is in accordance with the provisions in section 612(a)(12) of the Act, which provide that a State must identify or have a method for defining the financial responsibility of non-educational agencies for services required to provide FAPE to children with disabilities and that the financial responsibility of those agencies, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of LEAs. Thus, the statute contemplates that public agencies should, in appropriate circumstances, be accessing public benefits and insurance programs as a means of paying for services required under Part B.

The constraints on a public agency's use of public benefits or insurance are related to two very important parent protections. First, consistent with the definition of *FAPE* in section 602(9) of the Act, services must be made available at public expense and without charge to

the child or the child's parents. Second, information in a child's education records is protected under FERPA and section 617(c) of the Act. Under FERPA and the regulations in § 300.622 implementing section 617(c), a child's education records cannot be released to a State Medicaid agency without parental consent, except for a few specified exceptions. These exceptions do not include the release of education records for the purpose of billing a public or private benefits or insurance program.

We are proposing these amendments to advance these critical parent protections and to reduce unnecessary burden on a public agency's ability to access public benefits or insurance in appropriate circumstances. First, we are mindful of the importance of ensuring that parents have sufficient information to make decisions about a public agency's use of their public benefits or insurance and the disclosure of their child's educational records for that purpose. Prior to the publication of the Part B regulations in 2006, there was no requirement, other than the parental consent requirements in FERPA and an earlier version of current § 300.622, which required that public agencies obtain parental consent before accessing a child's or parent's public benefits or insurance to pay for services necessary to make FAPE available to a child. To ensure that those services would be made available without cost to the child or the child's family, public agencies were prohibited from requiring parents to (a) Sign up for or enroll in a public benefits or insurance program and (b) incur out-of-pocket expenses related to the public agency's use of the public benefits or insurance. In addition, public agencies were prohibited from using a child's benefits under a public benefits or insurance program if that use would decrease available lifetime coverage or any other insured benefit, result in the family paying for services that would otherwise be covered and that are required for the child outside of the time the child is in school, increase premiums or lead to the discontinuation of insurance or benefits, or risk loss of eligibility for home and community-based waivers based on aggregate health-related expenditures.

These ''no cost'' provisions are stated in the current regulations in § 300.154(d)(2)(i), (ii), and (iii) (and we are not proposing changes to them in this NPRM). Notwithstanding the importance of these protections, however, the regulations that we issued in 2006 do not require that parents be notified of these restrictions on a public agency's ability to access public benefits or insurance for services required under Part B. Furthermore, the current regulations do not require that parents be informed of their rights to refuse to provide consent or to withdraw consent for disclosures of personally identifiable information from education records for access to public benefits or insurance.

In reviewing the 2006 regulations, we have determined that amendments are necessary to ensure parents are receiving the information they need regarding their rights with respect to the use of their public benefits or insurance for Part B services. We believe it is very important that parents be provided information about the limitations on a public agency's billing of public benefits or insurance programs, as well as their rights under FERPA and section 617(c) of IDEA to consent prior to the disclosure of personally identifiable information from education records, and to withdraw their consent for such disclosures without penalty. This information would help parents make informed decisions about, and monitor public agencies' use of, public benefits and insurance used to provide services for their child. Accordingly, through these proposed regulations, we would specifically require public agencies to provide this information to parents.

Second, these proposed amendments are designed to address the concern expressed to the Department by many SEA personnel and other interested parties that, since the publication of the Part B regulations in 2006, the inability to obtain parental consent has contributed to public agencies' failure to claim all of the Federal financial assistance available for individualized education program (IEP) services covered under Medicaid. In addition, public agencies have expressed concern over using limited resources and the significant administrative burden to obtain parental consent for the use of Medicaid and other public benefits or insurance each time that access to public benefits or insurance is sought. Consequently, many of these parties have requested that the Department remove the parental consent requirement in current § 300.154(d)(2)(iv).

The results of the National Alliance for Medicaid in Education, Inc. (NAME)'s 2009 Biennial Survey Trends and Data, which collects information from SEAs, LEAs, and State Medicaid agencies on the use of Medicaid in education, support States' concerns. (*See: http://medicaidforeducation.org/*) As part of this 2009 survey, NAME identified the fiscal impact of § 300.154(d)(2)(iv) as one of the key factors adversely affecting LEAs' use of public benefits or insurance to help pay for special education and related services. NAME provided summary responses from a few specific school districts surveyed indicating that the regulation requiring parental consent to bill Medicaid each time that access to public benefits or insurance is sought had a direct negative effect on an LEA's ability to bill Medicaid for Part B services on students' IEPs. For example, one LEA reported to NAME that the regulation requiring parental consent to bill Medicaid each time that access to public benefits or insurance is sought precluded the LEA from claiming approximately 70 percent of the Federal Medicaid financial participation available for covered IEP services for about 6,800 of its students. One school district reported foregoing Medicaid reimbursements totaling $1.5 million in school year 2008–2009 and $507,000 in school year 2009–2010, rather than incur the expense of obtaining parental consent to bill Medicaid. Additionally, in the NAME 2009 survey, one SEA estimated that overall statewide reimbursements were 20 to 23 percent lower than projected due to ''parental consent to bill'' issues.

School districts also provided to NAME examples of the administrative burden caused by the consent requirement. For example, they pointed out that the process for following up with parents to obtain parental consent is very laborious and time consuming. Staff must first identify those IEPs that lack parental consent, confirm parents' addresses, and conduct home visits in order to obtain consent when necessary. At a cost of $4,075, one school district reportedly sent out more than 5,200 requests to parents for consent to bill Medicaid. The district received responses from only about 30 percent of those parents. Another school district reported to NAME that, in addition to lost Federal match dollars, the regulation cost the LEA nearly $15,000 in postage in the previous school year to send out parental consent forms, more than half of which were not completed and returned.

Since 2006, we have encouraged public agencies to use children's public benefits or insurance to the extent possible to help pay for some of the costs of providing special education and related services. Section 612(a)(12) of IDEA recognizes that public benefits or insurance are important resources for LEAs and other public agencies to access, when appropriate, to assist in meeting their obligation to make FAPE available to all children who are eligible to receive services under IDEA. While the examples provided to NAME of

decreases in Medicaid reimbursement cannot be directly attributed solely to the parental consent provision in current § 300.154(d)(2)(iv), it appears that the parental consent provision has taxed resources and created significant administrative burden on public agencies.

Given the importance of public agencies maximizing the financial resources available in order to make FAPE available, and given the difficulty they are experiencing in obtaining parental consent under current § 300.154(d)(2)(iv), we believe replacing this consent requirement with a written notification requirement will assist public agencies by facilitating reimbursement through Medicaid or other public benefits or insurance programs. We also believe that written notification will continue to protect the rights of children with disabilities to receive FAPE and the privacy rights of children and parents. While we believe the proposed regulations will provide administrative and financial relief to some public agencies (SEAs and LEAs), we recognize these benefits may increase costs for public agencies responsible for administering public benefits or insurance programs. We invite comments on the impact the proposed regulations may have on public benefits or insurance programs.

The proposed revisions to § 300.154(d)(2)(iv) are also consistent with the President's January 18, 2011, Executive Order 13563 entitled ''Improving Regulation and Regulatory Review'' and February 28, 2011, memorandum to executive departments and agencies entitled ''Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments.'' These documents direct each Federal executive department and agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the department's or agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

These proposed amendments to the Part B regulations would address concerns raised by SEAs and LEAs regarding the burdens imposed by current § 300.154(d)(2)(iv)(A), while protecting the rights of parents and children and ensuring that children with disabilities receive FAPE. Accordingly, we believe the proposed revisions in § 300.154(d)(2)(iv) further the President's directive to reduce the burden on States and other entities.

In sum, under the proposed amendments to § 300.154(d)(2)(iv), public agencies would no longer be required to obtain separate parental consent prior to seeking to bill or otherwise access the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under Part B of the Act. Instead, public agencies would be required to provide written notification, consistent with current § 300.503(c), to the child's parents that includes: (1) A statement that parental consent must be obtained under 34 CFR part 99 and § 300.622 before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid); (2) a description of the no cost provisions in § 300.154(d)(2)(i), (ii), and (iii); (3) a statement that the parents have the right under 34 CFR part 99 to withdraw their consent to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time; and (4) a statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and § 300.622 to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

Written notification may be provided to parents when it is most appropriate and convenient for the family, but must be provided before the State seeks to use the child's or parent's public benefits or insurance; as a practical matter this may be at the child's initial IEP meeting, when the parent consents to the initial provision of special education services, at a parent-teacher conference, or at another time when it is most convenient for the parent. We are interested in receiving comments, however, on whether requiring the notification be provided at a specific time or meeting, such as the initial IEP meeting, would be desirable from the parents' or the LEA's perspective.

No other changes are being proposed to § 300.154(d). Thus, public agencies will continue to be subject to the requirements in § 300.154(d)(2)(i), (ii), and (iii), which states that the public agency—(i) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE under Part B of the Act; (ii) may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided under Part B, but pursuant to current § 300.154(g)(2), may pay the cost that the parents otherwise would be required to pay; and (iii) may not use a child's or parent's benefits under a public benefits or insurance program if that use would decrease available lifetime coverage or any other insured benefit; result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school; increase premiums or lead to the discontinuation of benefits or insurance; or risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures. Additionally, public agencies would continue to have to comply with the parental consent requirements of FERPA and § 300.622 prior to disclosing personally identifiable information in educational records to Medicaid or other public benefits or insurance programs. The following case study illustrates what the different provisions in current regulations and the proposed regulation would mean for the family of a child with a disability:

Case Study for the Use of Public Insurance Under Part B of IDEA

Tommy is evaluated and determined eligible for special education services. The IEP Team, which includes Tommy's parents, meets to develop Tommy's IEP and identify the special education and related services that Tommy needs. The IEP Team determines that, in addition to special education services, Tommy needs related services including physical therapy twice a week for 30 minutes and occupational therapy once a week for 30 minutes. If Tommy needs a change in services, the IEP Team, which includes his parents, must revise the IEP. [Note that Tommy's parents and the school can agree not to convene an IEP Team meeting for the purposes of making any changes, and instead, may develop a written document to amend or modify Tommy's current IEP.]

Tommy is eligible for public insurance (*i.e.,* Medicaid), but his parents have not enrolled him in Medicaid. When his parents are asked to give their consent to provide special education and related services to Tommy, a member of the IEP Team may, but is not required to, explain that Medicaid can help the school pay for Tommy's special education and related services—specifically, that the school

can be reimbursed by Medicaid for some of the costs of Tommy's physical and occupational therapy. The IEP Team asks Tommy's parents if they would consider enrolling Tommy in Medicaid and makes clear that the parents do not have to enroll Tommy in Medicaid in order to receive services and that the services will be provided at no cost regardless of their choice. Tommy begins receiving special education and related services as outlined in his IEP.

Under the current Part B regulations: Tommy's parents enroll Tommy in Medicaid and provide their consent for the school to provide Tommy's personal information (*e.g.,* name, birth date, special education eligibility) to Medicaid so that the school can be reimbursed for some of the physical and occupational therapy services it provides to Tommy. Additionally, Tommy's parents provide their consent for the school to bill Medicaid for the services described in Tommy's IEP. The IEP Team explains to Tommy's parents that when they provide consent to bill the Medicaid program, their consent to bill the Medicaid program is only for the services outlined in Tommy's IEP for the period specified in the IEP and that if Tommy's services or the cost of providing those services change, the school would need to obtain their consent each time services are revised or costs change in order to bill Medicaid. [Note that the confidentiality and no-cost protections outlined below are in the current regulations, but there is no requirement that parents be informed of these protections as they relate to the use of public benefits or insurance.]

Under the proposed regulations:

In order for the school to use Medicaid funds to pay for Part B services, the following must occur:

(1) Tommy's parents must give their consent for the school to provide Medicaid with Tommy's personal information (*e.g.,* name, birth date, special education eligibility).

(2) The school must provide Tommy's parents with a written notice that informs them of the following:

(a) *Consent is required and may be withdrawn.* Parental consent must be obtained before the school discloses, for billing purposes, a child's personally identifiable information to Medicaid. Parents may withdraw their consent to disclose personally identifiable information to Medicaid at any time and thus prevent the school from billing Medicaid. If the parents do not provide consent or withdraw consent, the school must still provide IDEA services at no cost.

(b) *No-cost protections.* The school may not require parents to sign up for or enroll in Medicaid. The school may also not require parents to incur an out-of-pocket expense (*e.g.,* deductible or co-pay) incurred in filing a claim for services. Additionally, the school may not use a child's Medicaid benefits if that use would (i) Decrease lifetime coverage or any other insured benefit, (ii) result in the family paying for services that would otherwise be covered by Medicaid and that are required for the child outside of the time the child is in school, (iii) increase premiums or lead to discontinuation of benefits or insurance, or (iv) risk loss of eligibility for home and community-based waivers. [These are referred to as the ''no cost protections'' in current § 300.154(d)(2)(i), (ii), and (iii).]

(c) *Services will continue.* If the parent does not enroll in Medicaid under paragraph (b) above, does not provide consent, or withdraws consent under paragraph (a) above, the school must still provide special education and related services at no cost to the child and parents.

The school would no longer be required, as under current § 300.154(d)(2)(iv)(A), to obtain parental consent each time that it seeks access to public benefits or insurance programs (which the Department has interpreted to mean each time there is a change in the services or cost of services billed to Medicaid or other public benefits or insurance programs). Note, however, that if there is a change in Tommy's services, Tommy's IEP Team, which includes his parents, must revise the IEP. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting or the parents and the school can agree not to convene an IEP Team meeting for the purposes of making any changes, and instead, may develop a written document to amend or modify Tommy's current IEP.

Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) Have an annual effect on the economy of $100 million or more or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

We have reviewed Executive Order 12866 and determined that this is a significant regulatory action under section 3(f)(4) of Executive Order 12866.

The Department has also reviewed these regulations pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

We emphasize as well that Executive Order 13563 requires agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In its February 2, 2011, memorandum (M–11–10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include ''identifying changing future compliance costs that might result from

technological innovation or anticipated behavioral changes.''

We are issuing these regulations only upon a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

1. Potential Costs and Benefits

Section 300.154(d)

Under current regulations, public agencies are required to obtain informed written consent from parents to use a child's or parents' public benefits or insurance to pay for services identified in the child's IEP. Consent must be obtained for a specified type (*e.g.,* physical therapy, speech therapy) and amount of services (*e.g.,* number of hours per week) for a specified period of time (*e.g.,* a year). If the type or amount of service changes, or if the amount charged for services changes, the public agency must obtain parental consent covering the change in services or costs to be charged to the child's or parents' public benefits or insurance. Proposed changes to this section would permit public agencies to use public benefits or insurance programs in which a child participates to provide or pay for services required under Part B of the Act without obtaining parental consent each time it seeks access to those benefits or insurance, provided that parental consent requirements imposed under FERPA and § 300.622 are met and written notification has been provided to parents. These changes would allow public agencies to save the administrative and postage costs necessary to obtain written consent from parents, but they would add a requirement that public agencies provide a written notification to parents prior to accessing public insurance funds to inform them of their rights and protections under the Act. We estimate that the proposed changes to § 300.154 would result in a net cost savings and provide an economic benefit to a number of LEAs in many States.

Savings from reduction in current requirements:

Although there are no direct data on the number of children who participate in both IDEA Part B and public benefits or insurance programs, a Congressional Research Service (CRS) report indicates that at least 25 percent of children receiving services under IDEA are eligible for Medicaid services (including children that are eligible but not enrolled in Medicaid).[1] For this analysis, we assume that 20–30 percent of the 6,614,000 students enrolled in the Part B program are also enrolled in public benefits or insurance programs for a total of 1,322,800 to 1,984,200 children enrolled in both programs. Some LEAs do not use public benefits or insurance to pay for services that are eligible for reimbursement; however, there are no direct data on the number of these LEAs or the number of eligible students enrolled in these LEAs. We assume that all LEAs seek parental consent for all students enrolled in both programs. As a result, our analysis likely overestimates the percentage of students enrolled in both programs that would need parental consent.

Under current regulations, we assume that consent must be obtained 1.2 times per year. This results in a total estimate of 1,587,360 to 2,381,040 consent requests per year for 1,322,800 to 1,984,200 children. If we assume that the forms are no more than 4 pages long and that it takes approximately 5–10 minutes of administrative time to draft and print these forms for each consent request (forms must be tailored to the specific services and duration of services as specified in the child's IEP), the cost would be approximately $5,386,000 to $15,683,000 annually.[2]

We assume that in most cases (50–75 percent), parents respond to a request for consent during a child's IEP meeting (either annual or following a change in the IEP) and that in cases where a response is not obtained during an IEP meeting (25–50 percent) (or the agency and parents agree to make a change in the IEP without convening an IEP meeting as statutorily permitted), public agencies mail forms directly to parents to be completed and returned. In cases where consent is requested during an IEP meeting, we assume that there are 5 participants (one special education teacher, one general education teacher, one psychologist, one school representative, and one parent) with average earnings of $44.87 per hour in wages and benefits.[3] Assuming it takes on average one minute to obtain a response, the additional estimated cost of obtaining a response during an IEP meeting would be $2,967,000 to $6,677,000 annually.

In cases where it is necessary to send consent forms to parents by mail, public agencies would incur additional administrative, postage, and material costs. We assume that 25–50 percent of parents will receive consent forms sent via mail, that only 30–50 percent of those recipients will respond to any particular letter request, and that a maximum of 3 letters are sent to any particular parent for a total 694,470 to 2,607,239 letters sent. We assume that the postage cost of sending each form would be $0.44, each envelope would be $0.10, and each 4-page form would be $0.20. In addition, parents responding to consent requests would need to provide return postage of $0.44 and $0.10 for a return envelope. We estimate a total postage and materials cost of $574,791 to $2,254,521.[4] We estimate that it takes approximately 10–15 minutes of administrative time to track the addresses of parents who have not provided a response, mail forms to parents, and process responses, and an additional 5 minutes for parents to respond to a consent request for a total time cost of $3,391,521 to $15,182,363.[5] Thus, we estimate that the total costs incurred under the current regulations and thus, the gross savings of the proposed changes to this section would be $15,303,000 to $41,471,000 annually.

Costs of additional requirements:

The proposed changes to § 300.154(d) would permit public agencies to access a child's or parent's public benefits or insurance if the public agency provides written notification to the child's parents prior to accessing public benefits or insurance funds to inform them of their rights and protections under the Act.

Proposed section 300.154(d)(2)(iv) would specify that this written notification must include: (1) A

[1] U.S. Congressional Research Service. Individuals with Disabilities Education Act (IDEA) and Medicaid (RL31722; Jan. 31, 2003), by Richard Apling and Elicia Herz.

[2] Assumes the cost of administrative time is $48.90 per hour based on the median wage of a special education teacher in 2009 of $36.22, as reported in the National Compensation Survey (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), with benefits valued at approximately 35 percent of the wage.

[3] Median wages of participants, excluding the parent, were obtained from the National Compensation Survey (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*). This calculation uses the Federal minimum wage of $7.50 per hour to account for the cost of a parent's time.

[4] Amounts shown are the additional postage and material costs of sending forms via mail; the cost of the first form copy is not included.

[5] Assumes the cost of administrative time is $48.90 per hour based on the median wage of a special education teacher in 2009 of $36.22, as reported in the National Compensation Survey (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), with benefits valued at approximately 35 percent of the wage. This calculation uses the Federal minimum wage of $7.50 per hour to account for the cost of a parent's time.

statement that parental consent must be obtained under 34 CFR part 99 and § 300.622 before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid); (2) A statement of the ''no cost'' provisions in § 300.154(d)(2)(i) through (iii); (3) A statement that the parents have the right under 34 CFR part 99 to withdraw their consent to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time; and (4) A statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and § 300.622 to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

We do not expect the requirements for notification to have a significant cost impact. While the notification must be provided to parents before the public agency may use the public benefits or insurance to pay for Part B services, the timing of the written notification is otherwise left to the discretion of the public agencies. In many instances, public agencies would have an opportunity to provide this notification, either by mail or in person, in conjunction with other required documentation or activities and would incur only the additional cost of photocopying the notification.

Although the specific format and content may vary by State, we estimate that it would take no more than 10 hours per State to draft a written notice that complies with these requirements and that the notice would not exceed 4 pages in length. Although the notification requirement rests with LEAs, we assume States will choose to create a standard notice in order to increase efficiency and address any applicable State laws.

According to the National Compensation Survey from the Bureau of Labor Statistics, the median hourly wage for lawyers employed full-time in State or local government is $38.46.[6] With benefit costs of approximately 35 percent, we estimate that the cost per State of drafting this notice would be no more than $520, for a national cost of approximately $31,000.

Assuming all LEAs need to prepare notifications and that it would take approximately 30 minutes for an administrative assistant to obtain and modify an existing notice for each LEA, the total cost of preparing notifications would be $196,000.[7] If the written notification is assumed to be no more than 4 pages long, then the cost of photocopying this document for the estimated 1,322,800 to 1,984,200 children who participate in both Part B and a public benefits or insurance program would be approximately $265,000 to $397,000 upon adoption of these changes. Assuming notification is provided once for each child over the course of his/her K–12 education, the annual cost of providing these notifications would be $20,000 to $31,000.

In some instances, public agencies would be unable to provide this written notification in conjunction with other mailings or in person and would need to provide written notification by mail separately. We assume that sending written notification by mail is required for half of the eligible children and that the cost of each notification would be $0.74.[8] The resulting additional cost of mailing these notifications would be an estimated $357,000 to $536,000 upon adoption of the proposed changes and $27,000 to $41,000 annually thereafter. This would result in a total cost of $849,000 to $1,159,000 upon adoption of the proposed changes and $48,000 to $72,000 annually thereafter.

After accounting for additional notification costs resulting from the proposed changes, the net savings upon adoption of these changes would be $14,144,000 to $40,622,000 in the first year after adoption and then $15,231,000 to $41,423,000 annually thereafter.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a number heading; for example, § 300.154, regarding methods of ensuring services.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand see the instructions in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed amendments to the regulations governing the Assistance to States for the Education of Children with Disabilities program, if finalized, would not place unnecessary burdens on small businesses and organizations. In fact, small entities such as small LEAs would benefit from the proposed changes to the Assistance to States for the Education of Children with Disabilities program, because these entities would experience less burden when accessing Medicaid or other public benefits or insurance programs to appropriately pay for services under Part B of the Act.

Paperwork Reduction Act of 1995

These proposed regulations contain information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of the information collection is given below with an estimate of the annual record keeping burden.

The proposed regulations include one information collection requirement associated with proposed § 300.154. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507d), the Department has submitted a copy of this section to

[6] *http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf.*

[7] Assumes the cost of administrative time is $23.96 per hour based on the median wage of secretaries and administrative assistants in 2009 of $17.75, as reported in the National Compensation Survey (*http://www.bls.gov/ncs/ocs/sp/nctb1479.pdf*), with benefits valued at approximately 35 percent of the wage. The number of LEAs is assumed to be 16,330 as reported by the NCES (Schools and Staffing Survey, ''Public School District Data File,'' 2007–08).

[8] The assumed cost of mailing a notification includes $0.20 for 4 sheets of paper, $0.44 in postage, and $0.10 for an envelope.

OMB for its review. Interested persons are requested to send comments regarding the information collection to the Department of Education within 30 days after publication of these proposed regulations. This comment period does not affect the deadline for public comments associated with this proposed regulation.

Collection of Information: State and Local Educational Agency Record Keeping, Notification, and Reporting Requirements under Part B of the Individuals with Disabilities Education Act (Information Collection 1820–0600). Proposed § 300.154(d)(2)(iv) will be added to this currently approved collection. The Act requires SEAs and LEAs to gather, maintain, report, and disclose various information and data, but the Act does not require this information and data to be submitted to the Department.

Under proposed § 300.154(d)(2)(iv), each LEA must provide a written notification to parents prior to accessing a child's or parent's public benefits or insurance. We assume that each SEA will develop a model notice that its LEAs can use and that it will take an average of about 10 hours to draft the notice for each of the 60 grantees funded under Part B of IDEA, representing a total burden of 600 hours. We further estimate that as an uppermost bound it will take an additional 8,165 hours for LEA staff to obtain and modify an existing model notification, based on not more than 30 minutes for each of the 16,330 LEAs. However, we would expect that most LEAs will simply use the model from its SEA. Therefore, we estimate the one-time burden for the first year of implementation of this notification requirement to be not more than 8,765 hours. With the addition of the burden to SEAs and LEAs associated with proposed § 300.154, the total annual record keeping and notification burden for this collection of information is estimated to be approximately 521,491 hours for the 104,038 separate responses from SEAs and LEAs.

Consistent with the earlier discussion, the following chart describes the sections of the proposed regulations involving information collections, the information being collected, and the collections the Department will submit to OMB for approval and public comment under the Paperwork Reduction Act.

Regulatory section	Collection information	Collection
§ 300.154(d)	Requires that parents receive a written notification prior to LEAs accessing a child's or parent's public benefits or insurance.	Information collection 1820–0600 ''State and Local Educational Agency Record Keeping, Notification, and Reporting Requirements under Part B of the Individuals with Disabilities Education Act.''

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by e-mail to *OIRA_Submission@omb.eop.gov* or by fax to (202)395–6974. Commenters need only submit comments via one submission medium. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;

Enhancing the quality, usefulness, and clarity of the information we collect; and

- Minimizing the burden on those who must respond. This includes exploring 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.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Requests for copies of the submission for OMB review may be accessed from *http://edicsweb.ed.gov* by selecting the ''Browse Pending Collections'' link. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, room 2W115, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to (202) 401–0920.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Electronic Access to this Document: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

List of Subjects in 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: August 31, 2011.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

1. The authority citation for part 300 continues to read as follows:

Authority: 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

2. Section 300.154 is amended by revising paragraph (d)(2)(iv).

The revision reads as follows:

§ 300.154 Methods of ensuring services.

* * * * *

(d) * * *

(2) * * *

(iv) Prior to accessing a child's or parent's public benefits or insurance, must provide written notification, consistent with § 300.503(c), to the child's parents. The notification must include—

(A) A statement that parental consent must be obtained under 34 CFR part 99 and § 300.622 before the public agency discloses, for billing purposes, their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance o program (*e.g.,* Medicaid);

(B) A statement of the ''no cost'' provisions in § 300.154(d)(2)(i)–(iii);

(C) A statement that the parents have the right under 34 CFR part 99 to withdraw their consent to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) at any time; and

(D) A statement that withdrawal of consent or refusal to provide consent under 34 CFR part 99 and § 300.622 to disclosure of personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.,* Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

* * * * *

[FR Doc. 2011–22784 Filed 9–27–11; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL REGISTER

Vol. 76 Wednesday,
No. 188 September 28, 2011

Part III

Securities and Exchange Commission

17 CFR Part 230
Prohibition Against Conflicts of Interest in Certain Securitizations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 34–65355; File No. S7–38–11]

RIN 3235–AL04

Prohibition Against Conflicts of Interest in Certain Securitizations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing for comment a new rule under the Securities Act of 1933 (''Securities Act'') to implement the prohibition under Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') on material conflicts of interest in connection with certain securitizations. Proposed Rule 127B under the Securities Act would prohibit certain persons who create and distribute an asset-backed security, including a synthetic asset-backed security, from engaging in transactions, within one year after the date of the first closing of the sale of the asset-backed security, that would involve or result in a material conflict of interest with respect to any investor in the asset-backed security. The proposed rule also would provide exceptions from this prohibition for certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making.

DATES: Comments should be received on or before December 19, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–38–11 on the subject line; or
- Use the Federal eRulemaking Portal (*http://http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number S7–38–11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Elizabeth Sandoe, Senior Special Counsel, David Bloom, Branch Chief, Anthony Kelly, Special Counsel, Barry O'Connell, Attorney Advisor, Office of Trading Practices and Processing and Jack I. Habert, Attorney Fellow, Division of Trading and Markets, at (202) 551–5720, and David Beaning, Special Counsel and Katherine Hsu, Chief, Office of Structured Finance, Division of Corporation Finance, at (202) 551–3850, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed Rule 127B under the Securities Act.

I. Introduction

Section 621 of the Dodd-Frank Act adds new Section 27B to the Securities Act.[1] This new Section of the Securities Act prohibits an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity (collectively ''securitization participants''), of an asset-backed security (''ABS''), including a synthetic ABS, from engaging in a transaction that would involve or result in certain material conflicts of interest.[2] The prohibition under Securities Act Section 27B applies to both registered and unregistered offerings of ABS.[3] This prohibition applies during the period ending on the date that is one year after the date of the first closing of the sale of the ABS. Section 27B provides exceptions from the prohibition described above for certain risk-mitigating hedging activities, liquidity commitments and bona fide market-making.[4]

Section 27B of the Securities Act further requires the Commission to issue rules for the purpose of implementing the new Section's prohibition.[5] To meet this statutory requirement, we are proposing new Rule 127B under the Securities Act to make it unlawful for a securitization participant to engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and any investor in an ABS that the securitization participant created or sold at any time for a period ending on the date that is one year after the date of the first closing of the sale of the ABS.[6] Consistent with Securities Act Section 27B(c), the proposed rule excepts from the prohibition certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making. We discuss proposed Rule 127B in more detail below and offer a number of examples of how the proposed rule would apply to particular fact patterns. We also seek commenter input regarding whether information barriers or disclosure would be relevant and

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 621, 124 Stat. 1376, 1632 (2010).

[2] Section 27B(a) of the Securities Act states that an ''underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security (as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), which for the purposes of this section shall include a synthetic asset-backed security), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.'' 15 U.S.C. 77z–2a(a).

[3] *See infra* Section IIIA(ii).

[4] Section 27B(c) of the Securities Act excepts the following activity from the prohibition under Section 27B(a) of the Securities Act: ''(1) Risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings arising out of such underwriting, placement, initial purchase, or sponsorship; or (2) purchases or sales of asset-backed securities made pursuant to and consistent with—(A) Commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, to provide liquidity for the asset-backed security, or (B) bona fide market-making in the asset-backed security.''

15 U.S.C. 77z–2a(c).

[5] Section 27B(b) of the Securities Act. 15 U.S.C. 77z–2a(b).

[6] We note that Section 27B(a) is not effective until the adoption of final rules issued by the Commission. Section 621(b) of the Dodd-Frank Act states that ''Section 27B of the Securities Act of 1933 * * * shall take effect on the effective date of final rules issued by the Commission under section (b) of such section 27B * * *.'' The proposed interpretations and related examples discussed in this proposing release therefore will have no force or effect except to the extent they are incorporated into any final Commission release adopting rules under Section 27B.

appropriate in managing and mitigating conflicts of interest or permitting certain transactions that might otherwise be prohibited by the proposed rule.

In crafting our proposed rule, we have primarily incorporated the text of Section 27B of the Securities Act. This release also sets forth below certain proposed clarifying interpretations of that text and a number of questions for public comment, all of which take into account comments we have received to date regarding the implementation of Section 621 of the Dodd-Frank Act.[7]

II. Background

A. Securitization

Securitization is a mechanism for pooling certain financial assets that have payment streams and credit exposures associated with them and effectively converting the pool into a new financial instrument—an ABS—that is ''backed'' by the pool of assets and offered and sold to investors. More specifically, a financial institution or other entity, commonly known as a sponsor, first originates or acquires a pool of financial assets, such as mortgage loans, credit card receivables, auto loans or student loans. The sponsor then sells the financial assets, directly or through an affiliate, to a special purpose entity (''SPE''). The SPE issues the securities supported or ''backed'' by the financial assets. These securities are sold to investors in either a public offering subject to an effective registration statement filed with the Commission or an offering exempt from registration. As described by the Commission:

Securitization generally is a financing technique in which financial assets, in many cases illiquid, are pooled and converted into instruments that are offered and sold in the capital markets as securities. This financing technique makes it easier for lenders to exchange payment streams coming from the loans [or other pooled assets] for cash so that they can make additional loans or credit available to a wide range of borrowers and companies seeking financing. Some of the types of assets that are financed today through securitization include residential and commercial mortgages, agricultural equipment leases, automobile loans and leases, student loans and credit card receivables.[8]

As a result of the securitization, the credit and other risks associated with the pooled assets is transferred away from the sponsor's balance sheet to investors in the ABS.[9]

ABS investors are generally interested in the experience of the collateral manager and the ''quality of the underlying assets, the standards for their servicing, the timing and receipt of cash flows from those assets and the structure for distribution of those cash flows.'' [10] With respect to the structure for cash flow distributions, some ABS transactions are structured to provide cash flow distribution through ''pass-through certificates representing a pro rata share of the cash flows from the underlying asset pool''.[11] Other ABS transactions offer a range of risk exposures and yields to investors. This is accomplished through the SPE issuing different classes of securities, commonly referred to as tranches.[12] Transaction agreements typically specify the structure of an ABS transaction and detail how cash flows generated by the asset pool will be divided among tranches. This division of cash flows is often referred to as the ''flow of funds'' or ''waterfall.'' [13]

The securitization process developed in the 1970s and subsequently has experienced significant growth and evolved dramatically.[14] With this evolution, the investor base has broadened and the ABS themselves have become more complex. There are, for example, now synthetic ABS in which investors in securities issued by SPEs acquire credit exposure to a portfolio of fixed income assets without the SPE owning these assets. Rather, the investors gain this exposure because the SPE has entered into derivatives transactions, such as credit default swaps (''CDS'') that reference particular assets.[15] The counterparty to the CDS may be the sponsor who originated or selected the underlying portfolio. The SPE, as seller of protection under the CDS, is in effect long the credit exposure on those assets as if it had purchased them.

For example, a bank that maintains fixed income assets on its balance sheet may protect itself against default of those assets by purchasing a CDS from the SPE that references the same or similar types of assets. In other cases, a person may desire to purchase CDS protection even though such person does not own the reference assets underlying the CDS sold by the SPE. In both of the above cases, the SPE, as seller of the CDS protection, takes on the risk of default on the reference assets underlying the CDS (and the consequent obligation to make a payment to the CDS counterparty as a result of such default) in exchange for ongoing payments from the purchaser of the CDS protection. In addition, in both scenarios any payments the SPE is required to make under the CDS will be funded from amounts received by the SPE from the investors in the ABS issued by the SPE. Thus, the proceeds of the SPE's issuance of securities typically are not used to purchase loans, receivables or other investment assets, but instead are typically used to purchase highly creditworthy collateral [16] to support (i) The SPE's contingent obligation to pay the purchaser of the CDS in the event of one or more defaults with respect to the reference assets underlying the CDS (the synthetic reference pool of assets), and (ii) to the extent not used for payments to the CDS purchaser, the SPE's obligations to investors in the SPE's

[7] As of August 24, 2011, the Commission had received eight comment letters addressing new Section 27B of the Securities Act. All the comment letters regarding new Section 27B of the Securities Act are available on the Commission's Web site at *http://www.sec.gov/comments/df-title-vi/conflicts-of-interest/conflicts-of-interest.shtml.*

[8] Asset-Backed Securities, Release No. 33–9117 (Apr. 7, 2010), 75 FR 23328, 23329 (May 3, 2010) (''Release 33–9117'').

[9] One type of ABS is a collateralized debt obligation (''CDO''). In a CDO structure, a sponsor may sell to an SPE an asset pool that holds fixed income products, such as loans, mortgage-backed securities or corporate bonds. The SPE then issues debt securities collateralized or ''backed'' by this asset pool.

[10] Asset-Backed Securities, Release No. 33–8518 (Dec. 22, 2004), 70 FR 1506, 1511 (Jan. 7, 2005) (''Release 33–8518'').

[11] *Id.*

[12] *Id.* (''ABS transactions often involve multiple classes of securities, or tranches, with complex formulas for the calculation and distribution of the cash flows. In addition to creating internal credit enhancement or support for more senior classes, these structures allow the cash flows from the asset pool to be packaged into securities designed to provide returns with specific risk and timing characteristics.'').

[13] *Id.* (''The flow of funds specifies the allocation and order of cash flows, including interest, principal and other payments on the various classes of securities, as well as any fees and expenses, such as servicing fees, trustee fees or amounts to maintain credit enhancement or other support.'').

[14] *See, e.g.,* Sylvain Raynes & Ann Rutledge, The Analysis of Structured Securities: Precise Risk Measurement and Capital Allocation 3 (2003); *see also* Release No. 33–9117, 75 FR at 23330, (''[a]t the end of 2007, there were * * * nearly $2.5 trillion of asset-backed securities outstanding''). Securities Industry and Financial Markets Association, Global CDO Issuance—Quarterly Data from 2000 to Q1 2011 (updated 4/1/11), *available at http://www.sifma.org/research/statistics.aspx* (reporting a doubling in the volume of synthetic CDO issuances between 2005 and 2007). In recent years, the market for securitization has declined. *See, e.g.,* David Adler, *A Flat Dow for 10 Years? Why it Could Happen,* BARRONS (Dec. 28, 2009).

[15] The protection sold by the SPE under a CDS may reference a portfolio of assets, a single asset, or an index.

[16] The term ''collateral,'' when used in connection with a synthetic ABS, has a different meaning than the term ''collateral'' in a non-synthetic ABS. In a non-synthetic ABS the collateral is the pool of underlying assets (*e.g.,* a pool of student loans). In a synthetic ABS, the collateral is often U.S. Treasury securities or other securities used as credit support for the SPE's potential payment obligations under a CDS that references an underlying asset pool.

issued securities.[17] The SPE makes payments to investors based on cash flows and proceeds from the CDS and the collateral pool.

Therefore, in both the non-synthetic ABS and the synthetic ABS, the SPE and the investors in the SPE have an ongoing long exposure to each instrument in a reference pool of assets—*i.e.,* assets held directly by the SPE, in the case of a non-synthetic transaction, or assets referenced in a CDS under which the SPE has sold protection to a counterparty, in the case of a synthetic transaction. The transactions differ, however, in that the synthetic transaction inherently involves a party—the counterparty to the CDS—that has purchased CDS protection on the same reference pool of assets and thus has an ongoing short exposure to those assets. This purchaser of CDS protection may be a securitization participant (such as the bank sponsoring the synthetic ABS). In these cases—and considering the CDS in isolation—the securitization participant would be taking an investment position that is directionally opposite to that taken by the investors in the synthetic ABS, as is generally the case in any transaction through which a buyer is able to acquire and a seller is able to dispose of a particular financial exposure in pursuit of their respective investment objectives. If the referenced assets default, the securitization participant receives a payment from the SPE pursuant to the CDS and the investors in the SPE ultimately suffer a loss on their investment.[18] If the referenced assets do not default, the investors would have benefited from payments from the CDS counterparty while the SPE would not have any payment obligations to the CDS counterparty.

Request for Comments Regarding the Description of the Securitization Process

1. Are there any other key features of the securitization process that need to be highlighted in considering the scope of Securities Act Section 27B? If so, which features, and why?

2. We seek commenter input regarding the reasons why market participants enter into synthetic ABS transactions instead of non-synthetic ABS transactions. What relative economic or other benefits do synthetic ABS transactions offer to investors and securitization participants? Under what circumstances are such transactions more or less beneficial for each type of market participant? What economic, market or other considerations affect the determination by investors and securitization participants to enter into such transactions?

3. We ask that commenters estimate the volume of synthetic ABS transactions on an annual basis in terms of size and dollar value over the last ten years and to supplement those estimates with data where possible. We would also appreciate comparative estimates of synthetic and non-synthetic ABS transaction volume during this same period.

4. We ask that commenters describe the impact on the market, and in particular on investors, if securitization participants refrained from structuring and selling any particular types of synthetic ABS. Please include a discussion of all advantages and disadvantages as well as any effects on investor protection, liquidity, capital formation, the maintenance of fair, orderly and efficient markets and the availability of credit to borrowers.

5. Do synthetic ABS transactions involving other synthetic ABS, CDOs of CDOs or other transactions involving multiple layers of ABS exposures raise additional or heightened conflict of interest concerns? If so, why and how should these factors be reflected in our proposed rule?

6. What are the key features of the securitization process that bear on the existence or significance of conflicts of interest between participants in that process and investors in the ABS? How has the securitization process changed in recent years, and how have those changes exacerbated or mitigated any potential conflicts of interest? Are the potential conflicts of interest in this process different in kind, degree or with respect to transparency than the conflicts that may arise in connection with creating and offering other credit products, such as corporate debt?

7. Are certain types of ABS more susceptible to conflicts of interest? Are certain parties in the securitization process more likely to have a conflict of interest with investors than others? Are there transactions inherent in the structure of a synthetic ABS that raise special or heightened conflict of interest concerns relative to other ABS transactions or otherwise?

8. Are the conflicts of interest that may arise during the securitization process different in kind or degree than those that may arise after the securitization process? How should the Commission interpret issues related to pre- and post-offering conflicts of interest for purposes of Securities Act Section 27B?

9. We request commenters' views concerning conflicts that may arise from the multi-tranche structure, including where securitization participants retain part or all of a particular tranche.[19]

B. Initial Comments Received Regarding the Implementation of Section 27B

Shortly after the passage of the Dodd-Frank Act, the Commission provided the public with the opportunity to express views on the various Dodd-Frank Act provisions that the Commission is required to implement, including Section 27B of the Securities Act, as added by Section 621 of the Dodd-Frank Act.[20] As noted above, we received eight initial comment letters regarding our implementation of Section 27B. One letter was written by the sponsors of Section 621 of the Dodd-Frank Act, who urged the Commission and other federal financial regulators, among other things, to ''fully and faithfully'' implement the Dodd-Frank Act, including Section 27B of the Securities Act.[21] This letter noted that a central purpose of Securities Act Section 27B is to prohibit ''firms from packaging and selling asset-backed securities to their clients and then engaging in transactions that create conflicts of interest between them and their clients.'' [22] Further, it noted that a Permanent Subcommittee on

[17] The assets or types of assets on which the SPE will sell protection would typically be disclosed to investors upfront and they would invest in the SPE's securities based on the anticipated risk of default on those assets and income received by the SPE from selling protection via CDS that reference those assets. The SPE would in effect have a synthetic reference pool of assets created by the SPE's long exposure to the assets underlying the CDS that it sold.

[18] As further discussed below, the securitization participant's short exposure may itself be hedged—by entering into an offsetting CDS transaction, or otherwise—such that in terms of its overall risk profile the securitization participant does not retain exposures directionally opposite to those taken by investors in the synthetic ABS.

[19] We note that other provisions of the Dodd-Frank Act seek to align the interests of ABS investors with securitizers. *See, e.g.,* Section 941 of the Dodd-Frank Act. The proposed rule is not intended to prohibit risk retention as required by Section 941. *See* Credit Risk Retention, Release No. 34–64148 (March 30, 2011), 76 FR 24090 (April 29, 2011) (Commission proposing rules jointly with the Office of the Comptroller of the Currency, Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency and the Department of Housing and Urban Development to implement the credit risk retention requirements of section 15G of the Securities Exchange Act of 1934 (15 U.S.C. 78o–11), as added by Section 941 of the Dodd-Frank Act) (''Release 34–64148'').

[20] Public Comments on SEC Regulatory Initiatives under the Dodd-Frank Act, *available at http://sec.gov/spotlight/regreformcomments.shtml.*

[21] Letter from Senators Jeffrey Merkley and Carl Levin to Commission Chairman Mary Schapiro, et al. (Aug. 3, 2010) (''Merkley-Levin Letter'') at p. 1, *available at http://www.sec.gov/comments/df-title-vi/conflicts-of-interest/conflictsofinterest-2.pdf.*

[22] *Id.* at p. 5.

Investigations hearing that addressed issues related to The Goldman Sachs Group, Inc. ''highlighted a blatant example of this practice: The firm assembled asset-backed securities, sold those securities to clients, bet against them, and then profited from the failures.'' [23] These commenters included in their letter excerpts from the Congressional Record providing further background as to the purpose of Section 621, including the following statement: ''[t]he intent of section 621 is to prohibit underwriters, sponsors and others who assemble asset-backed securities, from packaging and selling those securities and profiting from the securities' failures.'' [24]

Other commenters were industry associations and representatives of market participants who expressed their views on the implementation of Section 27B both in general and in the context of specific situations, and who highlighted their concerns about an overly broad application of Securities Act Section 27B. For example, one comment letter supported the prohibition on material conflicts of interest but also urged that certain activities should not be prohibited regardless of whether they result in potential or actual conflicts of interest.[25] Two other commenters cautioned against a broad interpretation of the term ''material conflicts of interest'' for purposes of Section 27B of the Securities Act.[26] These commenters noted, for example, that the relationship between securitization participants, on the one hand, and investors, on the other hand, can in certain respects be viewed as fundamentally conflicted in the simple sense that a buyer and seller of assets always have opposing interests, as to price, asset quality and other terms and conditions.[27] These commenters asserted that Section 27B was not intended to eliminate this type of conflict.

Commenters suggested different tests for assessing whether a transaction involves or results in a material conflict of interest prohibited by Section 27B. One commenter suggested that a transaction or activity should not be prohibited under Section 27B if ''(i) Such transaction or activity represents an overall alignment of risk to the ABS or underlying assets similar to that borne by investors of the ABS, (ii) such transaction or activity is unrelated to the [securitization participant's] role in the specific ABS, (iii) disclosure of the transaction or activity of the [securitization participant] adequately mitigates the risk posed by the potential or actual conflict with respect to any investors in the ABS or (iv) another regulatory regime applies with respect to the potential or actual conflict of interest.'' [28]

Another commenter asserted the proposal should prohibit: ''(a) ABS transactions in which the adverse performance of the pool assets would directly benefit an identified party or sponsor (or any affiliate of any such entity) of the applicable ABS transaction; (b) ABS transactions in which a loss of principal, monetary default or early amortization event on the ABS would directly benefit an identified party or sponsor (or any affiliate); and (c) ABS transactions in which an insolvency event related to the issuing entity of the ABS would directly benefit an identified party or sponsor (or any affiliate).'' [29] This commenter believed that most ordinary course business transactions concerning securitization participants do not have these characteristics and should be permitted.[30]

A third commenter suggested that the proposal should ''prohibit transactions that create a material incentive to intentionally design asset-backed securities to fail or default.'' [31] The commenter further proposed that a material conflict of interest would exist if ''(i) A [securitization participant] participates in the issuance of an asset-backed security that is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security and (ii) within one year following the issuance of such asset-backed security, the [securitization participant] enters into such related or subsequent transaction.'' [32]

Commenters provided examples of a number of conflicts of interest that they view as inherent in, and indeed essential to, the securitization process and that in their opinion should not be prohibited by Section 27B.[33] In fact, one commenter listed more than twenty categories of potential conflicts of interest that, in its view, are inherent in the ordinary course of securitization but should not be prohibited by Section 27B: (1) The basic risk transfer that occurs in structuring a securitization; (2) the tranching of debt; (3) holding differing classes of securities in an asset-backed transaction; (4) risk retention; (5) retaining the right to receive excess spread or cash flows; (6) failure to provide funding under a liquidity facility; (7) failure to provide a credit enhancement; (8) control rights (*e.g.,* ''the contractual right to remove the servicer, appoint a special servicer, exercise a clean-up call or instruct a trustee or servicer to take certain actions with respect to the collateral underlying the ABS or against an issuer or other transaction party'' and ''voting rights as a security holder or in another capacity in a transaction''); (9) hedging activities unrelated to a securitization; (10) providing financing (*e.g.,* a warehouse line or financing investors to purchase an ABS); (11) servicer conduct (*e.g.,* servicer interactions with obligors including loan modifications and adjustments to loan terms); (12) collateral manager conduct (*e.g.,* the collateral manager acquiring assets for itself or others but not making the assets available to the asset-backed issuer, engaging ''in 'agency cross' transactions in which the collateral manager or an affiliate thereof acts as a broker for compensation for both the issuer and the other party to the transaction'' and

[23] *Id.*

[24] *Id.* (citing 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Carl Levin)).

[25] Letter from the Securities Industry and Financial Markets Association (Dec. 10, 2010) (''SIFMA Letter'') at pp. 4 and 12 (SIFMA ''generally support[s] the prohibition of material conflicts of interest'' but ''enumerates certain natural and expected conflicts which may arise in ABS transactions but do not constitute the type of 'material conflicts' intended to be regulated by Section 621'').

[26] Letters from the American Securitization Forum (Oct. 21, 2010) (''ASF Letter'') at p. 3 and the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance of the Section of Business Law of the American Bar Association (Oct. 29, 2010) (''ABA Letter'') at p. 2.

[27] ABA Letter at p. 3 (''The relationship between an ABS sponsor and ABS investors is inherently conflicted, in that the ABS sponsor is seeking funding and the ABS investors are providing that funding on negotiated terms. Pool selection may also involve conflicts * * * We believe that conflicts of this type, relating to the terms and nature of the security, exist in any ABS transaction and cannot be eliminated.'').

[28] SIFMA Letter at p. 3.

[29] ABA Letter at p. 3.

[30] *Id.*

[31] ASF Letter at p. 4.

[32] ASF Letter at p. 5.

[33] *See, e.g.,* ABA Letter at p. 2 (''We believe rules implementing this provision should give appropriate weight to Congressional intent while permitting a broad range of common activities that are essential to the functioning of the securitization market.''); *see also* SIFMA Letter at pp. 2 and 5 (''The goal of the letter is to provide the Commission with some representative examples of potential conflicts of interest that may arise as part of an ABS transaction but that should not be expressly prohibited under Section 621''; ''conflicts of interest are inherent in securitization * * * These conflicts should be disclosed to investors and other transaction parties to the extent they are material, but should otherwise be permitted * * * conflicts created in the normal course of a securitization are sufficiently known by, or disclosed to, investors and do not fall under the intended scope of Section 621.'').

'''client cross' transactions in which the collateral manager or an affiliate thereof causes a transaction between a securitization issuer and another client of the collateral manager without the collateral manager or its affiliates receiving compensation''); (13) conduct in connection with a trustee (*e.g.,* a sponsor ''may want to acquire a trustee or the trust business from the trustee''); (14) transactions in swaps and caps; (15) transactions in CDS and other derivatives; (16) receipt of payments for performing a role in a securitization prior to payments made to investors; (17) paying an entity for a rating or to provide due diligence; (18) market research; (19) entering into a merger, acquisition, or restructuring that could be adverse to the securitization activities; (20) a bank affiliate of an underwriter making a loan to the sponsor; (21) an underwriter acting as underwriter or placement agent in connection with securities issued by a competitor of a sponsor; and (22) an underwriter hedging market-making activity.[34] Other commenters echoed the view that there are many activities that involve or result in potential conflicts of interest in connection with a securitization that should not be prohibited by Section 27B.[35]

Three other commenters offered their views on topics including the elimination of conflicts of interest, costs associated with regulation, and disclosure requirements.[36] A sponsor of tax lien-backed securities suggested that ''municipally-sponsored [sic] tax lien securitization programs should be exempt from the rules promulgated pursuant to Section 621 of the [Dodd-Frank] Act.'' [37]

III. Discussion of Proposed Rule

Pursuant to Section 27B(b) of the Securities Act, the Commission proposes Rule 127B under the Securities Act to address material conflicts of interest that arise in connection with a securitization. As the securitization process has grown more complex, securitization participants may in some circumstances engage in a range of different activities and transactions that give rise to potential conflicts of interest, and the existence and potential effects of conflicts of interest in that process have received increased attention.[38]

The proposed rule is designed to implement Section 27B of the Securities Act. As noted above, the text of proposed Rule 127B is based substantially on the text of Section 27B. As described below, the Commission is proposing for comment guidance to market participants as to the nature and scope of conduct that would be prohibited under the proposed rule. The Commission has received a number of initial comments regarding the breadth of any proposed definition of material conflict of interest, and we have sought to strike an appropriate balance between prohibiting the specific type of conduct at which Section 27B is aimed without restricting other securitization activities.[39] We preliminarily believe that the proposed rule strikes that balance, but we seek comment on all aspects of proposed Rule 127B and of our proposed interpretations of its scope and requirements. It is important to note that although the proposed rule would prohibit certain transactions that would involve or result in certain material conflicts of interest, it would in no way limit or restrict the applicability of the general antifraud provisions of the federal securities laws to conduct arising before or after the proposed rule becomes effective. Thus, all conduct in connection with a securitization, whether or not effected in compliance with Section 27B and proposed Rule 127B, would remain subject to these and other relevant provisions of the securities laws.

The discussion of the proposed rule set forth below is divided into three parts. First, we describe certain conditions that, under Section 27B, must be present for the proposed rule to apply. In particular, we discuss the persons, products, timeframes, and conflicts that potentially fall within the scope of the proposed rule, and we propose a standard for determining whether a ''material conflict of interest'' exists for purposes of the proposed rule. Second, we discuss three categories of activities—risk-mitigating hedging activities, liquidity commitments, and bona fide market-making—that are excepted from the scope of the proposed rule, as provided in Section 27B. Third, we provide examples of selected securitization transactions and describe how our proposed test for determining whether or not a transaction involves or results in a ''material conflict of interest'' prohibited by proposed Rule 127B would apply to such examples.

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[34] SIFMA Letter at p. 5 through 11.

[35] *See, e.g.,* ABA Letter at pp. 2–4. The ABA Letter sets forth a more limited list of activities that occur in the ordinary course of a securitization, some of which overlap with the SIFMA Letter, that mainly occur either as part of structuring the ABS or in connection with a securitization, and which the ABA believes should not be prohibited by the proposed rule. With respect to conduct that is related to structuring the ABS, the ABA identifies: (1) A securitization participant seeking funding that is provided by the investor in the securitization; (2) pool selection; (3) risk retention; and (4) subordinated tranches. The ABA Letter also highlights the following conduct customarily effected in connection with securitization: (1) ''Dealing with delinquent assets (*e.g.,* whether and to what extent to modify an obligation or to foreclose on underlying collateral)''; (2) originating or acquiring second lien loans on mortgaged properties; (3) providing a warehouse loan or other loan to be repaid from the proceeds of ABS issuance; (4) loans to servicers or credit enhancers; (5) loans to an investor secured by ABS (*e.g.,* an investor margin account or repo facility); (6) ''sales by an identified party of ABS which it originally placed or sales of other debt or equity securities of an ABS issuer or of debt of an entity included in a CDO or CLO;'' and (7) the exercise of remedies upon a loan default.

Similarly, the ASF Letter identifies activities that are routinely undertaken in connection with securitization, which in its view should not be prohibited by the proposed rule, including (1) ''Short-term funding facilities such as 'warehouse' lines, variable funding notes and asset-backed commercial paper, whereby the underwriter or its affiliate provides financing to the sponsor to fund asset originations or purchases,'' (2) the pursuit of customary servicing activities such as loan modifications, short sales and short refinances; (3) tranche structure; (4) risk retention; and (5) providing best execution in interest rate and currency swaps to obtain interest rates or currencies that differ from the underlying assets. ASF Letter at p. 3.

[36] *See* Letters from Robin McLeish (July 28, 2010) (''People should not be allowed [to engage in] any conflict of interest.''), Timothy Hogan (Sept. 15, 2010) (''Underwriters * * * should disclose whether they are advocating for the Issuer or the Investor or both * * * This requirement should apply regardless of whether the securities are registered or exempt from registration.''), and Robert O.L. Lynn (Oct. 6, 2010) (''Redistributing compliance risk toward the individual-employee level could yield cost-efficient enforcement by increasing the downside risk to anyone attempting to disguise conflicts of interest—without requiring additional taxpayer resources.'').

[37] *See* Letter from Mark Page, Director of Management and Budget, The City of New York (Nov. 12, 2010) at p. 5 (''City of New York Letter'').

[38] *See, e.g.,* Staff of S. Comm. On Homeland Security and Governmental Affairs, Sub. Comm. On Investigations, 112th Cong., Wall Street and the Financial Crisis: Anatomy of a Financial Collapse (Comm. Print 2011), *available at http://hsgac.senate.gov/public/_files/Financial_Crisis/FinancialCrisisReport.pdf* (hereinafter ''*Senate Subcommittee Report: Anatomy of a Financial Collapse''*). *See also, Staff of S. Comm. on Homeland Security and Governmental Affairs, Sub. Comm. on Investigations, 111th Cong.,* wall street and The Financial Crisis: The Role of Investment Banks (Comm. Print 2010) (Exhibit 1a), *available at http://hsgac.senate.gov/public/_files/Financial_Crisis/042710Exhibits.pdf* (hereinafter ''*Senate Subcommittee Report: The Role of Investment Banks''*); The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, *available at http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_full.pdf* (hereinafter, ''*The Financial Crisis Inquiry Report''*); Consent and Final Judgment as to the Defendant J.P. Morgan Securities LLC in *SEC* v *J.P. Morgan Securities LLC (f/k/a/J.P. Morgan Securities Inc.),* 11 CV 4206 (S.D.N.Y 2011); Litigation Release No. 22008 (June 21, 2011); and Consent and Final Judgment as to Defendant Goldman, Sachs & Co. in *SEC* v *Goldman, Sachs & Co. and Fabrice Tourre,* 10 CV 3229 (S.D.N.Y. 2010); Litigation Release No. 21592 (July 15, 2010), 2010 WL 2799362 (July 15, 2010).

[39] *See* Section IIID of the Release.

Though in a number of examples particular reference is made to synthetic ABS for the purpose of furthering the discussion or providing clarification, we are seeking to apply the same general principles and guidance to both synthetic ABS and non-synthetic ABS.

We note that in analyzing whether a particular activity is prohibited by the proposed rule, market participants would be permitted to consider each of the conditions and exceptions discussed below independently. Thus, they could conclude that the activity is not prohibited by the proposed rule if: (1) The activity is outside the scope of the proposed rule (because, for example, it does not involve a covered person or product, or does not entail a material conflict of interest), or (2) the activity falls within a permitted exception to the rule. We seek comment on all aspects of proposed Rule 127B and of our proposed interpretations of its scope and requirements.

A. Conditions Required for Application of the Proposed Rule

There are five key conditions, each of which is discussed below, that define the circumstances in which the proposed rule might prohibit material conflicts of interest in the securitization process. In particular, in order for the proposed rule to apply, the relevant transaction must involve (1) Covered persons, (2) covered products, (3) a covered timeframe, (4) covered conflicts, and (5) a ''material conflict of interest''. Each of these conditions must be present in order for the prohibition under the proposed rule to apply.

i. Covered Persons

The proposed rule would apply to an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, of an ABS. These persons are specified in Section 27B(a) of the Securities Act and typically have substantial roles in the assembly, packaging and sale of ABS. They structure the product and control the securitization process, and thus they may have the opportunity to engage in activities that the proposed rule and Section 27B of the Securities Act are intended to prevent.

The term ''underwriter'' is defined in Section 2(a)(11) of the Securities Act. The Securities Act, however, does not define for purposes of Section 27B of the Securities Act the terms ''placement agent,'' ''initial purchaser,'' ''sponsor,'' ''affiliate'' or ''subsidiary.'' We do not propose to define these terms for purposes of the proposed rule at this time. Although the term ''sponsor'' is defined in connection with Regulation AB's disclosure regime and the second prong of the definition of the term ''securitizer'' in Section 15G of the Securities Exchange Act of 1934 (''Exchange Act'') is substantially identical to the Regulation AB definition of sponsor, the Regulation AB definition might not identify all persons involved in the structure and sale of, for example, a synthetic ABS transaction, who may have the opportunity to engage in activities that the proposed rule is intended to prevent.[40] We note that synthetic ABS are not included within the scope of Regulation AB.[41] Neither the Commission nor our staff has interpreted the Regulation AB definition in the context of synthetic ABS transactions. We preliminarily believe that the Regulation AB definition of sponsor might be under-inclusive or confusing in the context of the proposed rule. Furthermore, we preliminarily believe that a collateral manager should be subject to the proposed rule, based on such entity's role in structuring the transaction and selecting assets.

We preliminarily believe that terms such as placement agent and initial purchaser are sufficiently well understood in the context of the market for ABS, given that securitization developed in the 1970s and market participants frequently identify the various participants in the securitization process using these terms (for example, by specifying the placement agent, initial purchaser, and sponsor in offering documents).[42] We also recognize that many of these terms, however, are defined or used in other provisions of the federal securities laws and rules adopted thereunder.[43] While certain specific definitions used in other areas of the federal securities laws and rules may be workable in this context, others may be over- or under-inclusive. For example, we seek commenter input concerning whether the term ''sponsor'' in this context should include the collateral manager or others who for a fee, or some other benefit, play a substantial role in the creation of an ABS, or managing or servicing the assets underlying an ABS. Although as noted above we do not preliminarily believe definitions are warranted in the proposed rule text, we seek commenters' views on this issue.

Request for Comments Regarding Covered Persons

10. Should we provide definitions for the terms ''placement agent,'' ''initial purchaser,'' ''sponsor,'' ''affiliate'' or ''subsidiary''? One commenter suggested that we adopt definitions for the terms ''initial purchaser'' and ''sponsor'' but not for other covered persons.[44] Should we adopt this commenter's approach? We seek comment concerning whether certain terms should or should not be defined, and the rationale supporting such distinctions. Specifically, we seek comment as to whether definitions of these terms in other provisions of the federal securities laws and rules would be necessary and workable in this area, whether existing definitions should be tailored specifically for this rule proposal, or whether new definitions would be necessary to achieve the purpose of the proposal.

11. Should the term ''sponsor'' have the same meaning as defined in Regulation AB?[45] Please explain why or why not. Would such definition be workable or would it be over- or under-inclusive in this context?

12. For purposes of proposed Rule 127B, should the term ''sponsor'' be defined to specifically include a collateral manager or any other person (*e.g.,* servicers, custodians, *etc.*) who, for a fee or some other benefit, has a substantial role in the creation of the ABS? We seek commenter input regarding whether such definition would be appropriate or over- or under-inclusive. If you believe such a definition would be over- or under-inclusive, please provide examples of how such definition would be over- or

[40] The Regulation AB definition of sponsor is found at 17 CFR 229.1101(*l*); *see also* Release No. 34–64148.

[41] Synthetic ABS do not fit within the more narrow definition of ABS included in Regulation AB because payments on synthetic ABS are based primarily on the performance of reference assets and not the performance of a discrete pool of financial assets that by their terms covert into cash and are transferred to a separate entity. *See generally* Release 33–8518.

[42] ABA Letter at page 6 (''Section 27B also uses the term 'sponsor', which is not currently defined in the Securities Act of 1933. However, the term sponsor has been defined in Regulation AB, and the definition there is virtually identical to clause (B) of the definition of ''securitizer'' that is added to the Securities Exchange Act of 1934 by virtue of Section 941 of the Dodd-Frank Act. We recommend that the Commission utilize the definition of 'sponsor' in Regulation AB for purposes of Section 27B''). While the ABA Letter suggested using the Regulation AB definition of the term sponsor, others did not make such a suggestion.

[43] *See, e.g., infra* notes 44 through 51.

[44] *See* ABA Letter at p. 6 (suggesting ''the Commission clarify that the term 'initial purchaser' as used in Section 27B refers to a broker-dealer functioning in a role equivalent to that of an underwriter or placement agent in a Rule 144A transaction'' and ''that the Commission utilize the definition of 'sponsor' in Regulation AB for purposes of Section 27B.'').

[45] 17 CFR 229.1101(*l*) (''Sponsor means the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.'').

under-inclusive. Would clarification or more specificity be needed if we were to use such a definition of ''sponsor''? If so, please explain what would be needed and why. Alternatively, should the term ''sponsor'' be defined to specifically include a collateral manager or any other person (*e.g.,* servicer, custodian, *etc.*) who, for a fee or some other benefit, participates in the creation of the ABS? We seek commenter input regarding whether or not this alternative definition would be more appropriate. If commenters believe that definitions of a particular covered person are necessary but that existing definitions from other areas of the federal securities laws and rules or other sources are not workable in this context, please suggest an alternative definition(s). Commenters should explain why their suggested definition(s) better identifies persons intended to be covered by Section 27B.

13. Should proposed Rule 127B provide that an ''affiliate'' of, or a person ''affiliated'' with, a specified person is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified? Such terms are defined similarly in Section 16 of the Securities Act, Rule 405 under the Securities Act, and Rule 12b–2 under the Exchange Act.[46] Would such a definition be workable or would it be over- or under-inclusive in this context? Please discuss whether or not a servicer would typically be an affiliate of an underwriter, placement agent, initial purchaser, or sponsor, under such a definition.

14. Should the definition of the term ''subsidiary'' be the same as the definition of subsidiary found in Exchange Act Rule 12b–2?[47] Please explain why or why not. Would such definition be workable or would it be over or under-inclusive in this context?

15. Should the term ''underwriter'' in the context of Securities Act Section 27B have the same meaning as the definition in Section 2(a)(11) of the Securities Act?[48] We note that Section 2 of the Securities Act states that terms used in the Securities Act have the meanings assigned to them in that section ''unless the context provides otherwise.'' Is the context in Section 27B of the Securities Act, and proposed Rule 127B thereunder, such that the term ''underwriter'' should not have the meaning in Section 2(a)(11)? Would that definition be workable or over- or under-inclusive, in this context? Should we define the term ''underwriter'' instead to have the same meaning as the definition in Rule 100 of Regulation M under the Exchange Act?[49] Please explain why or why not. Would such definition be workable or over- or under-inclusive in this context?

16. Should definitions for each type of covered person be the same as or consistent with Regulation AB? Should ''underwriter,'' ''placement agent,'' ''initial purchaser'' and ''sponsor'' have the same meaning as either defined by Regulation AB or, if undefined, as understood in Regulation AB (*e.g.,* underwriter or initial purchaser)? Would these terms need to be defined differently than defined or understood, if undefined, in Regulation AB in order to fulfill the intent of Section 27B of the Securities Act, particularly in connection with synthetic ABS? Please explain. Alternatively, please explain why consistent treatment would be appropriate.

17. For purposes of Rule 127B, should we define ''initial purchaser'' to mean a broker-dealer functioning in a role equivalent to that of an underwriter or placement agent who purchases the ABS pursuant to an agreement that contemplates the resale of those securities to other purchasers in transactions that are not required to be registered under the Securities Act in reliance upon Rule 144A[50] or that are otherwise not required to be registered because they do not involve any public offering?[51] Would this language adequately describe the types of unregistered transactions in which an initial purchaser might participate (*i.e.,* Rule 144A transactions and private resales made in reliance on the so-called Section ''4(1–½)'' exemption)? Should the definition of ''initial purchaser'' incorporate different or other concepts? Are there persons that should be subject to this provision in addition to broker-dealers that act as initial purchasers?

ii. Covered Products

Proposed Rule 127B(a), like Section 27B under the Securities Act, applies with respect to any ''asset-backed security (as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), which for purposes of this rule shall include a synthetic asset-backed security)''. Section 941(a) of the Dodd-Frank Act added Section 3(a)(77) to the Exchange Act to provide that the term ''asset-backed security'':

> (A) means a fixed income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a security or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flows from the asset, including—
>
> (i) A collateralized mortgage obligation;
>
> (ii) A collateralized debt obligation;
>
> (iii) A collateralized bond obligation;
>
> (iv) A collateralized debt obligation of asset-backed securities;
>
> (v) A collateralized debt obligation of collateralized debt obligations; and
>
> (vi) A security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and
>
> (B) Does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.[52]

The proposed rule, like Securities Act Section 27B, incorporates this definition and specifically includes synthetic ABS in describing the scope of the prohibition on certain material conflicts of interests.

We are not proposing to define the term ''synthetic asset-backed security'' for purposes of proposed Rule 127B, because we understand that this term is commonly used and understood by market participants.[53] However, we seek comment on whether this understanding is correct and whether we should provide a definition of this

[46] *See* 15 U.S.C. 77p(f)(1); 17 CFR 230.405; and 17 CFR 240.12b–2, respectively.

[47] *See* 17 CFR 240.12b–2 (''A 'subsidiary' of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries.'').

[48] 15 U.S.C. 77b(a)(11).

[49] 17 CFR 242.100 (''Underwriter means a person who has agreed with an issuer or selling security holder: (1) To purchase securities for distribution; or (2) to distribute securities for or on behalf of such issuer or selling security holder; or (3) to manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder.'').

[50] 17 CFR 230.144A.

[51] *See* ABA Letter at p. 6 (suggesting that the Commission ''clarify that the term 'initial purchaser' as used in Section 27B refers to a broker-dealer functioning in a role equivalent to that of an underwriter or placement agent in a Rule 144A transaction.'').

[52] Public Law 111–203, 941, 124 Stat. 1376, 1890–91.

[53] We note that the definition of ABS in Securities Act Regulation AB does not include a synthetic ABS. *See* Release 33–8518, 70 FR at 1514 and Item 1101(c) of Regulation AB (17 CFR 229.1101(c)). However, the prohibition in Section 27B of the Securities Act applies both to an ABS as defined in Section 3 of the Exchange Act, and to a synthetic ABS. Synthetic securitizations ''create exposure to an asset that is not transferred to or otherwise part of the asset pool. These synthetic transactions are generally effectuated through the use of derivatives such as a credit default swap or total return swap. The assets that are to constitute the actual 'pool' under which the return on the ABS is primarily based are only referenced through the credit derivative.'' Release 33–8518, 70 FR at 1514.

term to facilitate implementation of the proposed rule.

We also note that the definition of an ABS in Section 3(a)(77) of the Exchange Act (an ''Exchange Act-ABS'') is much broader than the definition of an ABS in Securities Act Regulation AB. The definition of an Exchange Act-ABS includes securities that are typically sold in transactions that are exempt from registration under the Securities Act, such as CDOs, and that are not necessarily backed by a discrete pool of assets.

Neither Section 27B nor proposed Rule 127B distinguishes between ABS that are sold in an offering registered with the Commission or in an offering that is exempt from registration. Accordingly, our proposal would apply to ABS in both such circumstances. We recognize that Section 27B, and our proposed rule, refer to an underwriter, a term that, in the Securities Act, is typically, but not exclusively, used in the context of registered offerings. Section 27B, however, also applies to placement agents and initial purchasers, which are parties that perform functions similar to an underwriter in unregistered offerings. Moreover, as noted above, the definition of Exchange Act-ABS includes ABS typically offered and sold in unregistered transactions.

Request for Comments Regarding Covered Products

18. Should we define or interpret the term ''synthetic asset-backed securities'' and if so, how? Please explain why or why not. Please provide a suggested definition and the rationale for why the suggested definition is appropriate. Should any such definition or interpretation be limited to ABS for which the credit exposure for the asset pool from which payments are derived consists substantially of swaps, security-based swaps or other derivatives (and the collateral held by the SPE)?

19. Should any such definition or interpretation of ''synthetic ABS'' include any combination of securities that produces an economic result equivalent to an ABS, whether or not collateralized or having features meeting the specific requirements of the definition of ABS? If we were to define the term, should we define ''synthetic ABS'' as securitizations designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool, including transactions effectuated through the use of derivatives such as a CDS or total return swap, and for which the assets that are to constitute the actual ''pool'' under which the return on the ABS is primarily based are for the most part referenced through the derivative? [54]

20. Please discuss any similarities or differences between security-based swap agreements in general and security-based swap agreements used in synthetic ABS that are relevant for purposes of proposed Rule 127B. Please discuss whether or not such similarities or differences should be addressed in a definition or interpretation of the term ''synthetic ABS'' for purposes of proposed Rule 127B, and why.

21. We seek comment on the application of proposed Rule 127B to municipal securities that are ''asset-backed securities'' within the meaning of Section 3(a)(77) of the Exchange Act as amended by the Dodd-Frank Act.[55] Please explain whether you believe there are any differences between the application of this provision to municipal securities that are ABS and its application to other types of ABS. Should there be an exemption under Securities Act Section 28 from proposed Rule 127B for decisions made in the exercise of the governmental function of a state or local government acting as a securitization participant? Please explain why or why not. Would other exceptions applicable to state and local government issuers or sponsors of ABS be appropriate? Please explain why or why not. If you believe exceptions should be included, please describe what such exceptions should be and why they would be appropriate. We seek specific comment about whether some or all varieties of municipally-sponsored tax lien securities should be exempt from the proposed rule and if so, why such an exemption would be appropriate for such tax-lien securities.[56] For example, we ask commenters to provide their reasoning as to whether or not the proposed rule should apply to a municipal tax lien securitization in which the tax liens arose by operation of law and were sold by a municipality through a tax lien securitization program in which all liens were securitized and the municipality had no role in the lien selection process.[57]

iii. Covered Timeframe

Proposed Rule 127B uses the Securities Act Section 27B language ''at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security.'' It is during this time period, which extends for one year following the first closing of the sale of the security to the public, that no securitization participant could engage in a transaction giving rise to prohibited conduct. Accordingly, if a transaction occurs in the period prior to one year after the date of the first closing of the sale of the ABS, it is covered by the proposed rule.

Securities Act Section 27B specifies the end of the covered timeframe—one year following the first closing of the sale of the security to the public. Section 27B, however, does not specify the commencement point for the covered timeframe and we are not proposing to do so at this time. As a result, the proposed rule would cover transactions effected prior to ''the date of the first closing of the sale of the asset-backed security.'' We preliminarily believe that this result may be appropriate because prior to the first closing securitization participants involved in structuring and marketing an ABS may engage in transactions involving or resulting in material conflicts of interest that in form or effect are, for purposes of the proposed rule, difficult to distinguish from similar transactions occurring after the first closing. Thus, using the sale date as a starting point for the covered timeframe might be under-inclusive. We request comment, however, on whether and how our proposed approach might be over-inclusive, as well as whether alternative approaches to defining the covered timeframe (such as treating the date of first sale as the beginning of the covered timeframe) might be appropriate.

Request for Comments Regarding Covered Timeframe

22. Is there a point in time prior to ''one year after the date of the first closing of the sale of the asset-backed security'' at which the prohibition in Section 27B was not intended to apply? Please explain why or why not.

23. Should the proposed rule specify the commencement point for the covered timeframe? Please provide an explanation. In particular, please

[54] *See* Section IIIA(2)(a) of Release 33–8518, 70 FR at 1513–1515.

[55] The definition of an ABS within the meaning of Section 3(a)(77) of the Exchange Act as amended by the Dodd-Frank Act includes securities that are typically sold in transactions that are exempt from registration under the Securities Act.

[56] *See* City of New York Letter at p. 5 (''Many actions that the City of New York takes in the exercise of its governmental powers pursuant to other statutes or regulations or to serve the public's interest and protect the health and safety of its residents could potentially be viewed as being in conflict with the interest of investors in the tax lien-backed securities. For example, the City could take an action that would adversely impact the value of one of the properties securing a tax lien or the value of other properties in that area, which could adversely impact the value of that property.'').

[57] *See id.*

discuss whether or not the commencement point for the covered timeframe should be ''the date of the first closing of the sale of the asset-backed security.'' Please include a discussion of whether or not such commencement point for the covered timeframe would be appropriate, or whether it would be over- or under-inclusive. In addition, please discuss whether such approach would have any advantages or disadvantages.

24. Should the commencement point for the covered timeframe be tied to the point at which a person becomes a securitization participant? How would such a point in time be defined? Should the commencement point vary depending on which securitization participant role a person performs? Please provide an explanation.

25. Should the commencement point for the covered timeframe be tied to some other reference point prior to the first closing of the sale of the ABS to the public? Please provide an explanation.

iv. Covered Conflicts of Interest

The Commission also proposes to delineate the scope of ''conflicts of interest'' that would potentially be covered by the proposed rule.[58] Specifically, there would not be a covered conflict of interest involved if the conflict in question: (1) Arose exclusively between securitization participants or exclusively between investors; (2) did not arise as a result of or in connection with the related ABS transaction; or (3) did not arise as a result of or in connection with ''engag[ing] in any transaction'' (as more fully described below).

First, consistent with Securities Act Section 27B, we propose that the scope of the conflicts of interest covered by proposed Rule 127B(a) would be limited to material conflicts of interest between an entity that is a securitization participant with respect to an ABS and an investor in such ABS, whether or not such investor purchased the ABS from the securitization participant. This proposed interpretation is not intended to narrow or broaden the scope of the statutory language. Under this interpretation, however, if conflicts of interest were to arise solely among securitization participants, acting in their capacity as such in connection with the securitization process, they would not be subject to the proposed rule, given the focus of Section 27B on protecting investors (*e.g.,* conflicts of interests between a sponsor and a collateral manager of an ABS are not the focus of the proposal).[59]

Second, conflicts of interest arising solely among investors in the ABS offering (where investors could include securitization participants, provided these conflicts arise only from their interests as an investor) would also not be covered by the proposed rule.[60] Thus, for example, the proposed rule is not intended to prohibit the multi-tranche structures commonly used in ABS offerings, even though those structures may involve conflicts between the interests of various classes of investors in the offering by virtue of the different risks and rewards associated with such tranches.

Third, we propose that the prohibition under Rule 127B(a) would only apply to those conflicts of interest between a securitization participant and an investor that arise as a result of or in connection with the related ABS transaction. Our proposed rule, therefore, would not address other conflicts of interest that happen to arise between these same parties but that are unrelated to their status as a securitization participant and investor, respectively.[61]

Fourth, we propose that in order for the proposed rule to apply, the conflict of interest must arise as a result of or in connection with ''engag[ing] in any transaction.'' For example, engaging in any transaction would include, but not be limited to, effecting a short sale of, or purchasing CDS protection on, securities offered in the ABS transaction or its underlying assets. ''Engag[ing] in any transaction'' would also include the securitization participant selecting assets, directly or indirectly, for the underlying asset pool and selling those assets to the SPE.[62]

We recognize that not every activity undertaken by a securitization participant would be ''engag[ing] in any transaction'' for purposes of Securities Act Section 27B or the proposed rule. For example, the issuance of investment research by a securitization participant would not be ''engag[ing] in any transaction'' for purposes of the proposed rule. We request comment on whether there are other types of activities in which securitization participants may engage that should be specifically excluded from the scope of the phrase ''engag[ing] in any transaction.''

Request for Comment Regarding Covered Conflicts of Interest

26. Would the application of the proposed interpretation to conflicts of interest between securitization participants and investors in ABS be appropriate or could it be viewed as broadening or narrowing the scope of paragraph (a) of the proposed rule in a way that could prevent it from achieving its intended purpose? Please explain. Please describe any alternative interpretation that would better align the scope of the proposed rule with the conflicts that Section 27B is designed to address.

27. We seek commenter input regarding conflicts of interest that might arise between securitization participants, whether or not such conflicts impact ABS investors, and to what extent, if any, such conflicts are addressed under Securities Act Section 27B.

[58] The proposed interpretations are not intended for broad application concerning the use of the term ''material conflicts of interest'' and would not apply in other areas of the federal securities laws and rules or SRO rules or in connection with other provisions of the Dodd-Frank Act.

[59] *See* Merkley-Levin Letter, at attachment (Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Carl Levin)) (''[Securitization participants], like the mechanic servicing a car, would know if the vehicle has been designed to fail. And so they must be prevented from securing handsome rewards for designing and selling malfunctioning vehicles that undermine the asset-backed securities markets. It is for that reason that we prohibit those entities from engaging in transactions that would involve or result in material *conflicts of interest with the purchasers of their products.''*) (emphasis added).

[60] *See supra* note 19.

[61] For example, the underwriter of an ABS may also be the underwriter in an unrelated common stock offering. One investor may purchase securities in both the ABS offering and the common stock offering. If the underwriter engaged in transactions that undermined the market value of the common stock offering, that activity (while potentially addressed by other provisions of the federal securities laws and rules thereunder, depending on the facts and circumstances) would not fall within the scope of Proposed Rule 127B even though one of the investors in the common stock offering is also an investor in the ABS offering.

See ABA Letter at p. 5 (''The rules should clarify that the prohibition on material conflicts of interest does not extend to transactions unrelated to the relevant ABS transaction. The language of Section 27B referring to a 'material conflict of interest with respect to any investor in a transaction arising out of such activity', creates some ambiguity as to whether the phrase 'arising out of such activity' is intended to identify the investor, or the context in which the potential conflict may arise. Underwriters, placement agents, initial purchasers and sponsors, or their affiliates, may have a variety of relationships with investors who purchase ABS from or through them. We believe that the better reading of Section 27B is that the conflict of interest shall not arise in the context of the transaction with respect to which the investor acquired the ABS. This construction would help to assure the integrity of ABS offerings, while not imposing unreasonable restrictions on the overall relationships between the identified parties and sponsors, on the one hand, and ABS investors, on the other.'').

[62] Merely ''engaging in any transaction'' does not in and of itself trigger the prohibitions of the proposed rule. For example, the sale of underlying assets to the SPE must also involve or result in a material conflict of interest with ABS investors and all other conditions required for application of the proposed rule must be met.

28. Should the phrase ''engaging in any transaction'' for these purposes be interpreted more broadly or narrowly? Please provide specific suggestions.

29. Are the examples noted above of activity that constitutes ''engaging in any transaction'' over-inclusive, under-inclusive or appropriate in the context of the proposed rule? Are there examples of ''engaging in any transaction'' in addition to effecting a short sale of securities offered in the ABS transaction or its underlying assets, or buying CDS protection on the relevant ABS or its underlying assets, that should be considered in this context? Please explain. Should the phrase ''engaging in any transaction'' include the asset-backed offering itself?

30. Is the example noted above of an activity that does not constitute ''engaging in any transaction'' (the issuance of investment research) appropriate in assessing conflicts of interest? Are there other activities that should not be ''engaging in any transaction'' for these purposes? If so, which activities, and why?

31. Please identify situations, if any, in which a securitization participant has engaged in a transaction that conflicts with the interests of ABS investors as well as engaged in a transaction that is aligned with the interests of ABS investors. Please discuss whether and how you believe such situations should be addressed under the proposed rule.

v. Conflicts of Interest That Are Material

Perhaps the most challenging issue in implementing Section 27B is to identify those conflicts of interest involving securitization participants and investors that are ''material'' and intended to be prohibited under Section 27B and our proposed rule. If a conflict of interest is not a ''material conflict of interest'', then it would not be covered by Section 27B and our proposed rule.

The proposed rule does not define the term ''material conflict of interest.'' We preliminarily believe that any attempt to precisely define this term in the text of the proposed rule might be both over- and under-inclusive in terms of identifying those types of material conflicts of interest arising as a result of or in connection with a securitization transaction that Section 27B was intended to prohibit, especially given the complex and evolving nature of the securitization markets, the range of participants involved, and the various activities performed by those participants. Accordingly, we propose to clarify the scope of conflicts of interest that are material and intended to be prohibited under Section 27B and our proposed rule through interpretive guidance rather than through a detailed definition in the proposed rule.[63]

In considering how best to interpret the phrase ''material conflict of interest'' for these purposes, we note that on the one hand, in order to give full effect to Section 27B, this phrase should be interpreted sufficiently broadly so as to capture the full range of transactions by securitization participants that involve or result in a material conflict of interest between securitization participants and investors. If the phrase is construed too narrowly, the proposed rule could potentially permit certain securitization participants to take undue advantage of their role in the securitization process, in which case the proposed rule might fail to enhance the integrity of securitization practices as fully as intended.

On the other hand, however, a number of commenters have argued that multiple conflicts of interest often arise between securitization participants and investors as an inherent part of the securitization process. Thus, they have cautioned, an overly broad interpretation may curtail the willingness of securitization participants to engage in securitization transactions, which ultimately could limit, increase the costs of, or effectively prohibit transactions that might benefit investors, efficiently redistribute risk, and support important segments of the economy.[64]

We are not aware of any basis in the legislative history of Section 621 to conclude that this provision was expected to alter or curtail the legitimate functioning of the securitization markets, as opposed to targeting and eliminating specific types of improper conduct. Moreover, as a preliminary matter, we believe that certain conflicts of interest are inherent in the securitization process, and accordingly that Section 27B and our proposed rule should be construed in a manner that does not unnecessarily prohibit or restrict the structuring and offering of an ABS.

We have considered the various tests suggested by commenters for identifying material conflicts of interest for purposes of Section 27B and our proposed rule. While mindful of these suggestions and of the analysis accompanying them, the Commission preliminarily believes that the appropriate balance would best be struck through an interpretation that, for purposes of the proposed rule, engaging in any transaction[65] would ''involve or result in [a] material conflict of interest'' between a securitization participant and investors in the relevant ABS if:

(1) *Either:*

(A) a securitization participant would benefit directly or indirectly from the actual, anticipated or potential (1) Adverse performance of the asset pool supporting or referenced by the relevant ABS, (2) loss of principal, monetary default or early amortization event on the ABS, or (3) decline in the market value of the relevant ABS (where these are discussed below, any such transaction will be referred to as a ''short transaction''); or

(B) a securitization participant, who directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS, would benefit directly or indirectly from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration, as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction as described above; *and*

(2) there is a ''substantial likelihood'' that a ''reasonable'' investor would consider the conflict important to his or her investment decision (including a decision to retain the security or not).[66]

We preliminarily believe that this formulation of a conflict of interest that is material would directly address those types of activities that Section 27B was intended to prohibit—*e.g.,* situations in which a securitization participant engages in a transaction through which it benefits when the related ABS fails or performs adversely or has the potential to fail or perform adversely and there is a substantial likelihood that a reasonable investor would consider the

[63] *See supra* note 6.

[64] *See, e.g.,* SIFMA Letter at p. 3 (''If not focused on the transactions referenced by Senators Merkley and Levin, rules promulgated under Section 621 could restrict many standard industry practices which are vital to the functioning of the ABS markets and beneficial to investors.''). *See also* ASF Letter at p.3–4 (''Similarly, a broad interpretation of 'material conflicts of interest' could prohibit servicers * * * who are affiliated with the sponsor of a transaction from pursuing customary servicing activities * * * This restriction would effectively prohibit sponsors and their affiliates from servicing the loans that they originate, requiring costly servicing transfers that will decrease efficiency and potentially lead to confusion for consumers and disruptions in the servicing of assets.'').

[65] *See supra* Section IIIA(iv). Such a transaction would include effecting a short sale of securities offered in the ABS transaction or its underlying assets, or buying CDS protection on the relevant ABS or its underlying assets.

[66] *See Basic* v. *Levinson,* 485 U.S. 224, 231–32 (1988) (citing *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976)).

fact of such benefit important to his or her investment decision.[67]

a. Item 1(A) of ''Material Conflict of Interest'' Test

Engaging in a transaction would ''involve or result in [a] material conflict of interest'' if as a result of such transaction the securitization participant would benefit from the actual, anticipated or potential poor performance of the ABS or the underlying assets. It would not be necessary for a securitization participant to *intentionally* design an ABS to fail or default in order to trigger the rule's prohibition.[68] We preliminarily interpret the intent of Section 27B more broadly—to prohibit securitization participants from benefiting from the failure of financial instruments that they help structure, offer and sell to investors. Thus, under the proposed rule a securitization participant would be prohibited from profiting from the decline of an ABS it helped to create (assuming that the conflict would be important to a reasonable investor), even if that securitization participant did not intentionally cause, or increase the likelihood of, such decline. For example, a securitization participant that engaged in a short sale of the relevant ABS four months following the first closing of sale of the ABS would meet item 1(A) of the material conflict of interest test. The securitization participant would be able to benefit from a decline in the market value of the ABS through the short sale even if the securitization participant did not design the ABS to fail. The analysis does not turn on whether the securitization participant intentionally designed the ABS to fail, but rather whether the securitization participant would benefit, through the actual, anticipated or potential decline in the market value of the ABS, in this case in the form of gains from the short sale.

We highlight the reference in our proposed test to the requirement that a securitization participant would benefit directly or indirectly from the actual, anticipated or potential decline in the value of the ABS (or underlying assets). If a securitization participant effected a short transaction in the ABS, it would not be necessary for the market value of the ABS to actually decline in order for a ''material conflict of interest'' to arise. It would be sufficient that the securitization participant engaged in a transaction under which it would benefit if the market value of the ABS were to decline.[69]

We recognize that—like other prophylactic conflict of interest rules—the proposed rule and interpretation might limit certain investment activities that might otherwise be made for bona fide purposes. For example, it is possible for a securitization participant and investors in an ABS who have complete access to information regarding the underlying assets simply to have different views regarding the future prospects for those assets, based on their independent analysis of market and commercial trends or other factors. For example, an investor may believe that the assets will perform well, but the securitization participant may believe that the assets will perform poorly. In this case, restricting or prohibiting the securitization transaction would limit the ability of both the investor and the securitization participant to transact freely based on their respective views of the underlying assets (even though they might make the same investment choice if they were not involved in the securitization). We therefore acknowledge the concern that this proposal might have unintended effects, such as potentially limiting investment opportunities for investors if a securitization participant refrains from structuring and selling ABS in reaction to this proposal. We seek commenter input below concerning the extent to which such unintended effects might occur, and any potential impacts, including any impact on investors, investor protection, liquidity, capital formation, the maintenance of fair, orderly and efficient markets and the availability of credit to borrowers (through assets underlying an ABS).

On the other hand, in the context of a securitization transaction, the securitization participant is generally seeking to sell to investors a particular investment view regarding the underlying assets, in the form of the ABS. In this sense, the proposed rule and interpretation would help prohibit the securitization participant from structuring and offering the ABS to investors on the premise that it will be a good investment when the securitization participant has either structured the transaction in a manner that is designed to fail or takes other actions (*i.e.,* entering into a short transaction) through which it will profit from such failure. Moreover, the proposed prohibition would be all the more important given that as a practical matter investors in the ABS may not have as much information regarding the underlying assets as the securitization participant, and may be drawing inferences regarding the quality of the assets based on the involvement and marketing efforts of the securitization participant in the transaction as well as any other information provided by the securitization participant. We seek commenter input regarding potential benefits, including benefits for investors, investor protection, liquidity, capital formation and the maintenance of fair, orderly and efficient markets that might ensue as a result of the proposed interpretation and how these potential benefits may impact any unintended consequences referenced above.

Nothing in the proposed interpretation would prevent a securitization participant from taking positions in which its economic interests would be aligned with the investors in the ABS it has created and sold—such as by purchasing the ABS.[70] While the proposed interpretation would cover benefiting from the adverse performance of the asset pool supporting the ABS, we note that the proposed interpretation would not

[67] *See* 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Levin) (''The intent of Section 621 is to prohibit underwriters, sponsors, and others who assemble asset-backed securities, from packaging and selling those securities and profiting from the securities' failures.'').

Our proposed approach for identifying when a person engages in transactions that involve or result in material conflicts of interest is, in part, similar to the ABA's suggested focus for the proposed rule. *See* ABA Letter at p. 2 (''we believe the focus of the rulemaking should be on the following types of conflicts: (a) ABS transactions in which the adverse performance of the pool assets would directly benefit an identified party or sponsor (or any affiliate of any such entity) of the applicable ABS transaction; (b) ABS transactions in which a loss of principal, monetary default or early amortization event on the ABS would directly benefit an identified party or sponsor (or any affiliate); and (c) ABS transactions in which an insolvency event related to the issuing entity of the ABS would directly benefit an identified party or sponsor (or any affiliate).''). In addition, the ABA suggested that the ''rules should clarify that the prohibition on material conflicts of interest does not extend to transactions unrelated to the relevant ABS transaction.'' *Id.* at p. 5.

[68] *See* SIFMA Letter at p. 1 (''reforms may be necessary to ensure that securitization transaction parties are not creating and selling asset-backed securities ('ABS') that are intentionally designed to fail or default and profiting from the failure or default of such ABS.''). *See also,* ASF Letter at p. 5 (a material conflict exists if the ABS ''is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security.'').

[69] We also understand that a securitization participant may engage in a short transaction, for example, in the context of market-making or in the context of hedging assets being pooled to create an ABS. If such activities qualify for the proposed exceptions in the rule discussed below—*i.e.,* the exceptions for bona fide market-making and risk-mitigating hedging—they would be permitted.

[70] *See* SIFMA Letter at p. 3 (a transaction or activity should not be prohibited under Securities Act Section 27B if ''such transaction or activity represents an overall alignment of risk to the ABS or underlying assets similar to that borne by investors of the ABS'').

prevent a securitization participant's transactions in the securities of a lender whose mortgage pools are included or referenced in an ABS because the proposal is focused solely on the ABS and its underlying portfolio.

b. Item 1(B) of ''Material Conflict of Interest'' Test

If a securitization participant would not benefit in the manner set forth in item 1(A) of the material conflict of interest test, one must determine whether the securitization participant would benefit in the manner set forth under item 1(B) of that test. A benefit under either item 1(A) or 1(B) would satisfy item 1 of the test.

Engaging in a transaction would involve or result in a material conflict of interest arising as a result of or in connection with a transaction if a securitization participant who directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS would benefit directly or indirectly—from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration—as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction as described above.[71]

In certain circumstances, a third party might directly or indirectly select assets underlying an ABS or structure the ABS transaction through its relationship with a securitization participant. In these situations, it is possible that the third party, rather than the securitization participant, might enter into a short transaction of a type that would be prohibited for the securitization participant itself under our proposed rule and interpretation. For example, the third party might select assets for the securitization transaction that it anticipates will perform poorly, and then enter into a short transaction on the ABS in order to benefit from the anticipated decline in the market value of the ABS or its underlying assets.

The securitization participant would not necessarily be a party to the short transaction, and therefore might not directly profit from that short transaction due to any future adverse performance of the ABS or its underlying assets. However, the securitization participant may be incentivized to leverage the role it plays in selecting assets underlying the ABS to seek other benefits. For example, the securitization participant might benefit (*e.g.,* through compensation, the promise of future business, or other forms of remuneration from either the third party or the ABS) by allowing a third party to select the assets in the manner described, and in so doing would effectively benefit by having permitted the third party to potentially profit from a related short transaction. This would result in a material conflict of interest between the securitization participant and investors in the ABS of the type that Section 27B is intended to prohibit. Item 1(B) would apply because the securitization participant would benefit directly or indirectly from fees or other forms of remuneration, or the promise of future business, fees or other forms of remuneration. As a result of item 1(B), a securitization participant could not create an opportunity for a third party to engage in any transaction that the securitization participant itself would not be permitted to engage in under item 1(A) of the proposed interpretation.[72]

Given that Section 27B and our proposed rule apply to securitization participants, the burden of compliance with these requirements would fall on the securitization participant that directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS and who then permits or facilitates the involvement of a third party in those aspects of the transaction. We recognize that in certain instances there might be practical challenges for securitization participants seeking to determine whether they are subject to this restriction, or whether the involvement of third parties in a securitization transaction complied with the proposed rule. For example, in certain cases there might be practical difficulties for a securitization participant in determining whether a third party that was involved in selecting the underlying assets or the structuring of the ABS might also engage in prohibited short transactions. While securitization participants could use different tools to manage these practical difficulties, we preliminarily believe that when reasonable to do so, securitization participants could rely on appropriate contractual covenants or representations, either between themselves or with the relevant third parties, to determine compliance with our proposed rule. For example, if a third party were involved in selecting the underlying assets or structuring the ABS, where reasonable to do so a securitization participant could rely on contractual assurances (from the third party or from another securitization participant who had obtained such assurances from the third party) that the third party would not engage in any short transactions that would be prohibited if engaged in by a securitization participant in the relevant offering.

Of course, it would not be necessary for a securitization participant to obtain such contractual assurances—for example, in circumstances where it did not have any reasonable basis to believe that a third party would engage in a short transaction in a way that would violate our proposed rule.

c. Item 2 of ''Material Conflict of Interest'' Test

Item 2 of the proposed interpretation, which requires ''a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision,'' is intended to require that the potential implications of the relevant conflict be sufficiently important as to warrant the prohibition imposed under the proposed rule. We preliminarily do not believe it would be appropriate to interpret the proposed rule so broadly as to prohibit all transactions that give rise to any conflict of interest, even if the potential benefits of such transactions for the securitization participant were so minimal as to be unimportant to a reasonable investor.

We note that in considering whether there is a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision, it is not possible to designate in advance certain facts or occurrences as determinative in every instance.[73] Rather the proposed interpretation would require an assessment of the inferences that a reasonable investor would draw from a

[71] For purposes of item 1(B), we interpret the statutory reference to a securitization participant ''engaging in a transaction'' to include circumstances where the securitization participant, although not itself a party to a transaction as contemplated by item 1(A), would benefit directly or indirectly as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction.

[72] We note for clarity that in order for a transaction to be a material conflict of interest under item 1(B), the third party would actually need to effect a short transaction. Thus, with respect to both items 1(A) and 1(B), the material conflict of interest test contemplates the existence of a short transaction by the securitization participant or the third party, as applicable.

[73] *Basic* v. *Levinson,* 485 U.S. at 236 (''Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.'').

given set of facts and circumstances.[74] It would be appropriate, however, to consider both the probability that the securitization participant would receive a benefit and the magnitude of the benefit.[75] Thus, for example, it is possible that a securitization participant might stand to benefit substantially from a decline in the value of the ABS, but the probability of its receiving such benefit under the circumstances might be so small that a reasonable investor would not consider the conflict important to his or her investment decision.

Although the proposed interpretation uses a materiality formulation that is also used under the federal securities laws for determining whether disclosure is necessary—*i.e.,* whether there is a substantial likelihood that a reasonable investor would consider the issue important to his or her investment decision—the use of this phrase in this context is not intended to suggest that a transaction otherwise prohibited under the proposed rule would be permitted if there were adequate disclosure by the securitization participant. We note in this regard that there may be practical challenges in relying on disclosure as a means to address all transactions involving a material conflict of interest—including in particular certain transactions arising after the offering documents have been disseminated but before the one-year timeframe covered by the proposed rule has elapsed.[76] Nevertheless, we request comment as to whether and to what extent adequate disclosure of a material conflict of interest should affect the treatment under the proposed rule of an otherwise prohibited transaction.

Request for Comments Regarding Material Conflicts of Interest

32. We seek comment regarding any potential consequences of not defining the term ''material conflict of interest'' in the proposed rule text and instead proposing an interpretation in the context of the proposed rule. Please discuss whether or not there may be an unintended chilling effect on securitization transactions resulting from potential uncertainty associated with not defining material conflict of interest. If you believe the Commission should define ''material conflict of interest,'' please provide a suggested definition and the rationale as to why such definition identifies the conflicts that the proposed rule is intended to address.[77] Is it likely or unlikely that such a definition would be able to anticipate all future material conflicts of interest? Would such a definition lead to unintended consequences, such as excluding from the proposed prohibition certain activities undertaken by securitization participants that involve material conflicts of interest? Or would such a definition be over-inclusive and encompass activities undertaken by securitization participants that do not involve material conflicts of interest?

33. Is the distinction suggested by commenters between conflicts that are inherent in the securitization process and those that are not a meaningful one?[78] Is this proposed distinction useful for purposes of defining the scope of Securities Act Section 27B? Are there other ways to distinguish between different conflicts of interest that the Commission should take into account in considering the scope of Section 27B? Would a reasonable investor understand the difference between conflicts of interest that are inherent in the offering process and those that are not?[79] Would the reasonable expectations of an investor in an ABS offering be a useful test for determining which conflicts of interest are material?

34. Is the proposed interpretation regarding what constitutes a material conflict of interest appropriate? Should the interpretation be broader or narrower? Please suggest alternative interpretations for what would constitute material conflicts of interest for purposes of the proposed rule and explain why such interpretations would better identify transactions that involve or result in material conflicts of interest. In addition to the magnitude of a benefit and the probability that it will occur, are there additional (or alternative) factors that should be considered in assessing whether there is a substantial likelihood that a reasonable investor would consider the conflict important to his or her decision to invest?

35. Should the proposed interpretation extend to indirect or unforeseeable benefits to a securitization participant? Please explain why or why not. How would a securitization participant determine that there was no such indirect or unforeseeable benefit?

36. Are there circumstances in which facilitating a third party to benefit from the adverse performance of the ABS or underlying assets would not be a material conflict of interest? Please explain.

37. We seek commenter input regarding the potential use of contractual provisions and covenants by securitization participants to manage their compliance with the proposed rule, as well as a discussion of how a securitization participant would determine that no contractual assurance was necessary.

38. As an alternative, would it be appropriate to prohibit a securitization participant from allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS (absent contractual provisions) if the involvement of the third party in the ABS transaction or the actions of the third party unrelated to the ABS transaction constituted a material conflict of interest with the investors in the ABS transaction (regardless of whether or not the securitization participant benefitted)?

39. Some commenters asserted that the prohibited conduct should be limited to creating and selling an ABS that is ''intentionally designed to fail or default'' [80] or creating and selling an ''intentionally flawed'' ABS so that a securitization participant can profit from a related or subsequent transaction.[81] As one commenter suggested, should the test focus on whether ''(i) Such transaction or activity represents an overall alignment of the risk to the ABS or underlying assets similar to that borne by investors of the

[74] *Id.* (citing *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 450 (1976)).

[75] *Id.* at 238 (citing *SEC* v. *Texas Gulf Sulphur, Co.,* 401 F.2d 833, 849 (2d Cir. 1968) (en banc), *cert. denied, sub nom Coates* v. *SEC,* 394 U.S. 976 (1969)).

[76] *See infra* Question 98.

[77] *See, e.g.,* ASF Letter at p. 5 (suggesting that a material conflict of interest ''shall exist, if other than for hedging purposes or as permitted by Section 27B(c) of the Securities Act of 1933, (i) A [securitization participant] participates in the issuance of an asset-backed security that is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security and (ii) within one year following the issuance of such asset-backed security, the [securitization participant] enters into such related or subsequent transaction.'').

[78] *See supra* Section IIB.

[79] *Id.*

[80] *See* SIFMA Letter at p. 2.

[81] *See* ASF Letter at p. 5 (''the definition of 'material conflicts of interest' should prohibit those types of transactions identified by Senators Merkley and Levin that create conflicts of interest by creating intentionally flawed asset-backed securities.'' Specifically, the commenter suggested that a material conflict of interest exists ''if, other than for hedging purposes or as permitted by Section 27B(c) of the Securities Act of 1933, (i) A [securitization participant] participates in the issuance of an asset-backed security that is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security and (ii) within one year following the issuance of such asset-backed security, the [securitization participant] enters into such related or subsequent transaction.'').

ABS, (ii) such transaction or activity is unrelated to the [securitization participant's] role in the specific ABS, (iii) disclosure of the transaction or activity of the [securitization participant] adequately mitigates the risk posed by the potential or actual conflict with respect to any investors in the ABS or (iv) another regulatory regime applies with respect to the potential or actual conflict of interest''? [82] Is such a formulation for the proposed rule appropriate? Please explain. Would such a test be over-inclusive and encompass activities that do not involve or result in material conflicts of interest? Would such a test be under-inclusive and fail to cover activities that are intended to be prohibited by Section 27B and the proposed rule? What other approaches would provide a substantially similar or higher level of investor protection as the proposed rule?

40. Are there transactions inherent in the securitization process that would be material conflicts of interest under the proposed interpretation that were not intended to be prohibited by Section 27B? Or, are there transactions inherent in the securitization process that would not fall within the proposed interpretation and the proposed rule that should be prohibited under Section 27B and application of the proposed rule? Please identify and provide an explanation of these activities as well as an explanation of why they should or should not be prohibited under Section 27B and the proposed rule. We ask that commenters address each of the activities set forth in initial comment letters as described in Section II.B as well as activities not addressed by initial comment letters.

41. Are modifications to the proposed rule or interpretation, consistent with the statute, necessary or advisable to mitigate any such unintended consequences?

42. Is the phrase ''fees or other forms of remuneration, or the promise of future business, fees or other forms of remuneration'' too narrow or too broad, or is it appropriate? Are there benefits to the securitization participant that would not be captured by this phrase? Should the proposal specifically address the anticipation or expectation of or attempts to induce such benefits? Please explain why or why not.

43. We ask commenters to discuss whether or not the proposal would prohibit any person ''engag[ing] in any transaction'' that commenters believe should be permitted under Section 27B of the Securities Act? If such activity were prohibited, please discuss any potential impact, including any impact on investors, investor protection, liquidity, capital formation and the maintenance of fair, orderly and efficient markets.

44. We seek commenter input regarding whether the phrase used in item 1(B) ''directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS'' is appropriate, under- or over-inclusive. Please provide examples of persons who would not be identified by this phrase that you believe should be subject to the proposed rule. Please provide examples of persons that would be identified using this phrase that you believe should not be subject to the proposed rule. Would the phrase ''exercises control over the structure of the relevant ABS or the selection of assets underlying the ABS'' be more appropriate? Please explain why or why not. Would the phrase ''has substantial control over the relevant ABS or the selection of assets underlying the ABS'' be more appropriate? Please explain why or why not. Would the phrase ''influences the structure of the relevant ABS or the selection of assets underlying the ABS'' be more appropriate? Please explain why or why not. We seek commenter suggestions on alternative language and an explanation of why it would be more appropriate in this context. Please include in your responses a discussion of whether any alternative option would be over- or under-inclusive and provide examples of persons who would not be identified by the alternatives that you believe should be subject to the proposed rule as well as examples of persons who would be identified by alternatives but that you believe should not be subject to the proposed rule.

45. Is the proposed application of the prohibition under Section 27B to securitization participants if third parties, directly or indirectly, structure the relevant ABS or select assets underlying the ABS appropriate? Should the restrictions be placed on a broader category of activities or a more delineated one? Should we define the phrase ''directly or indirectly, to structure the relevant ABS or select assets underlying the ABS'' used in item 1(B)? If yes, please provide a suggested definition and the rationale as to why such definition would be appropriate.

46. We seek commenter input regarding whether the phrase used in item 1(B) ''as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS'' is appropriate, over- or under-inclusive. Please provide examples of persons who would not be identified by this phrase that you believe should be. Please provide examples of persons that would be identified using this phrase that you believe should not be. Would the phrase ''as a result of allowing a third party, directly or indirectly, to influence the structure of the relevant ABS or the selection of assets underlying the ABS'' be more appropriate? Please explain. Would the phrase ''as a result of allowing a third party, directly or indirectly, to substantially influence the structure of the relevant ABS or the selection of assets underlying the ABS'' be more appropriate? Please explain. We seek commenter suggestions on alternative language and an explanation of why it would be more appropriate in this context.

B. Statutory Exceptions

Consistent with Securities Act Section 27B, proposed Rule 127B(b) would provide exceptions to the prohibition in proposed Rule 127B(a) for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making. We have modeled the proposed exceptions on the text of Section 27B of the Securities Act.

i. Risk-Mitigating Hedging Activities

Pursuant to the proposed rule, the following would not be prohibited by paragraph (a) of the proposed rule:

> Risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with such positions or holdings.

The proposed exception for risk-mitigating hedging activities uses the language set forth in Section 27B(c)(1).[83] The goal of this proposed exception is to allow certain hedging activities that are designed to reduce or mitigate risk for the underwriter, placement agent, initial purchaser, or sponsor, where risk mitigation refers to the practice of limiting the consequences of a risk, without necessarily reducing the probability of the risk occurring. For example, firms engage in risk-mitigating hedging as they pool assets to create ABS. The assets are assembled over time and firms hedge the specific risk of a price decline of the assets being assembled for the pool while the pool is

[82] SIFMA Letter at p. 3.

[83] We did not incorporate the second use of the phrase ''arising out of such underwriting, placement, initial purchase or sponsorship'' to streamline the proposed rule text, and intend no substantive change from Section 27B(c)(1).

formed. This type of activity would fall within the proposed exception.

Although the exception in Section 27B(c)(1) by its terms does not address affiliates and subsidiaries, the Commission preliminarily believes that, since affiliates and subsidiaries of securitization participants are included in the list of persons who are prohibited from engaging in the type of activity specified in Section 27B they too should have the benefit of the proposed exception for risk-mitigating hedging activities. Therefore, the Commission would interpret the exception as applying to affiliates and subsidiaries of securitization participants.

The proposed exception is not intended to permit speculative trading masked as risk-mitigating hedging activities.[84] Generally, risk-mitigating hedging is effected to reduce risk from an existing position or a position about to be taken.[85] The risk-mitigating hedging activities would be required to occur in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an ABS.[86] In addition, the activities would be required to be designed to reduce the specific risk to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings as mandated by Section 27B. Risk-mitigating hedging may include a series of hedging transactions, based on the price movements of the underlying assets, in order to remain delta-neutral.[87] Risk-mitigating hedging does not include trading to establish new positions designed to earn a profit.[88] That activity might be an indicator of speculation.[89]

Material changes in risk should generate a corresponding change in risk-mitigating hedging.[90] Moreover, a risk-mitigating hedge generally should unwind as exposure is reduced. Over-hedged exposure may be indicative of a proprietary position rather than a risk-mitigating hedge. Intermittent activity (hedging only when one chooses to act) or activity that is inconsistent with a hedging policy is also indicative of proprietary trading. Typically, the hedge should not be significantly greater than actual exposure to the underlying assets. The hedge (*e.g.,* the notional amount under the hedge) should be correlated so that losses (gains) on the position being hedged are offset by gains (losses) on the hedge without appreciable differences. The Commission preliminarily believes that activity would not qualify as a risk-mitigating hedge for purposes of the proposed rule if the predicted performance of the hedge throughout the length of time that the hedge and the related position were held, resulted in a situation in which incrementally poor performance of an ABS or its underlying assets would result in a securitization participant earning appreciably more profits on the hedge than the losses incurred from their ABS exposure.

We seek comment on the application of the proposed exception to ''mitigating'' the consequences of a risk as intended by Congress.

Request for Comments Regarding Risk-Mitigating Hedging Activities

47. It has been argued that firms must hedge actual risks created by actual positions that left them with actual exposures.[91] Please discuss how such exposures arise and how they might be defined. Section 27B uses only the terms ''positions or holdings.'' Please discuss application of Section 27B and the proposed rule to exposures. Is there any difference between ''positions or holdings'' and ''actual risks created by actual positions'' and ''actual exposures''? If yes, please discuss the application of the proposed rule in light of such difference.

48. Please discuss whether clarifying interpretations concerning the terms ''mitigate'' and ''exposures'' would be consistent with prohibiting material conflicts of interest. Please discuss whether such interpretations would narrow or broaden the exception in a manner that is inconsistent with the purpose of Section 27B. Please discuss whether additional interpretations would be needed.

49. We seek comment regarding whether or not there are concerns about the level of transparency for risk-mitigating hedging activities and whether there are ways to assure the transparency of risk-mitigating hedging, such as through the use of standardized instruments.

50. Please describe whether, and if so, how firms engaging in securitization transactions currently distinguish risk-mitigating hedging from other activity.

51. We seek comment concerning the type of activity that would fall within the proposed exception under the proposed rule. Please discuss how firms currently identify risks associated with securitization transactions. Please discuss how firms currently hedge such risks (*e.g.,* currency hedges, interest rate hedges, index hedges, credit derivatives). What policies or procedures are used to control, monitor, or manage those hedges? Should it be a condition to relying on the exception that the hedge was consistent with written, reasonably designed policies and procedures regarding risk-mitigating hedging activities? What types of instruments are used to hedge specific risks? When would securitization participants typically engage in risk-mitigating hedging activities pursuant to the proposed

[84] Similar concepts are used in proposed Exchange Act Rule 3a67–4 which defines the term ''hedging or mitigating commercial risk.'' For example, Rule 3a67–4(b)(1) provides that ''[s]uch position is: (i) [n]ot held for a purpose that is in the nature of speculation, investing or trading'' Release No. 34–63452 (Dec. 7, 2010), 75 FR 80174, 80215 (Dec. 21, 2010).

[85] *See infra* Section IIIE (discussing the potential interplay with the Volcker Rule). Similar concepts are used in connection with risk-mitigating hedging with respect to the Section 619 of the Dodd-Frank Act, commonly referred to as the Volcker Rule. ''Risk-mitigating hedging is defined by two essential characteristics; (i) The hedge is tied to a specific risk exposure, and (ii) there is a documented correlation between the hedging instrument and the exposure it is meant to hedge with a reasonable level of hedge effectiveness at the time the hedge is put in place.'' Financial Stability Oversight Council, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds (Jan. 2011)(''FSOC Study''), at p. 30, *available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.*

[86] Risk-mitigating hedging would also be permitted in connection with market-making to the extent it relates to positions taken in connection with the permitted activity.

[87] *See, e.g.,* FSOC Study at p. 30 (''hedging activity should adjust over time'').

[88] *See, e.g., id.* at p. 20 (hedging ''presents a potential avenue to evade the proprietary trading prohibition if hedges do not correlate with owned assets or if a banking entity seeks an *independent return through the application of the hedge''*) (emphasis added).

[89] *See, e.g.,* William L. Silber, *On the Nature of Trading: Do Speculators Leave Footprints*?, 29 Journal of Portfolio Management 4, 64 (Summer 2003) (''Silber'') (describing speculation as trading in anticipation of future prices and taking on the risk of unanticipated equilibrium price movements in order to earn profits). In addition, we note that these statements are only intended to describe trading that may not qualify for the proposed exception. These statements are not intended to opine on the permissibility of speculative trading in other contexts.

[90] Risk-mitigating hedging indicia are considered in connection with the Volcker Rule. ''Hedging activity should be designed to reduce the key risk factors in the banking entities' existing exposure, and should offset gains or losses that would arise from those exposures. Hedging activity should adjust over time based on changes in a banking entity's underlying exposures. Hedging activity should adjust over time if market conditions alter the effectiveness of the hedge even if the underlying positions remain unchanged. Material changes in risk should generate a corresponding change in hedging activity and should be consistent with the desk's hedging policy.'' FSOC Study, at p. 30.

[91] *See, e.g.,* Jeff Merkley, U.S. Senator and Carl Levin, U.S. Senator, *Making the Dodd-Frank Act Restrictions On Proprietary Trading & Conflicts of Interest Work, available at http://www.rooseveltinstitute.org/%5Bmenu-trail-parents-raw%5D/making-dodd-frank-act-restrictions-proprietary-trading-and-conflicts-intere#.*

exception? Are these activities continuous? Is there a time when risk-mitigating hedging activities in connection with an underwriting, placement, initial purchase or sponsorship would typically cease? Please discuss whether and why a firm may either fully hedge a risk or partially hedge a risk in connection with activities designed to reduce specific risks arising out of an underwriting, placement, initial purchase or sponsorship. Does risk-mitigating hedging differ among the various securitization participants? If yes, please explain.

52. We seek comment regarding how the proposed exception might affect principal trading (other than market-making) as well as examples of principal trading that you believe could or could not qualify for the exception. Please explain why.

53. We seek commenter input regarding any principal trading that would be prohibited by the proposed rule and that would not qualify for the proposed risk-mitigating hedging activities exception or the proposed bona fide market-making exception discussed below. Please discuss any positive and negative consequences of any such prohibition of principal trading.

54. Please discuss hedging that occurs during the ''warehouse period'' as assets are accumulated and held prior to securitization. Please comment upon the types of risk that are hedged during the warehouse period (*e.g.,* credit risk, basis risk, default risk, *etc.*) as well as the types of instruments used to hedge (*e.g.,* index products, derivatives, *etc.*) and who undertakes the hedging. Please discuss whether and how the securitization participant conducting the hedging distinguishes such hedging from other trading. Please comment upon whether and how such hedging is separated from other trading (*e.g.,* different accounts, separate profit and loss treatment, *etc.*). Please discuss how such hedging should be treated under the proposed new rule. Commenters should explain their recommendations.

55. We seek comment concerning the type of activities that should or should not qualify for the proposed exception.

56. We seek comment concerning indicators of speculative or other trading masked as risk-mitigating hedging activity.

57. We seek comment as to whether modifications should be made to the proposed risk-mitigating hedging exception in order to reduce any inappropriate adverse impact on investors.

58. We seek comment as to whether modifications should be made to the proposed risk-mitigating hedging exception in order to clarify its scope for those who may seek to avail themselves of the exception.

59. Should the term ''risk-mitigating hedging activities'' be defined? If yes, please explain and provide a suggested definition. If no, please explain.

60. We seek comment concerning which department(s) of a securitization participant (*e.g.,* an underwriter) typically effect risk-mitigating hedging.

61. Should the exception be conditioned on the maintenance by the securitization participant of books and records that would demonstrate that the activity in question fell within the exception? If so, what types of records should the securitization participant be required to maintain?

62. Should disclosure be a pre-requisite for relying on the exception? Please explain.

ii. Liquidity Commitments

Pursuant to the proposal, the following shall not be prohibited by paragraph (a) of the proposed new rule:

> Purchases or sales of asset-backed securities made pursuant to and consistent with commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, to provide liquidity for the asset-backed security.

The exception would permit securitization participants (including affiliates and subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor of an ABS) to provide liquidity pursuant to a commitment. While the statutory language specifically refers to ''purchases or sales of asset-backed securities,'' generally, we understand that commitments to provide liquidity may be viewed by some market participants as encompassing a variety of activities. For example, we understand that a liquidity commitment may be viewed as a way to promote full and timely interest payments to ABS investors. In addition, we understand that a securitization participant may provide financing to accommodate for differences in the maturity dates between asset-backed commercial paper and the underlying assets. For example, a sponsor of asset-backed commercial paper may provide a liquidity facility if a tranche of $3 million of the asset-backed commercial paper matures on the 30th day of the month, yet only $2 million of the underlying receivables match that maturity. If there is an inability to repay the $1 million shortfall by issuing new commercial paper, the sponsor may provide a loan secured by the receivables to provide for the $1 million shortfall. By way of another example, a liquidity commitment could be an agreement by a securitization participant, such as an underwriter, to purchase an ABS from its customer in a repo transaction consistent with applicable limitations on such transactions.[92] While we understand that these are some of the ways that liquidity commitments are often understood by market participants, we ask commenters to identify other examples of liquidity commitments and to discuss the application of the exception to such activities as consistent with Securities Act Section 27B.

Request for Comments Regarding Liquidity Commitments

63. Are modifications to the proposed Rule 127B(b)(2) exception necessary or are there interpretations that the Commission should provide in order for the exception to work as intended? If yes, please explain why.

64. Are there transactions that involve material conflicts of interest related to a liquidity commitment that should qualify for this exception? Please explain why or why not.

65. Should the proposed exception be interpreted to cover only purchases and sales of the ABS? Please explain why such interpretation would or would not be consistent with the statute.

66. Is liquidity provided through means other than purchases and sales of the ABS? If yes, please describe all additional means of providing liquidity.

67. Should the proposed exception cover engaging in any transactions involved in warehousing the underlying assets? If yes, please explain, including why this would be consistent with the intent of the exception.

68. We seek comment concerning the current scope of liquidity commitments by each type of securitization participant. How do such entities currently supply liquidity? When does this activity commence and terminate?

69. Please discuss the impact of the proposed exception on liquidity, especially for less liquid securities held by investors.

70. How do firms currently distinguish commitments to provide liquidity from bona fide market-making? Please include a discussion of the use of inventory of the ABS and the underlying securities and the method for setting prices.

71. Please discuss how the various securitization participants provide

[92] *See, e.g.,* 15 U.S.C. 78k(d).

liquidity commitments. For example, please identify specific ways that a sponsor provides liquidity versus an underwriter.

72. Should the exception be conditioned on the maintenance, by some or all of the securitization participants, of the books and records that would demonstrate that the activity in question fell within the exception? If so, what types of records should the securitization participant be required to maintain?

73. Should disclosure be a pre-requisite for relying on the exception? Please explain.

iii. Bona Fide Market-Making Exception

The following activities would not be prohibited by paragraph (a) of proposed Rule 127B under the Securities Act:

> Purchases or sales of asset-backed securities made pursuant to and consistent with bona fide market-making in the asset-backed security.

The exception would permit purchases or sales of ABS to be made pursuant to and consistent with bona fide market-making in the ABS. The exception would be available to all securitization participants (including affiliates and subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor of an ABS) that qualify for it if they engaged in bona fide market-making. We understand that the ABS market is typically an over-the-counter market, and ABS are not broadly distributed. We also understand that a few institutions may hold large positions in an ABS.

In determining if activities qualify as bona fide market-making for purposes of proposed Rule 127B, we preliminarily believe that the following principles are characteristics of bona fide market-making in ABS:

- It includes purchasing and selling the ABS from or to investors in the secondary market.
- It includes holding oneself out as willing and available to provide liquidity on both sides of the market (*i.e.,* regardless of the direction of the transaction).
- It is driven by customer trading, customer liquidity needs, customer investment needs, or risk management by customers or market-makers.
- It generally is initiated by a counterparty and if a customer initiated a customized transaction, it may include hedging if there is no matching offset.
- It does not include activity that is related to speculative selling strategies or investment purposes of a dealer, or that is disproportionate to the usual market-making patterns or practices of the dealer with respect to that ABS.
- Absent a change in a pattern of customer driven transactions, it typically does not result in a number of open positions that far exceed the open positions in the historical normal course of business.
- It generally does not include actively accumulating a long or short position other than to facilitate customer trading interest.
- It generally does not include accumulating positions that remain open and exposed to gains or losses for a period of time instead of being closed out promptly.[93] In contrast, an aged open position taken to facilitate customer trading interest would be hedged rather than exposed to gains and losses for a period of time.[94]

In addition, we note that the fact that trading is carried out in a market-making account or on a market-making desk would not be determinative of whether such trading is bona fide market-making in ABS. The account type or desk would not govern the analysis, since otherwise a market-making account or desk might be used in an attempt to disguise proprietary trading as bona fide market-making.

We seek comment as to whether the above principles accurately identify the characteristics of bona fide market-making in ABS or whether different or additional characteristics might better identify this activity. We seek comment regarding how utilizing the principles listed above in determining whether activity was bona fide market-making in ABS would affect principal trading and the provision of liquidity by market intermediaries. Please provide examples of principal trading that would qualify for the exception as well as principal trading that would not qualify for the exception.

We note that the applicability of this proposed guidance concerning bona fide market-making is specific to bona fide market-making in ABS and may or may not be applicable in other areas of the federal securities laws and rules, in self-regulatory organization (''SRO'') rules or in connection with other provisions of the Dodd-Frank Act.[95]

Depending on the facts and circumstances, bona fide market-making that does not meet each of these principles may still be bona fide market-making for purposes of the proposed exception. However, meeting just one factor might or might not be sufficient to qualify for the exception depending on the facts and circumstances.

We preliminarily believe that these principles would be appropriate as they are aimed at customer trading, customer liquidity needs, customer investment interest, or risk management by customers or market-makers. We also preliminarily believe that these principles would be necessary in order to distinguish bona fide market-making with respect to ABS that qualifies for the exception from other trading. We recognize, however, that there could be additional principles that would better identify bona fide market-making that is consistent with the intent of the exception. We seek commenters' views on any such principles.

Request for Comments Regarding Bona Fide Market-Making

74. We seek comment concerning the proposed indicators of bona fide market-making and any additional indicators of bona fide market-making with respect to ABS. We also seek comment concerning additional indicators of speculative or other trading masked as bona fide market-making.

75. Please provide specific, current examples of bona fide market-making in connection with ABS and explain how such activity evidences the proposed characteristics of bona fide market-making. Please discuss activity that does not evidence the proposed characteristics of bona fide market-making but that should qualify for the exception and why.

76. Please discuss whether there are features of ABS market-making that

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[93] Silber, *supra* note 90 (distinguishing market makers from other traders, such as speculators, using the following market-maker characteristics among others: (i) Customer-based traders who buy and sell assets to accommodate customer purchase and sale orders, (ii) earn money on the bid/ask spread without speculating on future prices, (iii) tend to close out positions quickly and thus have small losses on positions, (iv) reduce exposure to equilibrium price movements by minimizing the length of time they hold assets, and (v) avoid holding open positions).

[94] Similarly, indicia to be considered in connection with permitted market-making in less liquid markets under the Volcker Rule includes ''[p]urchasing or selling the financial instrument from or to investors in the secondary market; [h]olding oneself out as willing and available to provide liquidity on both sides of the market (*i.e.,* regardless of the direction of the transaction); [t]ransaction volumes and risk proportionate to historical customer liquidity and investment needs; and [g]enerally does not include accumulating positions that remain open and exposed to gains or losses for a period of time instead of being promptly closed out or hedged out to the extent possible. For example, an aged open position taken to facilitate customer trading interest would be hedged rather than exposed to gains and losses for a period of time.'' *See,* FSOC Study, p. 29. *See infra* Section IIIE (discussing the potential interplay with the Volcker Rule).

[95] Previously, we provided guidance that indicia of ''bona-fide market making'' for equity securities includes maintaining continuous two-sided quotes, among other things. *See* Release 34–58775 (Oct. 14, 2008), 73 FR 61690, 61698 (Oct. 17, 2008). However, different factors may apply to ABS, given the differences between the markets in equities and ABS.

differ from market-making in other types of securities. Please describe the time period for which a market-making position in ABS is generally held and any circumstances which would cause such a position to be held longer.

77. Do firms use derivatives in connection with bona fide market-making with respect to ABS? If yes, how?

78. Please describe whether firms currently identify bona fide market-making in ABS. If so, how?

79. Should we adopt a definition of the term ''bona fide market-making'' for purposes of proposed Rule 127B? If yes, please provide a suggested definition.

80. Should the exception be conditioned on the maintenance, by some or all of the securitization participants, of books and records that would demonstrate that the activity in question fell within the exception? If so, what types of records should the securitization participant be required to maintain?

81. Should disclosure be a pre-requisite for relying on the exception? Please explain.

Request for Additional Comments Concerning the Exceptions

82. Please discuss any activities that you believe would meet the proposed exceptions for risk-mitigating hedging, liquidity commitments and bona fide market-making but that could be viewed as a material conflict of interest. Should the Commission expressly state its view about why such activities would or would not be consistent with the exceptions? Please explain why such activity should or should not be interpreted as consistent with Securities Act Section 27B.

83. Please discuss the ways in which securitization participants might demonstrate compliance with the proposed exceptions for risk-mitigating hedging, liquidity commitments and bona fide market-making.

C. Application of Material Conflict of Interest Test

We set forth below examples of transactions that involve or that do not involve, as the case may be, potential conflicts of interest and describe how our proposed test for identifying material conflicts of interest for purposes of Section 27B and our proposed rule would apply to such transactions. We note that these examples are merely illustrative, and even minor differences in the facts and circumstances could change the analysis of these transactions. We further note that the examples below are intended only to illustrate the application of the proposed rule, and are not intended to address the application of other laws, rules or regulations to the relevant transactions. The conduct depicted in the examples might or might not violate provisions of the securities laws or rules that are not discussed here.

In the following examples, we focus primarily on items 1(A) and (B) of the interpretation as to whether a transaction involves or results in a material conflict of interest: First, whether under the transaction the securitization participant ''would benefit directly or indirectly from the actual, anticipated or potential (1) Adverse performance of the asset pool supporting the relevant ABS, (2) loss of principal, monetary default or early amortization event on the ABS, or (3) decline in the market value of the relevant ABS''; or second, whether under the transaction the securitization participant ''would benefit directly or indirectly from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration, as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction.'' We assume for purposes of discussion that, unless otherwise specified, the materiality requirement for our proposed interpretation is satisfied—*i.e.,* there is a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision. In addition, unless otherwise indicated in these examples, we assume that the exceptions under the proposed rule (*e.g.,* bona fide market-making or risk-mitigation hedging activities) would not be available.

Example 1—Securitization Participant Effecting a Short Transaction in an ABS, or any of the Assets Underlying an ABS

In Example 1, an ABS underwriter purchases CDS protection on the securities offered in the relevant ABS three months after the date of the first closing of the sale of the ABS. For these purposes, assume that the ABS meets the definition of an asset-backed security in Section 3(a)(77) of the Exchange Act and the underwriter's purchase of CDS protection was made solely for its own proprietary investment purposes and does not qualify for any exception in the proposed rule.[96]

The underwriter is a covered person as one of the enumerated securitization participants in the proposed rule. The ABS is a covered product because it meets the Section 3 definition of ABS in the Exchange Act. The purchase of CDS protection is a transaction for purposes of the proposal which occurred prior to one year after the date of the first closing of the sale of the ABS. Therefore, the transaction occurred within the covered timeframe.

In this example, the purchase of the CDS protection by the securitization participant is a short transaction within the covered timeframe that is prohibited by the proposed rule.[97] This short transaction would involve a material conflict of interest between the securitization participant and the ABS investors because the securitization participant would profit from the adverse performance of the ABS.[98]

Example 2—Securitization Participant Hedges Retained Investment in an ABS

In Example 2, an ABS underwriter purchases ABS that it distributed and contemporaneously purchases CDS protection on the ABS. For these purposes, assume that the ABS meets the definition of asset-backed security in Section 3(a)(77) of the Exchange Act, and the underwriter uses the CDS to hedge its ABS position on a delta neutral basis, such that the potential gains on the hedged positions are not appreciably larger than the potential losses on that portion of the ABS investment that is being hedged at any point in the future.

The underwriter is a covered person as one of the enumerated securitization participants in the proposed rule. The ABS is a covered product because it meets the Section 3 definition of ABS in the Exchange Act. The purchase of CDS protection is a transaction, which for purposes of the proposal occurred within the covered timeframe—*i.e.,* prior to one year after the date of the first closing of the sale of the ABS.

In this case, the proposed risk-mitigating hedging activities exception could apply, because the securitization participant is hedging a position arising out of the underwriting, placement,

[96] For example, the underwriter had no client that requested the long CDS exposure such that the purchased CDS protection could qualify for the bona fide market-making exception.

[97] Nothing in the proposed rule would prohibit the securitization participant from purchasing the ABS or selling protection on the ABS or the assets underlying the ABS.

[98] However, if the short transaction was executed in the context of market-making by the securitization participant (*e.g.,* the securitization participant purchases CDS protection from one customer to offset its sale of CDS protection to another customer), the exception under Rule 127B(b) would permit such market-making.

initial purchase or sponsorship of an ABS. However, if, the CDS transaction is structured such that under some circumstances, now or in the future, the recovery on the CDS might be appreciably greater than the exposure on the ABS, the risk-mitigating hedging exception would not apply, because the securitization participant would profit from the adverse performance of the ABS through a short transaction (the CDS). In this case, the securitization participant would not be managing risk, but instead would have a risk-taking position directionally opposed to the ABS (in the amount of the CDS exposure that exceeds what is necessary for a delta neutral hedge).[99]

Example 3—Synthetic ABS Transaction

Example 3 involves several variations on the role of a securitization participant, in this case a sponsor, in a synthetic ABS transaction. In each case, the securitization participant is a party to the CDS contract with the SPE, and thus the securitization participant is short the credit exposure of the reference portfolio underlying the ABS transaction.

In these scenarios, the sponsor is a covered person because it is one of the enumerated securitization participants in the proposed rule, and the ABS is a covered product because the proposal covers synthetic ABS. For purposes of the proposal, the purchase of CDS protection is a short transaction, which occurred prior to one year after the date of the first closing of the sale of the ABS. Therefore, the transaction occurred within the covered timeframe.

In Example 3A, the securitization participant does not have any exposure to the ABS or underlying assets other than its short position through the CDS transaction. In this instance, entering into the CDS with the issuer of the ABS would, by itself, generally involve or result in a material conflict of interest between the securitization participant and the ABS investors that would be prohibited by the proposed rule.

In Example 3B, the securitization participant's short exposure under the CDS with the issuer offsets the securitization participant's existing long exposure to the same assets underlying the ABS. For instance, the securitization participant might be seeking to reduce its long investment exposure to the relevant assets because it has come to believe that the assets will perform poorly. If the firm accomplishes this result by transferring the risk of its long positions to ABS investors through a synthetic ABS—while marketing the ABS securities to investors as a good investment opportunity—it could be viewed as benefiting from a decline in the ABS at the expense of the ABS investors, who now have the exposure to the underlying assets.[100] Although the securitization participant's existing long exposure to those assets and its short exposure under the CDS transaction may offset each other, in this scenario the CDS transaction is providing a hedge for an existing long investment position, rather than a hedge for assets associated with underwriting activities, and thus the risk-mitigating hedging exception would not be available.[101]

We preliminarily believe that in Example 3B and under our proposed interpretation the securitization participant would be prohibited from entering into the CDS transaction with the ABS issuer for the same reason as in Example 3A—the securitization participant would benefit through the CDS transaction from a potential decline in the ABS, and no exception to the prohibition is available—but we request comment on whether this result is appropriate in all circumstances.

In Example 3C, the securitization participant has accumulated a long cash or derivatives position in the underlying assets solely in anticipation of creating and selling a synthetic ABS—and not with a view to taking an investment position in those underlying assets. The securitization participant might choose to use the synthetic securitization structure rather than a traditional cash securitization when that is a more efficient mechanism for providing particular customers with exposure to the underlying assets. In this case the securitization participant therefore enters into a CDS with the SPE as part of a synthetic ABS transaction to offset the exposure to the underlying reference portfolio that it in turn acquired for purposes of effecting the ABS transaction.

We preliminarily believe that in Example 3C the short CDS transaction by the securitization participant would fall within the exception for risk-mitigating hedging activities—provided that there was no significant net basis risk, and that potential gains (or losses) by the securitization participant from the CDS protection it purchased from the issuer would be directly offset by losses (or gains) from the long position accumulated to offset that exposure. We seek comment on whether this interpretation would be appropriate. In addition, we seek comment on whether as a practical matter it will be possible to distinguish circumstances in which the securitization participant's long position in the underlying assets was originally acquired for investment purposes (*i.e.,* Example 3B), from circumstances in which the securitization participant's long position was acquired for purposes of creating the ABS (*i.e.,* Example 3C).

In Example 3D, the securitization participant that has entered into the short CDS transaction with the SPE contemporaneously enters into one or more offsetting CDS transactions with other market participants that did not play a role in selecting the reference assets of the ABS, and did not have any influence on any aspect of the ABS transaction. Provided that the securitization participant did not itself select assets that were biased to facilitate the ability of these market participants to profit from short transactions, and that the offsetting CDS transactions had no significant net basis risk (*i.e.,* potential gains (or losses) by the securitization participant from the CDS protection that it purchased from the issuer would be directly offset by losses (or gains) from the CDS transactions with third parties), we preliminarily believe that under the risk-mitigating hedging exception the securitization participant would be permitted to enter into this combination of the CDS transaction with the issuer of the ABS securities and the offsetting transactions with third parties.[102] The CDS transaction with the SPE is itself a position or holding arising out of the ABS transaction, and the securitization participant would not profit from excess exposure directionally opposed to the

[99] Labels such as ''hedging'' would not permit what would otherwise be prohibited conduct under the proposed rule. If a securitization participant engaged in a transaction within one year after the date of the first closing of the sale of the ABS that involved or resulted in a material conflict of interest with respect to investors in the ABS, that would be prohibited by proposed Rule 127B(a), even if it were referred to by the securitization participant as ''hedging.''

[100] *See* 156 Cong. Rec. S2599 (daily ed. July 15, 2010) (statement by Sen. Levin) (''But a firm that underwrites an asset-backed security would run afoul of the provision if it also takes the short position in a synthetic asset-backed security that references the same assets it created.'').

[101] We note that that risk-mitigating hedging exception in proposed Rule 127B(b)(1) is available only for hedging in connection with positions or holdings *arising out of* underwriting, placement, initial purchase or sponsorship of an ABS. In this scenario, the securitization participant's position in the underlying assets was acquired as an investment, and not for purposes of the initial offering transaction, and therefore the exception would not apply.

[102] *See* 156 Cong. Rec. S2599 (daily ed. July 15, 2010) (statement of Sen. Levin) (''Nor does it restrict a firm from creating a synthetic asset-backed security, which inherently contains both long and short positions with respect to securities it previously created, so long as the firm does not take the short position.'').

ABS because of the offset.[103] In this sense, Example 3D is comparable to Example 3C. However, if in Example 3D the securitization participant's CDS with the issuer is entered into to offset pre-existing CDS exposures to third parties that were entered into for purposes unrelated to the ABS transaction, the scenario would be comparable to Example 3B and the risk-mitigating hedging exception would not apply. As above, we seek comment on whether as a practical matter it will be possible to distinguish circumstances in which the securitization participant's short transaction with the ABS issuer is entered into to hedge an existing position (and is thus prohibited) or to facilitate the ABS transaction (and thus permitted).

Example 4—Facilitation of Third Party Activities

Example 4 involves variations on situations in which a securitization participant, in this case a placement agent, benefits by allowing an unaffiliated [104] third party to select the composition of the assets that underlie an ABS as defined in Section 3 of the Exchange Act. In each case, the third party purchases CDS protection on the relevant ABS prior to one year before the date of the first closing of the sale of the ABS.[105]

In each of the examples below, assume that the placement agent is a covered person as one of the enumerated securitization participants in the proposed rule, and that, the ABS is a covered product because it meets the Section 3 definition of ABS in the Exchange Act.

In Example 4A, the securitization participant, for a fee, facilitates the third party's entering into a short transaction, the purchase of CDS protection on the ABS, with a party who is not a securitization participant. Under item 1(B) of the interpretation of material conflicts of interest, and as previously described in Section III A(v)(b), by allowing the third party to select assets underlying the ABS, and then facilitating the third party taking a short position on the ABS or its underlying assets, the securitization participant has engaged in a transaction that involves or results in a material conflict of interest between the securitization participant and the ABS investors, and such activity would be prohibited under the proposed rule. The securitization participant creates the opportunity for the third party to select riskier assets for the underlying asset pool so that the anticipated poor performance of these assets would increase the likelihood of a profitable short transaction. In return for creating this opportunity for the third party, the securitization participant receives compensation for facilitating the third party's short transaction.

In Example 4B, the third party again enters into the CDS transaction but now with a party who is not a securitization participant, so that in this case the securitization participant does not facilitate that CDS transaction or receive a fee for doing so. As in Example 4A, in Example 4B, the securitization participant creates the opportunity for the third party to profit from its short transaction by permitting it to select risky assets for the underlying asset pool. We preliminarily believe that the securitization participant's activities in Example 4B would be prohibited under our proposed test. Although the securitization participant would not receive direct compensation for facilitating the short transaction we believe it would be appropriate to impute a benefit to the securitization participant for creating the opportunity for the third party to profit from its short transaction. For example, the securitization participant may receive compensation from its role in connection with the ABS or compensation from future business that the third party promises to direct to the securitization participant. We request comment on whether it is appropriate to treat the securitization participant in Examples 4A and 4B in the same manner, or whether the lack of direct compensation to the securitization participant in Example 4B would justify a different result.

In Example 4C, the third party who has selected assets in the ABS also purchases one or more of the securities offered in the ABS transaction. In this case, the third party's purchase of CDS protection on the relevant ABS offsets its exposure to the ABS. In general, we preliminarily believe that activities in which investors who purchase one or more securities offered in an ABS transaction decide at that time or later to reduce or hedge their exposure to these investments through subsequent short transactions, such as purchasing CDS protection, would qualify for the risk-mitigating hedging exception, and that these activities do not involve or result in the types of material conflicts of interest proposed Rule 127B is intended to address. In Example 4C, the third party is in the same position as a securitization participant who has selected the assets underlying the ABS, purchases the ABS, and then seeks to hedge that ABS by buying CDS protection (*e.g.,* the securitization participant in Example 2). By allowing the third party to select assets and then hedge a position in ABS purchased in the offering, the securitization participant would not be permitting the third party to do anything that the securitization participant itself could not do under the proposed rule.

In Example 4D, the same third party purchasing one or more securities issued by the ABS also buys CDS protection on those same securities or other securities in the offering (or their underlying assets), but in this case does so in a manner such that the third party will profit more from the short position than it will lose on the long securities position. For example, the third party may have purchased the equity tranche in order to influence the selection of riskier assets and implement an arbitrage strategy in which it would gain more on a CDS transaction on the issuer's securities than it would lose on the equity tranche.[106] This activity would no longer qualify for the risk-mitigating hedging exception. As per item 1(B) of the test, by allowing a third party to select assets underlying an ABS in a way that facilitates that third party's ability to profit from a short position on the ABS or its underlying assets, the securitization participant has engaged in a transaction that involves or results in a material conflict of interest between itself and investors in the ABS.

Request for Comments Regarding the Examples

We request comment on whether these examples demonstrate engaging in transactions that involve or result in material conflicts of interest of a type that proposed Rule 127B should prohibit. We also request that commenters provide descriptions of any

[103] Furthermore, since in this example there is no third party that has influenced the asset selection or structure of the ABS, it is unlikely that the ABS would have been structured in anticipation of underperformance of the ABS or its reference portfolio.

[104] ''Unaffiliated'' is used to describe the third party because Section 27B of the Securities Act applies to (and proposed Rule 127B would apply to) affiliates of a securitization participant.

[105] Note that in order to fall within item 1(B), a third party must both (i) Directly or indirectly structure the relevant ABS or select assets underlying the ABS, and (ii) enter into a short transaction. Thus, if in a synthetic ABS transaction a third party purchases CDS protection on the relevant ABS from the SPE, but does not structure the relevant ABS or select assets underlying the ABS, the third party's activities would not fall within the scope of item 1(B).

[106] *See e.g., Senate Subcommittee Report: Anatomy of a Financial Collapse, supra* n. 38, at 372 (describing a hedge fund's investment strategy as ''purchas[ing] the riskiest portion of a CDO—the equity—and, at the same time, to purchase short positions on other tranches of the same CDO'').

other examples of material conflicts of interest that the proposed rule should prohibit, and address whether our proposed materiality test appropriately captures such conflicts of interest.

84. Please identify activity that would constitute selecting assets underlying the asset pool or structuring the ABS transaction as discussed in the examples above. Should such activity include establishing criteria for asset selection, selecting names from a list of potential reference assets provided by a securitization participant or other activities? Should the number or percentage of assets selected as collateral be a factor in determining whether or not a person played a role in selecting assets? Should there be some level of activity that should not be considered selecting the assets or structuring the ABS? Please explain why or why not.

85. In connection with Example 3D above, please describe any circumstances in which a securitization participant may not be able to offset its CDS exposure, or can only partially offset its CDS exposure by entering into one or more offsetting transactions with other market participants. We seek commenter input regarding any specific consequences of prohibiting the activity described in Example 3D if the securitization participant cannot fully offset its CDS exposure.

86. We seek commenter input regarding the rationale applied in each of the scenarios in Example 4.

87. Are there additional factors that would better identify material conflicts of interest, especially in the context of evaluating the examples above? Please explain. For example, should we consider any factors not discussed in Example 4B when the unaffiliated third party may purchase CDS protection from another entity? How should such factors be considered in determining whether a transaction involves or results in a material conflict of interest?

88. Are there examples not listed above that occur frequently for which further guidance is needed? Please describe.

89. In Examples 1, 2, 3A, 3B, 4A, 4B, 4D, we illustrate activities that would be prohibited under the proposed interpretation discussed in the release. For each of these examples, we seek commenter input regarding how frequently the transactions described in the examples occur in connection with ABS and synthetic ABS as well as the potential positive and negative consequences of prohibiting such transactions. Please also include a discussion regarding any potential impacts, including any positive or negative impact, on investors, investor protection, liquidity, capital formation and the maintenance of fair, orderly and efficient markets if securitization participants refrained from creating and selling certain ABS and synthetic ABS to avoid the activities described in the examples above as a result of the proposed rule.

90. Example 3B describes a securitization participant transferring the risk of its long positions to ABS investors through a synthetic ABS. We seek commenter input regarding how frequently or infrequently this occurs and the consequences that might result from transferring such risk to ABS investors through a synthetic ABS. We also seek commenter input regarding the reasons why a securitization participant might or might not prefer to transfer such risk using a synthetic ABS instead of a non-synthetic ABS.

D. Application of the Proposed Rule to Other Activities

Initial commenters identified many activities that they believed could be implicated by Section 27B and the proposed rule. These activities include: (1) Activities that are routinely part of the securitization process that may be effected in connection with structuring an ABS; and (2) activities undertaken by securitization participants that are unrelated to the securitization.[107]

We believe that activities associated with the typical structuring of a non-synthetic ABS would not be prohibited by the proposed rule. For example, the basic transfer of risk in a non-synthetic ABS in which a securitization participant who is long the underlying assets sells them to an SPE is typical of most ABS structures and would not constitute a prohibited transaction, because after such sale the securitization participant would not benefit from the subsequent decline in the value of the ABS or the underlying assets. Additionally, the proposed rule would not prohibit the multi-tranche structure commonly used in securitization transactions. While investors in different tranches may have interests that conflict with each other, such conflicts would fall outside the scope of the proposed rule, which is focused on conflicts of interest between securitization participants and ABS investors. In addition, mere ownership by a securitization participant of the ABS would not constitute a material conflict of interest under the proposed rule, because such ownership by itself would not cause the securitization participant to benefit from the adverse performance of the asset-pool or the ABS; instead, the securitization participant would benefit from the positive performance of these assets.[108]

Commenters stressed the importance of the ''material'' aspect of the phrase ''material conflict of interest'' in Section 27B and suggested that activities inherent in the securitization process evidence ''expected conflicts * * * but do not constitute the type of 'material conflicts' intended to be regulated by Section 621.'' [109] We preliminarily believe that many activities that these commenters identified as being inherent to the securitization process would not be prohibited by the proposed rule because they would not fall within its scope or would fall within one of the exceptions to the prohibition.[110] Thus, we preliminarily agree that most activities undertaken in connection with the securitization process would not be prohibited by the proposed rule, including but not limited to: Providing financing to a securitization participant, deciding not to provide financing, conducting servicing activities, conducting collateral management activities, conducting underwriting activities, employing a rating agency, receiving payments for performing a role in the securitization, receiving payments for performing a role in the securitization ahead of investors, exercising remedies in the event of a loan default, exercising the contractual right to remove a servicer or appoint a special servicer, providing credit enhancement through a letter of credit, and structuring the right to receive excess spreads or equity cashflows.

Commenters also suggested that certain transactions in swaps, caps, CDS and derivatives should fall outside the proposed rule's prohibition. We invite commenters to analyze any such transactions with our proposed framework. In addition, commenters highlighted activities that are unrelated to a particular securitization (such as underwriting another ABS transaction for another issuer) and suggested that they should not be prohibited. We generally agree that many such activities would not be prohibited by the proposed rule, including underwriting an ABS for a different issuer. These activities generally could be undertaken absent additional facts indicating otherwise, such as facts indicating a securitization participant engaged in a proprietary trade that would profit from

[107] *See supra* Section IIB.

[108] For this reason, we believe the proposed rule would not prohibit risk retention as required by Dodd-Frank Act Section 941. *See supra* note 19.

[109] SIFMA Letter at p. 4.

[110] *See, e.g.,* SIFMA Letter.

a directionally opposite view of the ABS.

Other activities unrelated to the securitization, such as market research, could be undertaken by a securitization participant. As mentioned earlier, the issuance of research would not be engaging in a transaction for purposes of the proposed rule and as such would not be prohibited.

We ask that commenters analyze these and other activities, using the proposed framework set forth above, including the use of the derivatives and the activities of servicers and collateral managers.

E. Relationship to Volcker Rule

Section 619 of the Dodd-Frank Act,[111] commonly referred to as ''the Volcker Rule,'' amends the Bank Holding Company Act to add new Section 13, Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds. The Volcker Rule includes (1) General prohibitions and restrictions on certain financial entities—including certain broker-dealers—engaging in proprietary trading or sponsoring or investing in a hedge fund or private equity fund, (2) certain exceptions to these prohibitions and restrictions (referred to as ''permitted activities''), and (3) limitations on permitted activities.

Like Section 621, the Volcker Rule is concerned with conflicts of interest. For example, the Volcker Rule is concerned with conflicts of interest that stem from proprietary trading at banking and non-bank financial firms. In addition, the Volcker Rule, like Section 621, includes the concepts of certain permitted activities concerning market-making related activities and risk-mitigating hedging activities.[112] Given the similarities between these two sections of the Dodd-Frank Act, the Commission may consider whether aspects of the rules adopted to implement Section 619 should be applied to this proposed rule in the future.[113] Our preliminary belief is that the exceptions for risk-mitigating hedging activities and bona fide market-making activities for purposes of proposed Rule 127B should be viewed no less narrowly than the comparable exceptions for such activities under the Volcker Rule.

Request for Comments Regarding Relationship to Volcker Rule

94. Please discuss any potential interplay of the ''Volcker Rule'' of Section 619 of the Dodd-Frank Act with Section 27B and proposed Rule 127B. In particular, we seek commenter input regarding whether or not the treatment of risk-mitigating hedging activities and bona fide market-making exceptions in Proposed Rule 127B(1) and (3) should be consistent with Section 13(d)(1)(B) and (C) of the Bank Holding Company Act concerning permitted market-making related activities and risk-mitigating hedging activities or whether there are reasons that necessitate different treatment. Please explain.

95. We ask that commenters describe any potential consequences if risk-mitigating hedging and market-making were treated differently under Proposed Rule 127B and the Volcker Rule.

96. We seek commenter input regarding any costs that may be incurred by securitizations participants, ABS investors and others if the exceptions in Proposed Rule 127B(b)(1) and (3) are interpreted differently than Sections 13(d)(1)(B) and (C) of the Bank Holding Company Act.

IV. Information Barriers, Disclosure, and Exemptions

Information barriers and disclosure are often used as tools to manage conflicts of interest in other areas of the federal securities laws. While Securities Act Section 27B does not explicitly provide for specific exceptions concerning information barriers or disclosure, we believe it would be useful to explore whether these tools might permit the proposed rule to better achieve its policy objectives without unnecessarily restricting beneficial market activities.

A. Information Barriers

Commenters suggested the Commission consider potential burdens triggered by Securities Act Section 27B on securitization participant's affiliates and the use of existing mechanisms to manage conflicts of interests, including in particular information barriers.[114] Commenters stated that securitization participants may have a large number of affiliates that engage in ordinary course activity that is both ''walled-off'' from other areas of the securitization participant and effected for purposes unrelated to any particular ABS transaction. Commenters asked that the Commission be mindful of potential ''unintended effects on everyday operations'' of securitization participant affiliates.[115]

Information barriers, in the form of written, reasonably designed policies and procedures, have been recognized in other areas of the federal securities laws and rules as a means to address or mitigate potential conflicts of interest or other inappropriate activities. For example, Section 15(g) of the Exchange Act recognizes that information barriers may be used to effectively manage the potential misuse of material, non-public information.[116] Exchange Act Rule 14e-5 prohibits certain purchases of securities outside of tender offers,[117] but contains an exception for purchases or arrangements to purchase by an affiliate of a dealer-manager.[118] The exception requires, among other things, that the dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate.[119] It also requires that the dealer-manager be a registered broker-dealer and that the affiliate have no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) in common with the dealer-manager that direct, effect, or recommend securities transactions.[120] Likewise, Regulation M, the set of anti-manipulation rules concerning securities offerings, contains an exception for certain persons based on information barriers.[121] Affiliated purchasers are excepted if, among other things, the affiliate maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a

[111] Dodd-Frank Act, Public Law 111–203, 619, 124 Stat. 1376, 1620 (2010).

[112] *See* Sections 619(d)(1)(B) and (C) of the Dodd-Frank Act, Public Law 111–203, 619(d)(1)(B) and (C), 124 Stat. 1376, 1624 (2010).

[113] The Commission must adopt rules not later than nine months after completion of the Financial Stability Oversight Council's study on the Volcker provisions. The study, *see supra* note 85, was issued on January 18, 2011.

[114] *See* discussion infra at note 126. *See, e.g.,* SIFMA Letter at p. 7 (''Financial institutions engage in hedging activities in many contexts and at many levels throughout an organization comprised of many business units, offices, trading desks and funds, each of which may be engaged in separate transactions that, in some cases, are walled off from other parts of the financial institution and may otherwise be transacted for purposes other than betting against the specific ABS that is sponsored or underwritten by that financial institution or its affiliate. Curtailing such hedging activities—which are unrelated to the actual ABS sponsored or underwritten by financial institutions and their affiliates and are entered into as part of their risk management practices and not as a bet against that ABS—would have adverse and unintended effects on everyday operations and risk management practices of financial institutions and their affiliates.'').

[115] SIFMA Letter at p. 8.

[116] Formerly Section 15(f) of the Exchange Act but redesignated by the Dodd-Frank Act. 15 U.S.C. 78*o*(g).

[117] 17 CFR 240.14e–5.

[118] 17 CFR 240.14e–5(b)(8).

[119] 17 CFR 240.14e–5(b)(8)(i).

[120] 17 CFR 240.14e–5(b)(8)(ii and iii).

[121] 17 CFR 242.100–105.

violation of Regulation M.[122] In order for an affiliate to avail itself of the exception it must also obtain an annual, independent assessment of the operation of such policies and procedures.[123] Like Rule 14e–5, it contains a restriction on common officers and employees.[124]

The concept of independent units (including affiliated entities) within multi-service firms has been recognized in discrete areas of the securities laws for those multi-service firms with units that function separately and independently.[125] We preliminarily believe it may be appropriate to consider the issue of independent units within a multi-service firm in the context of the proposed rule. Certain firms involved in securitization may undertake a wide range of activities in connection with multiple and different business lines, underwriting and trading ABS among them. We seek comment below concerning the extent of the restrictions that the proposed rule would place on firm-wide activities. We seek commenter input regarding whether firm-wide restrictions would be necessary to achieve the objectives of the statute or whether firm-wide restrictions would be unwarranted if transactions were independent of the creation and distribution of an ABS.

Request for Comments Regarding Information Barriers

91. We seek comment concerning the operation of information barriers and whether or not the use of information barriers to address conflicts of interest in connection with securitization transactions might be consistent with Securities Act Section 27B. In particular, the Commission seeks comment concerning whether this would be appropriate for certain affiliates and subsidiaries of securitization participants that may operate separately and independently.[126]

92. Should we consider the imposition of information barriers or other means of managing potential conflicts of interest? If so, what specific means should be considered (*e.g.,* physical separation?) How effective are any such alternative methods as currently used? Can such methods be circumvented? If so, in what ways? We seek commenter input regarding any limitations related to the use of information barriers in the context of managing potential material conflicts of interest under Section 27B?

93. We seek comment concerning whether ordinary business functions of affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors are sufficiently separated from the process of creating and marketing ABS so as not to create material conflicts of interest that the proposed rule is designed to address. For example, consider application of the proposed rule to an affiliate of a securitization participant that manages a fund and such fund purchases a CDS referencing securities issued in the ABS transaction. Should this type of activity be permitted, and if so, under what conditions? Discuss whether this scenario might form the basis of a clarifying interpretation or an exemptive rule. Please include in the discussion your views about possible forms of, and utility of, disclosure regarding the fund's CDS purchase. Please provide an explanation concerning any current separation between the securitization participant and/or its affiliates and subsidiaries, and whether the separation is mandated by existing rules and regulation. Please describe in detail how such separation is implemented, maintained and enforced by a firm. Please discuss whether information barriers, with respect to affiliates or subsidiaries, could result in a conflict of interest not being material, and/or whether, where consistent with Commission authority, the use of information barriers should be conditioned on certain requirements (*e.g.,* restrictions on common officers and employees, annual assessments of policies and procedures, being regulated by the Commission, entities providing certification to the Commission or other persons that activities have not involved or resulted in material conflicts of interest). We seek comment concerning whether such separation can meaningfully protect against material conflicts of interest in this context.

94. If consistent with Securities Act Section 27B, should one unit of a firm be able to effect (or be restricted from effecting) a transaction that involves a directionally opposed view of the ABS or its reference portfolio if that unit is separated by information barriers from another unit in the same firm that created and distributed the ABS? Is there any reason why information barriers would not be effective in this context? We seek comment on circumstances in which departments within one firm may be sufficiently separated so as not to create a material conflict of interest that the proposed rule is designed to address. Please identify all such departments and the activities in which they may engage that could result in the application of the prohibition in proposed Rule 127B, but may not raise the concerns designed to be addressed by Securities Act Section 27B. Discuss whether this scenario might form the basis of a clarifying interpretation or an exemptive rule. Please include in the discussion your views about possible forms of, and utility of, disclosure. Please provide an explanation of the separation between departments and whether it is mandated by existing rules and regulations. Please describe how such separation is implemented, maintained and enforced by the firm. We seek comment concerning whether such separation can meaningfully protect against material conflicts of interest in this context.

95. If a separate, independent unit concept were to be applied in connection with the proposed rule, what conditions would be appropriate to maintain the integrity of the independence between the separate units within a multiservice firm to permit transactions in one unit that are truly independent from the creation and distribution of an ABS in another unit (*e.g.,* (1) A written plan of organization to identify each unit, support its objective, and support its independent identity; (2) individual employees assigned to only one unit at any time; (3) compliance and internal audit routines; (4) written records; (5) separate management structure, location,

[122] 17 CFR 242.100(b).

[123] *Id.*

[124] *Id.*

[125] *See e.g.,* 17 CFR 200(f) (allowing multi-service broker-dealers to aggregate positions within defined trading units if a registered broker-dealer meets the following requirements ''(1) The broker or dealer has a written plan of organization that identifies each aggregation unit, specifies its trading objective(s), and supports its independent identity; (2) Each aggregation unit within the firm determines, at the time of each sale, its net position for every security that its trades; (3) All traders in an aggregation unit pursue only the particular trading objective(s) or strategy(s) of that aggregation unit and do not coordinate that strategy with any other aggregation unit; and (4) Individual traders are assigned to only one aggregation unit an any time.'').

[126] *See* ABA Letter at p. 5 (''Section 27B applies to all affiliates of underwriters and placement agents, which could include banks, broker-dealers, asset managers and ERISA fiduciaries. Banks and their affiliates are already subject to statutory and regulatory provisions designed to prevent conflicts of interest and prevent the use of material nonpublic information, and these provisions may require the establishment of information walls between affiliated entities or between different departments of a bank. Additionally, entities which are fiduciaries are obligated to act for the benefit of their beneficiaries and must be permitted to sell securities and enforce loans based on the best interests of beneficiaries. Underwriters and placement agents subject to Section 27B may have a large number of affiliates, which may result in significant administrative difficulties in applying the rule to all related entities. We ask the Commission to be mindful, when preparing its rules, of these existing obligations of transaction parties and their affiliates and of the compliance burdens which may result.'').

business purpose and profit and loss treatment; and (6) other conditions).

B. Disclosure

While Securities Act Section 27B does not contain a disclosure provision, commenters discussed the extent to which disclosure might mitigate potential conflicts of interest in this context.[127] Commenters stated that while there can be many potential conflicts of interest that arise in connection with securitization, most are not the type of material conflict of interest intended to be prohibited by Securities Act Section 27B.[128] Commenters stated that many conflicts of interest that arise in the normal course of a securitization are often contemplated by investors and indeed may be disclosed to investors.[129]

We seek comment concerning the role of disclosure in the context of Securities Act Section 27B and the proposed rule. Securitization participants typically provide various disclosures to investors in ABS, which generally should include appropriate disclosure as to conflicts of interest between investors and the securitization participant that would be material to investors.[130] While we have not identified all circumstances in which a transaction potentially could be characterized as involving or resulting in material conflicts of interest within the meaning of the proposed rule and Securities Act Section 27B, we seek comment on whether certain types of conflicts relating to an investor could be managed through disclosure. We seek comment about the value of disclosure as a means to manage conflicts of interest, while keeping in mind the limits of disclosure.[131] Various provisions of the federal securities rules and laws address actual and potential conflicts of interest in a variety of ways, including through the use of disclosure. We ask that commenters consider the use of the disclosure in the federal securities laws and rules or other areas, such as SRO rules, and reference those laws or rules and their experiences with those laws or rules in their responses to the questions below where applicable.

As discussed in further detail below, Section 28 of the Securities Act provides the Commission with authority to adopt conditional or unconditional exemptive rules or regulations ''to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.'' [132] We solicit comment as to whether, in some circumstances, material conflicts of interest that would be prohibited under Section 27B and the proposed rule could be addressed sufficiently through a conditional exemption. Specifically, provided the Commission were able to make the findings required by Securities Act Section 28, the Commission could require disclosure, as a condition to an exemption, to allow securitization participants to engage in what otherwise would be prohibited behavior under Section 27B and the proposed rule.

Request for Comments Regarding Disclosure

96. We seek commenter input regarding whether or not disclosure would be useful in this context and why. We seek commenter input regarding whether or not disclosure would adequately improve the alignment of the interests of securitization participants and investors and whether utilizing disclosure in this manner would adequately protect the public interest and the interests of investors. Please provide specific examples (*e.g.,* disclosure that a particular entity, whether or not a securitization participant, directly or indirectly selected the pool of assets or disclosure of other types of information). If you believe that specific disclosure would be appropriate, please explain under what circumstances and what level of detail should be required.

97. Are there conflicts of interest associated with specific types of transactions or activities that should be or could be managed through disclosure? [133] How would such an approach be incorporated in the context of the proposed rule? Should the use of disclosure in lieu of a complete prohibition apply to specific conflicts and not others? Which? What level of detail should any such disclosures include? Should any such disclosures include details about specific transactions or activities that the securitization participant plans to engage in, or has engaged in, relating to

[127] *See, e.g.,* Merkley-Levin Letter (''Further, the utility of disclosures must be carefully examined and not be seen as a cure for the conflicts. We provided the Securities and Exchange Commission with sufficient authority to define the contours of the rule in such a way as to remove conflicts of interest from these transactions, while also protecting the healthy functioning of our capital markets.''); *see infra* note 129.

[128] *See, e.g.,* ABA Letter at p. 4 (''In view of the many potential conflicts of interest that may arise between participants and investors in ABS * * * and in view of the legislative history and the statutory use of the term 'material conflict of interest,' we believe the rules issued by the Commission should focus on prohibiting the type of blatant conflict of interest described in the legislative history, while permitting other types of conflicts to exist subject to appropriate disclosure requirements * * * Potential conflicts of the type described above that either exist, or are contemplated, at the time of an ABS transaction are customarily disclosed in offering materials. Although the legislative history is clear that disclosure is not necessarily a cure for a conflict of interest arising out of profiting from a 'designed to fail' transaction, we believe adequate disclosure should suffice to address these ordinary course conflicts.''); *see also* SIFMA Letter at p. 5 (''In contrast to the material conflicts of interest created in the 'designed to fail' transactions cited by Senators Merkley and Levin, many other potential conflicts of interest are inherent in securitizations. These conflicts should be disclosed to investors and other transaction parties to the extent they are material, but should otherwise be permitted to fall outside the scope of Section 621. While Senators Merkley and Levin assert that disclosure alone may not eliminate the problematic nature of certain conflicts, SIFMA believes that conflicts created in the normal course of a securitization are sufficiently known by, or disclosed to, investors and do not fall under the intended scope of Section 621.''); ASF Letter at note 11 (''We note that Senator Levin believes that disclosure alone may not cure material conflicts of interest in all cases, such as in situations where 'disclosures cannot be made to the appropriate party or because the disclosure is not sufficiently meaningful.' We further note that Senator Levin does not believe that disclosing that the underwriter of an ABS 'has or might in the future bet against the security' will cure the conflict of interest arising if the underwriter takes a short position in a synthetic transaction that references the ABS. However, in situations that are clearly not instances of an asset-backed security being designed to fail, ASF believes that effective disclosure would remedy perceived conflicts.'').

[129] *See, e.g.,* SIFMA Letter at p. 5 (''SIFMA believes that conflicts created in the normal course of a securitization are sufficiently known by, or disclosed to, investors and do not fall under the intended scope of Section 621.'').

[130] We are not addressing the quality or adequacy of typical disclosures in ABS offerings, but are simply noting that such disclosure typically does occur in connection with such offerings.

[131] 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Levin). In addition, we note that disclosure that is made subsequent to an ABS transaction would not be appropriate in managing conflicts of interests because an investor would have already made an investment decision regarding whether or not to purchase the ABS.

[132] 15 U.S.C. 77z–3. *See infra* note 135.

[133] *See, e.g.,* SIFMA Letter at p. 4 through 11 (suggesting (i) ''To the extent the risk transfer dynamic between ABS sponsors and asset originators and investors constitutes a conflict of interest, this potential conflict is best addressed through disclosure,'' (ii) ''Potential conflicts arising in connection with these types of liquidity facilities should be disclosed to investors and otherwise permitted,'' (iii) ''Disclosure of the existence of control rights and transaction parties entitled to exercise such rights should be sufficient to inform investors of the possibility of such conflicts,'' (iv) ''Potential conflicts of interest arising in a transaction with an affiliated servicer should be disclosed to investors and otherwise permitted under the scope of Section 621,'' (v) ''Potential conflicts arising in a transaction with an affiliated trustee (to the extent permitted by existing law) should be disclosed to investors and otherwise permitted under the scope of Section 621,'' and (vi) ''Each securitization waterfall should clearly set forth the priority of payments for investors, including which payments are made prior to payments to investors, which disclosure should be adequate to permit the continuance of these arrangements.'').

the ABS? Is a substantial level of detail effective or useful?

98. Are there circumstances in which any such disclosure might be impracticable or ineffective? For example, if a securitization participant desired to effect a transaction several months after the closing, how might it be feasible for the securitization participant to send disclosures at that time? Would the securitization participant be able to identify all ABS investors to whom disclosures should be, or would be required to be, sent? Would disclosure of transactions that occurred long after the closing be useful, effective or appropriate?

99. Should the use of disclosures in lieu of a complete prohibition be limited to offerings involving certain types of ABS investors? If yes, please specify which ABS investors and why. Why might disclosure be adequate for some ABS investors but not others? What characteristics should a securitization participant use in determining whether an ABS investor needs particular disclosure? Are there some types of ABS investors for which disclosure should never be sufficient in this context? Should disclosures include risk disclosure statements for certain types of ABS investors? If so, which ones? If not, why not?

100. If disclosure were used in the context of proposed Rule 127B, in what format or structure should such disclosure be made? What information should be disclosed? Are there existing documents that could be used to make disclosures to ABS investors? Please specify which documents and explain why they would be appropriate. Conversely, please identify existing documents that would not be appropriate sources for disclosure. Please explain why.

101. We seek commenter input regarding the manner in which disclosure could be made so that it is timely, effective, and provides a meaningful opportunity for ABS investors to evaluate the conflict of interest. Please provide examples of disclosure that would be timely, effective, and provide a meaningful opportunity for ABS investors to evaluate a conflict of interest. Please provide examples of disclosures that would not be timely, effective, or provide a meaningful opportunity for ABS investors to mitigate the conflict of interest.

102. In order for disclosure to be timely, is there a specific time period prior to an ABS transaction in which disclosure should be made? Please explain. Alternatively, should disclosure be made within a reasonable time prior to an ABS transaction in order to permit an ABS investor an opportunity to evaluate the conflict of interest? Conversely, please discuss when disclosure might be made so far in advance of an ABS transaction that it would not be useful.

103. In order for disclosure to be effective, please discuss the level of detail that would permit a reasonable ABS investor to understand the conflict of interest. Please provide examples of disclosure that would be effective as well as examples of generic disclosures that would not be useful to ABS investors.

104. We seek commenter input regarding what explicit disclosures might be appropriate so that an ABS investor could meaningfully understand a conflict of interest. We seek commenter input regarding whether specific or enhanced disclosures should be made in connection with more complex ABS. Please identify the type of ABS and discuss the additional disclosures.

105. If disclosure were used in the context of proposed Rule 127B, should some or all of the securitization participants be required to make and maintain records to document disclosure, or to document that disclosure was made, to qualified customers? If so, what types of records should the securitization participant be required to make and maintain? We ask that commenters include in their response a description of the manner in which they would demonstrate compliance that disclosure was made to ABS investors.

106. Are there additional steps that securitization participants that seek to manage conflicts of interest through the use of disclosure should be required to take with regard to disclosure, such as notifying a regulator (*e.g.,* a designated examining authority or other relevant regulatory agency) of any failures to disclose, or ABS investor complaints?

107. Are there specific types of transactions or activities that should or could be managed through consent? Should the use of consent only apply to specific conflicts and not others? Which? Are there circumstances in which obtaining consent might be impracticable or ineffective? Should consent be limited to certain types of customers? Would consent prior to the first sale in the offering (or a reasonable time prior to first sale) provide adequate investor protection? Should consents, if permitted, require customers to acknowledge receipt, or acknowledge understanding of the matters to which they are consenting? Should a securitization participant be required to obtain new consents for each new transaction, or should securitization participants be permitted to rely on consents indicating that the securitization participant may also enter into transactions in the future that may result from potential conflicts of interest? Would consents indicating potential future transactions be useful or effective?

108. Please discuss the benefits and costs if a disclosure-based exemption were or were not adopted. In addition, please discuss any positive or negative impact on investors of providing or not providing a disclosure-based exemption. For example, would a disclosure-based exemption avoid potential prohibitions or restrictions (or potential chilling effects) on transactions that might otherwise arise under the proposed rule and that might have the unintended consequence of limiting investment opportunities that—if all the risks were fully disclosed—investors would want to have? Would a disclosure-based exemption adversely impact investor protection? If so, how? Similarly, would a disclosure-based exemption alleviate or exacerbate any unintended consequences of the proposed rule related to investors, investor protection, liquidity, capital formation, the maintenance of fair, orderly and efficient markets, and the availability of credit to borrowers (through the assets underlying an ABS)?

C. Exemptive Authority

While Section 27B of the Securities Act prohibits securitization participants from engaging in transactions that involve or result in material conflicts of interest, Section 28 of the Securities Act provides the Commission with authority to adopt conditional or unconditional exemptive rules or regulations.[134] We seek comment on whether and to what extent we should consider exemptive rules or regulations for certain transactions or activities otherwise covered by Section 27B, including conditional exemptions based on information barriers or disclosure.

109. We ask for comment about any benefits or disadvantages of using the general exemptive authority in Section 28 of the Securities Act to address circumstances where commenters believe the application of the

[134] Section 28 of the Securities Act provides that ''the Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation issued under this title, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.'' 15 U.S.C. 77z–3.

prohibition under Section 27B would not be consistent with prohibiting material conflicts of interest. Are there any special considerations relating to offshore sales of ABS that we should take into account in the proposed rule?

110. Are there other considerations related to cross-border sales of ABS that should be contemplated in connection with the proposed rule (*e.g.,* securitizations by offshore affiliates of U.S. entities, offshore securitizations sold to U.S. investors both in and outside of the U.S.)? Please provide comments.

111. Please discuss the ways in which the proposal, if adopted, would affect the ABS market, ABS investors, underwriters, placement agents, initial purchasers, or sponsors and the affiliates or subsidiaries of such entities.

V. General Request for Comment

The Commission seeks comment generally on all aspects of proposed Rule 127B, including on our approach to the proposed rule and implementation of Securities Act Section 27B as enacted by Section 621 of the Dodd-Frank Act. Are there other approaches that we should consider? We seek commenter input regarding whether and how the proposal might positively or negatively impact investor protection, the maintenance of fair, orderly, and efficient markets (including, *e.g.,* investment opportunities or liquidity), and capital formation. Commenters are requested to provide empirical data or economic studies to support their views and arguments related to the proposed rule. In addition to the questions above, commenters are welcome to offer their views on any other matter raised by the proposed rule. We note that comments are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and if accompanied by alternative suggestions to our proposal where appropriate.

VI. Paperwork Reduction Act

Certain provisions of the proposed rule would impose new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[135] The Commission is submitting the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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. OMB has not yet assigned a control number to the proposed collections of information.

A. Summary of Collections of Information

Proposed Rule 127B might cause securitization participants to rely on appropriate contractual covenants or representations—either between other securitization participants or with relevant third parties—to determine compliance with the rule. For example, if a third party was directly or indirectly involved in structuring the ABS or selecting assets underlying the ABS, a securitization participant might rely on contractual assurances (from the third party or from another securitization participant who had obtained such assurances from the third party) that the third party would not engage in certain short transactions. We expect that, to facilitate compliance with the proposed rule, securitization participants might enter into new contractual covenants.

B. Proposed Uses of Information

Although proposed Rule 127B does not require that a securitization participant enter into contractual covenants when it allows a third party, directly or indirectly, to structure the ABS or select assets underlying the ABS, the burden of compliance would fall on the securitization participant. Accordingly, entering into such contractual covenants might assist securitization participants in managing compliance with the proposed rule. To the extent that a securitization participant were a regulated entity, we anticipate that this collection of information would be used by the Commission staff in its examination and oversight program. Further, to the extent that a securitization participant were a member of an SRO, we anticipate that this collection of information would be used by the SRO staff in its examination and oversight program.

C. Respondents

According to issuance data from Asset-Backed Alert, supplemented with data from Securities Data Corporation (''SDC''), from 2005 through 2010, there were approximately 751 registered asset-backed transactions yearly. Therefore, the Commission preliminarily estimates that there are approximately 751 securitization participant respondents that might enter into contractual covenants concerning the involvement of a third party in the transaction.[136]

The Commission seeks comment as to the accuracy of the above estimates and all other estimates in this section. The Commission also seeks data regarding the yearly estimated number of unregistered asset-backed transactions.

D. Total Annual Reporting and Recordkeeping Burdens

Proposed Rule 127B might cause securitization participants to rely on appropriate contractual covenants or representations to determine compliance with the rule. While the Commission does not have details concerning the nature of the contractual relationships that exist among and between securitization participants and third parties involved in an asset-backed transaction, we expect that these parties typically enter into contractual relationships to protect their interests. For example, we believe that securitization participants likely enter into confidentiality agreements with other parties concerning the structuring of the transaction. We also understand that most asset-backed transactions are conducted as private placements and that in connection with each of these private placements there is a purchase and sale agreement for the equity piece of the transaction. To the extent that third parties and other securitization participants are parties to these confidentiality agreements and purchase and sale agreements, we believe the proposed rule would impose minimal additional burdens on the securitization participants as it would require only an additional covenant to existing contracts.

Because the Commission expects that most securitization participants already enter into some form of a contractual relationship with other securitization participants and third parties involved in the transaction, from discussions with industry experts we estimate that, on average, it would take approximately 2 to 10 internal and 2 to 10 external hours to draft and negotiate a contractual covenant assuring compliance with proposed Rule 127B into an existing contract. For PRA purposes, we conservatively use the upper end of this range and estimate 10 internal hours from a compliance attorney, and also 10 external hours for outside legal services that would cost $4,000 per contract.[137] Further, we

[135] 44 U.S.C. 3501 *et seq.*

[136] We note that the actual number of respondents could be less than 751 as some respondents may be involved in more than one asset-backed transaction.

[137] This is based on an estimated $400 per hour cost for outside legal services. This is the same

Continued

preliminarily estimate that only about half of all securitization participants already have some type of existing contractual arrangements. Accordingly, we estimate that the total annual burden of those securitization participants who already have contractual arrangements would be approximately 3,760 internal burden hours (10 hours × 376 contracts) and approximately $1.5 million ($4,000 per contract × 376 contracts) in external costs.

To the extent there are not existing contracts in place between the securitization participants and third parties, we believe the proposed rule would impose more significant burdens and estimate that it would take approximately 20 internal hours and 20 external hours at a cost of $8,000 (using the estimated $400 per hour cost for outside legal services noted above) per contract to draft and negotiate the contractual covenant. In this instance, we estimate that the total annual burden would be approximately 7,500 internal burden hours (20 hours × 375 contracts) and approximately $3.0 million ($8,000 per contract × 375 contracts) in external costs.

In summary, we estimate that the collection of information would require an annual burden of 11,260 internal hours and $4.5 million in external costs.[138]

E. Collection of Information Is Mandatory

The collection of information is not mandatory, however, we recognize that securitization participants may be likely to engage in the collection of information to manage their compliance with the proposed rule.

F. Confidentiality

The collection of information is not required to be filed with the Commission or otherwise made publicly available. However, as discussed above, if a securitization participant were a regulated entity, we anticipate that this collection of information would be used by the Commission staff in its examination and oversight program. Further, as discussed above, if a securitization participant were an SRO member, we anticipate that this collection of information would be used by the SRO staff in its examination and oversight program.

G. Request for Comment

We invite comment on these estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collection of information is necessary for the performance of our functions, including whether the information will have practical utility;
- Evaluate the accuracy of our estimates of the burdens of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed rules should direct them to (1) The Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503; and (2) Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–XX–XX. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. S7–XX–XX, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Economic Analysis

A. Introduction

We are proposing Securities Act Rule 127B to implement the requirements of new Section 27B of the Securities Act,[139] as mandated under the Dodd-Frank Act. The proposed rule would prohibit securitization participants from engaging in transactions that would involve or result in a material conflict of interest with respect to an investor in such ABS. The proposed rule includes exceptions, as established by Congress, from this prohibition for certain risk-mitigating hedging activities, bona fide market-making, and liquidity commitments.

We are sensitive to the benefits and costs of our rules. Some of those costs and benefits stem from statutory mandates, while others are affected by the discretion we exercise in implementing those mandates. We have endeavored to focus our economic analysis of the proposed rule on the policy choices under the Commission's discretion, recognizing that it may often be difficult to separate the discretionary aspects of the rule from those elements required by statute. We request comment on all aspects of the costs and benefits of the proposal, particularly any effect our proposed rules may have on efficiency, competition, and capital formation. We particularly appreciate comments that distinguish between costs and benefits that are attributed to the statute itself and costs and benefits that are a result of policy choices made by the Commission in implementing the statutory requirements.

B. Benefits

Consistent with the statute, the proposed rule is intended to benefit investors by better aligning incentives of securitization participants with those of investors in the ABS. For example, the proposed rule would apply to an underwriter or sponsor effecting a short transaction in an ABS within the prohibited time period. Although the possibility of short selling the securities during any period of time may create conflicting incentives for securitization participants, the proposed rule is intended to prevent such conflicting incentives during the prohibited time period as required under the statute.

We believe that our decision not to define ''material conflict of interest'' in the proposed rule would provide the benefit of better investor protection. An inadvertently narrow definition of that term could have the unintended consequence of excluding from the proposed prohibition certain activities undertaken by securitization participants that involve material conflicts of interest. Furthermore, by not limiting the definition to a specific list of material conflicts of interest, the

estimate used by the Commission for these services in the proposed consolidated audit trail rule: Exchange Act Release No. 62174 (May 26, 2010); 75 FR 32556 (June 8, 2010).

[138] These costs are all monetized in the cost-benefit analysis section of this release. The estimated dollar costs for the internal hours are $3.6 million ($320 per hour × 11,260 hours), where the $320 per hour figure for a compliance attorney is from SIFMA's *Management and Professional Earnings in the Securities Industry 2010,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The total annual monetized PRA cost for the cost-benefit analysis is therefore $8.1 million ($3.6 million in monetized internal costs + $4.5 million in external costs).

[139] 15 U.S.C. 77z–2a.

proposed rule may help prevent behavior involving material conflicts of interest that have not come to the attention of investors or the Commission, or that may develop in the future. The broad investor protection provided by the proposed rule could alleviate investor concerns that the securities they purchase might be tainted by conflicts of interest. This would reduce adverse selection costs in the ABS market and encourage investment in ABS to the extent that investors consider material conflicts of interest important in their investment decisions.

As discussed above, one way in which securitization participants might manage their compliance with the proposed rule given the practical difficulties for a securitization participant in determining third-party involvement in the securitization, is through contractual assurances.[140] Similarly, if a securitization participant were a regulated entity, such assurance would be useful information for Commission staff (and, in appropriate circumstances, SRO staff) in its compliance and oversight program. We believe that the use of such assurances would help to prevent transactions that result in a misalignment of interests between securitization participants and ABS investors. Similar or different benefits may or may not ensue if different tools were used to manage compliance. We seek comment regarding the benefits to investors, securitization participants, and the marketplace stemming from the Commission's proposed rule.

C. Costs

We recognize that the proposed rule could impact the scope of some current activities undertaken by underwriters, sponsors, and other securitization participants, such as curtailment or cessation of otherwise common activities which, in turn, could lead to potential costs for such participants and the broader securitization market. As will be described below, material conflicts of interest might only arise between an investor and a particular securitization participant, which might lead the investor to seek a relationship with another securitization participant. However, as illustrated in some of the examples in Section IIIC above, other material conflicts of interest arise as a result of the nature or structure of the transaction as a whole (without regard to the identity of the securitization participants involved), such that these types of transactions might be effectively prohibited. In such cases, there might be costs to the marketplace as a whole as investors and securitization participants seek alternative and potentially less efficient transaction structures to effect a similar investment strategy in a way that would not result in a material conflict of interest, or if investors and securitization participants were unable to effect their investment strategies at all. For example, a type of synthetic collateralized debt obligations (CDOs)—balance sheet CDOs—would generally be prohibited under the proposed rule (see Example 3B). Though securitization participants might be able to effect similar types of transactions in the form of non-synthetic ABS (which generally would not be prohibited by the above interpretation of material conflict of interest), there may be reasons why a synthetic form of a balance sheet CDO is a more efficient form of the transaction from the standpoint of the issuer or investors. In addition, this aspect of the proposed rule would limit the hedging options available to a lender who originated assets without the intent to securitize them.[141] Such a lender would be able to sell or securitize assets on its balance sheet, but not synthetically, even if doing so is economically optimal. Thus, a prohibition on structuring balance sheet CDOs might have a negative effect on efficiency and capital formation.

We recognize that by not defining the phrase ''material conflict of interest'' for purposes of this particular proposal, the proposed rule could create some regulatory uncertainty, which could lead to costs in the asset-backed securitization process. Securitization participants could avoid undertaking certain activities out of concern that the proposed rule would apply to such activities, despite the securitization participant's view that such activities did not create or result in a material conflict of interest. In particular, larger entities with multiple business lines could potentially have, as a dynamic of their structure and relationships with customers (and others), conflicts that—without sufficiently specific guidance—would be perceived as material and unavoidable. Thus, we acknowledge that many of the potential conflicts and costs discussed could disproportionately impact larger, multi-faceted, and diversified firms that offer a variety of services. Below, we identify a number of these potential costs and seek comment on whether there are ways to mitigate them.

Generally, we recognize that securitization participants would incur costs in updating or creating new procedures to monitor for potential material conflicts of interest that would be prohibited under the proposed rule. The magnitude of these potential costs could be more pronounced because we have not proposed definitions of terms, including a definition as to what is material or a conflict of interest. The proposed rule may result in creating an environment in which even the potential for relationships or transaction structures that would result in a material conflict of interest would be reduced. For example, there often may be several independent, unaffiliated parties under the definition of a securitization participant (*e.g.,* underwriters and placement agents) for a given asset-backed securitization. If each such participant in an asset-backed securitization were effectively conflicted out of the process, the asset-backed securitization market could in some situations cease to function efficiently. We recognize that such a restriction on potential participants to an asset-backed securitization could have costs, as well as potential unintended consequences on the ability of market participants to structure asset-backed products. We seek comment as to how the proposed rule might be applied or modified to address such situations.

Because we are not proposing to define the term ''material conflict of interest'', the effect could amplify the potential costs from the statutory prohibition on a securitization participant's existing and/or potential future client relations. For example, if an existing or potential client approached a firm to request that it undertake a certain conflicted transaction, the firm might determine not to do so because of the concern that the transaction could be viewed as a material conflict of interest between the securitization participant and investors in the ABS if one of the exceptions to the proposed rule were not available. Under these circumstances, the client might need to approach another financial firm to conduct the desired transaction. In some cases, the financial firm might not be able to determine with a sufficient level of certainty that a conflict of interest did not exist. As described above, in certain circumstances, where the transaction structure itself (without regard to the identity of the parties) involved a conflict of interest, the investor might have to forego the ABS investment entirely and thus might be unable to

[140] *See supra* Section IIIA(v)(b).

[141] *See supra* note 100.

participate in a particular investment opportunity that it desires. A broad interpretation by market participants of the term ''material conflict of interest'' in the rule could therefore cause the securitization participant to lose profits or fees that would have resulted from the client's business with respect to the conflicting transaction and, potentially, future profits and fees if the client determines to take some of its future business to other firms, or might cause investors to lose investment opportunities they might otherwise have. We recognize that firms expend considerable time and resources to cultivate relationships with their clients and, thus, if the proposed rule were to diminish (beyond the statutory mandate in Securities Act Section 27B) existing relationships or impede the formulation of new relationships, the impacts of the proposed rule could be significant to firms and the broader marketplace.

In addition, clients also could bear undesirable costs by losing the ability to utilize firms with particular expertise or specialization in certain areas due to real or perceived material conflicts of interest. Clients might also incur costs in searching for a different firm to consummate a transaction, where they have a preexisting relationship that they too have invested resources into developing. In addition, to retain their ability to utilize specific firms for non-ABS related transactions, some potential clients might choose to forego the ABS investment. We recognize that if the proposed rule were to cause an investor to forego an ABS investment entirely, there could be costs incurred by the investor in terms of seeking out alternative investments as well as the loss of return from the ABS investment. We seek commenter input regarding other costs that might be incurred by investors from foregoing an ABS transaction entirely.

All securitization participants are subject to the proposed rule's prohibition on material conflicts of interest. Thus, although the inability to conduct a transaction that would result in a material conflict of interest between the securitization participant and investors in the ABS might have a negative impact on certain client relations and could require the client to go elsewhere to conduct the requested transaction, presumably all securitization participants and their clients would potentially encounter similar issues. As a result, while a securitization participant could lose the business of one client due to the proposed rule, in some cases it also could gain the business of another securitization participant's client, where that securitization participant could not conduct the transaction due to a material conflict of interest. Collectively, based upon the analysis above related to firm-client relationships, we acknowledge that the potential loss of customers could be more costly to firms than the potential gain of other clients.[142] In turn, clients could incur costs in having to seek out new firms rather than utilizing firms with which they have preexisting, preferred business relationships. In sum, we recognize that both firms and clients could bear costs that may, in turn, impact the broader market, and we seek comment regarding these costs of the Commission's proposed rule.

Further, we recognize that there could be some instances in which the inability of a securitization participant to conduct a transaction that would result in a material conflict of interest could adversely affect the price of the ABS. Consistent with Section 27B, the proposed rule provides exceptions for risk-mitigating hedging activity, liquidity commitments, and bona fide market-making. A proposed transaction that results in a prohibited material conflict of interest, however, might not fit into one of these exceptions and, thus, would be subject to the general prohibition in the proposed rule. Although the transaction, if executed, could ultimately have a positive impact on the ABS, it would not be permitted to be undertaken under the proposed rule. This could impose costs both on the securitization participant and on investors in the ABS resulting from a decline (or foregone increase) in the value of the ABS. We seek comment on these pricing-related costs of the proposed rule.

The proposed rule could impose certain costs upon departments within a firm not directly involved with the securitization process by impacting their ability to conduct transactions that could result in a material conflict of interest with investors in an ABS for which the firm is a securitization participant. The scope of the proposed rule could require monitoring for potential material conflicts of interest within all or many departments of the firm. If any department's proposed transaction were determined to raise a potential material conflict of interest, that department could have to abandon the proposed transaction or wait until the proposed rule's prohibition period ended. We seek comment concerning any costs that could be incurred with respect to the various activities among different departments within one firm. We also seek comment concerning whether the operation of information barriers within firms might suggest the need for the Commission to provide interpretations to the proposed rule to exclude activity that should not be captured.

As required by Securities Act Section 27B, the scope of securitization participants in the proposed rule includes affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors. In some instances, the activities of an affiliate or subsidiary may not be known to the underwriter, placement agent, initial purchaser, or sponsor, and could, inadvertently, involve or result in a material conflict of interest with the investors in the ABS. Monitoring the activities of the affiliate or subsidiary for conflicts could be difficult, especially when there are existing information barriers between the entities, and could impose costs. For this reason, we seek comment concerning any costs that could be incurred by affiliates and subsidiaries.[143]

We recognize the statutory prohibition and thus the proposed rule may have significant costs with respect to how firms and clients establish, maintain, and benefit from relationships. For instance, because larger financial entities tend to form in an effort to achieve synergies and economies of scope in combining and offering multiple services, restrictions on such activities could lead to changes to their business activities that could reduce firm earnings. In part because of the breadth of the statutory provision and, thus, the proposed rule, these potential changes could have some disruptive effect on the firms, their clients, and the broader marketplace, reducing current efficiencies that may exist. Restricting the ability of securitization participants to maintain relationships that service multiple objectives could ultimately impact negatively both financial firms and their clients' ability to conduct economically efficient activities. In addition, firms with particular specialization in given areas that were precluded from providing such expertise due to

[142] *See, e.g.,* Myron B. Slovin, Marie E. Sushka & John A. Polonchek, *The Value of Bank Durability: Borrowers as Bank Stakeholders,* 48 J. Fin. 247 (1993); Mitchell A. Petersen & Raghuram G. Rajan, *The Benefits of Firm-Creditor Relationships: Evidence from Small Business Data,* 49 J. Fin. 3 (1994); Sreedhar Bharath, Sandeep Dahiya, Anthony Saunders & Anand Srinivasan, *So What Do I Get? The Bank's View of Lending Relationships,* 85 J. Fin. Econ. 368 (2007).

[143] *See supra* Section IV (noting the recognition of information barriers in Section 15(g) of the Exchange Act, Exchange Act Rule 14e–5, and Regulation M under the Exchange Act).

perceived material conflicts could disadvantage clients.

While not required by the proposed rule, we recognize that one way that securitization participants might seek to facilitate their compliance with the proposed rule is through contractual assurances.[144] The costs associated with such assurances could be minimal if contracts are currently utilized and could be easily modified to reflect the assurances (*e.g.,* standardized industry agreements, purchase and sale agreements, and confidentiality agreements). However, in circumstances where there are no agreements in place, there could be more significant costs for parties to negotiate a new agreement in its entirety. Other costs may or may not ensue if a tool other than a contractual assurance were used to manage compliance with the proposed rule. We seek commenter input regarding whether and how behaviors could change as a result of the use of contractual assurances that might increase or decrease costs.

We also note that there are potential costs associated with a clarification we propose to one of the exceptions under the proposed rule.[145] The proposed rule provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making, which are consistent with Securities Act Section 27B. We seek comment on the scope of the risk-mitigating hedging exception in the proposed rule in a manner that we believe is consistent with the intent of the legislation, but which could help securitization participants and other industry participants better understand whether an activity qualifies under the exception. In the proposed rule, we seek comment on the application of the proposed exception for risk-mitigating hedging activity to ''mitigating'' the consequences of a risk. We believe that risk mitigation would permit a securitization participant to limit the consequences of a risk, which could facilitate investor protection. We also seek comment on how ''exposures'' arise and whether the risk-mitigating hedging exception should apply to exposures as well as positions and holdings. Although we believe that such clarification would allow firms to better reduce and mitigate specific risks that arise out of underwriting, placement, initial purchase, or sponsorship of an ABS, we recognize that securitization participants would bear an additional cost in dedicating resources to determine whether their activities fall within this exception as interpreted beyond any cost they already would bear due to the existence of the statutory exception. Similar to the costs that could be incurred for compliance with the proposed rule, securitization participants could also face costs in their assessment of whether their activities qualify for the risk-mitigating hedging exception. We seek comment with respect to all aspects of the proposed risk-mitigating hedging exception.

D. Related Considerations

The coverage of Securities Act Section 27B and, thus the proposed rule which tracks the statute, could negatively impact economic efficiency both from the point of view of the securitizations participants, and sometimes also from the point of view of investors who seek to invest in the pools that back the ABS if certain ABS transactions did not get consummated because of the scope of the proposed rule.

The scope of activities under the proposed rule that could constitute potential conflicts of interest could potentially impact competition among asset-backed securitization market participants. For instance, larger entities with multiple business lines could have, as a result of their structure, unavoidable material conflicts of interest. An investor that utilizes such entities for multiple services could have to switch to competitors, or depending on the structure of ABS, forego the ABS transaction. Under these circumstances, the investor could incur additional search costs and find its business processes less efficient due to the loss of relationships.[146] The securitization participant could also potentially lose any profits or fees that would have resulted from the investor's business with respect to the conflicting transaction and, potentially, future profits and fees if the investor takes future business to another firm. In addition, investors and financial firms could both lose the financial benefits gained from established, cultivated relationships with securitization participants. This could be potentially costly to both investors that have established relationships with firms and, ultimately, to investors in the broader marketplace as a contraction in the securitization process could ensue. As firm-investor relationships are costly to develop, but valuable to maintain, firms and such investors might find application of the proposed rule to be disruptive in some circumstances and, thus, the broader marketplace could experience some inefficiency, as well as unintended impacts on capital formation.

In addition, given that the ABS offering process can involve multiple lead underwriters and an underwriting syndicate with several members, the proposed rule could have a multiplicative effect by conflicting out several unaffiliated financial institutions. If an attempt to limit this multiplicative effect through reducing the number of parties involved in a securitization negatively affects the manner in which ABS are structured and underwritten, this might have a negative impact on the efficiency of the securitization process. As previously noted, the scope of the statutory prohibition could amplify the inability of departments within a securitization participant to conduct business as they have in the past, which could increase financial costs, as well as heighten market inefficiency. These inefficiencies could ultimately negatively impact investors in ABS, as well as the consumers whose loans back the ABS.

Request for Comments Regarding the Economic Analysis

We seek comments and empirical data on all aspects of this Benefit-Cost Analysis, including identification and quantification of any additional benefits and costs. Specifically, we ask the following:

112. Are there any additional benefits that may arise from the proposed rule? Or, are there benefits described above that would not be likely to result from the proposed rule? If so, please explain these benefits or lack of benefits in detail.

113. Are there any additional costs that may arise from the proposed rule? Or, are there costs described above that would not be likely to result from the proposed rule? If so, please explain these costs or lack of costs in detail.

114. Do the types, or extent, of any benefits or costs from the proposed rule differ between certain securitization participants? For example, do potential benefits or costs differ in their application to underwriters as opposed to placement agents? Please explain.

115. Do the types, or extent, of any benefits or costs from the proposed rule differ between certain kinds of asset-backed securitizations? For example, do any benefits or costs differ between ABS and synthetic ABS? If so, how do the benefits or costs differ?

116. Can you quantify costs that might arise in relation to monitoring for

[144] *See supra* Section IIIA(v)(b).

[145] *See supra* Section IIIB(i).

[146] *See, e.g.,* Myron B. Slovin, Marie E. Sushka & John A. Polonchek, The Value of Bank Durability: Borrowers as Bank Stakeholders, 48 J. Fin. 247 (1993).

transactions that would result in a material conflict of interest between a securitization participant and investors in the ABS? Do securitization participants have existing procedures that might help mitigate potential costs?

117. With respect to potential costs related to the proposed rule prohibiting transactions by affiliates, subsidiaries, or another department within the firm that would result in a material conflict of interest with investors in the ABS, is it possible to quantify the cost of not being permitted to undertake such transactions?

118. Should the Commission consider interpretations that would be consistent with the goals of Section 27B and the proposed rule, but that would further reduce costs? If so, what areas of interpretation should the Commission explore?

119. What costs would be incurred by securitization participants, investors and others if certain synthetic ABS (*e.g.,* balance sheet CDOs) could no longer be created? We ask commenters to describe any resulting impacts on the ABS market and lending institutions if this were to occur, and provide supporting data if available.

120. We solicit comment on the impact of the proposed rule on efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

VIII. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[147] a rule is ''major'' if it has resulted, or is likely to result, in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposed rule would be a ''major'' rule for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, we solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumer or individual industries; and
- Any potential effect on competition, investment, or innovation.

IX. Regulatory Flexibility Act Certification

Pursuant to 5 U.S.C. 605(b), the Commission hereby certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule prohibits transactions by underwriters, placement agents, initial purchasers, or sponsors of an ABS, or any affiliate or subsidiary of such entities, that would involve or result in a material conflict of interest with investors in the ABS. Based on our current available data, we do not believe that a substantial number of underwriters of ABS would meet the definition of a small broker-dealer for purposes of the Regulatory Flexibility Act.[148] In addition, we are aware of only one sponsor that would meet the definition of a small entity for purposes of the Regulatory Flexibility Act.[149] Thus, the Commission does not believe the proposed rule, if adopted, would have a significant economic impact on a substantial number of small entities.

X. Statutory Authority and Text of Proposed Rule

The Commission is proposing new rule 127B (17 CFR 230.127B) pursuant to authority set forth in Sections 10, 17(a), 19(a), 27B, and 28 of the Securities Act.

List of Subjects in 17 CFR Part 230

Advertising, Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Proposed Rule

For the reasons set out above, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 781, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, 80a–37, and Pub. L. 111–203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

2. Add § 230.127B to read as follows:

§ 230.127B Conflicts of interest relating to certain securitizations.

(a) *Unlawful activity.* An underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security (as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), which for the purposes of this rule shall include a synthetic asset-backed security), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.

(b) *Excepted activity.* The following activities shall not be prohibited by paragraph (a) of this section:

(1) *Risk-mitigating hedging activities.* Risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with such positions or holdings; or

(2) *Liquidity commitment.* Purchases or sales of asset-backed securities made pursuant to and consistent with commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, to provide liquidity for the asset-backed security; or

(3) *Bona fide market-making.* Purchases or sales of asset-backed securities made pursuant to and consistent with bona fide market-making in the asset-backed security.

By the Commission.

Dated: September 19, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24404 Filed 9–27–11; 8:45 am]

BILLING CODE 8011–01–P

[147] Public Law 104–121, Title II, 110 Stat. 857 (1996).

[148] This is based on the ABS Database, which captures information on all asset-backed and mortgage-backed securitization issues sold worldwide. The database is compiled by the editors of Asset-Backed Alert. A detailed description of the database is provided at *http://www.abalert.com/about_abs.php.*

[149] This is based on data from the ABS Database.

FEDERAL REGISTER

Vol. 76 Wednesday,
No. 188 September 28, 2011

Part IV

The President

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 8721 of September 23, 2011

Minority Enterprise Development Week, 2011

By the President of the United States of America

A Proclamation

Our Nation is guided by the simple promise that no matter our origins, we can provide a better life for our children. We have long believed in a fair America, where, with hard work and determination, anyone can succeed. Our story has been written by generations who have put their shoulders to the wheel of history to move our country forward.

Today, this legacy continues. Our strength comes from individuals from all walks of life, and of every race and creed. Minority-owned businesses are engines of job creation and backbones of communities across America—from Main Street to Wall Street, and from country markets to Silicon Valley. They are on the cutting edge of development, and are strong competitors at home and abroad. Small businesses, including minority-owned enterprises, are where most new jobs begin. To recover from this economic crisis and improve our competitiveness, we must help these job creators hire, grow, and revitalize our economy.

My Administration is working to make this growth a reality. Our Start-up America initiative connects established private sector mentors to entrepreneurs, helping accelerate innovation through coordination. Last year, I signed the Small Business Jobs Act, providing billions of dollars in lending support and tax cuts for small businesses. The Federal Government is also the Nation's largest purchaser of goods and services, and every Federal agency is taking aggressive steps to improve contracting with small businesses, including minority-owned firms.

Even in challenging times, American entrepreneurs consistently respond to adversity with brighter ideas, more ambitious innovations, and smarter technology than the world has ever seen. These businesses create jobs and support our communities. As a Nation, we must continue to remove barriers to these opportunities, and ensure they remain open to all Americans.

The task of making America more competitive is a job for everyone. To build an economy that lasts, we must all work to create the well-paying jobs that will sustain us. During Minority Enterprise Development Week, we honor minority enterprises as vital to our economic success, and recommit to ensuring minority business owners have the information, tools, and resources they need to help America win the future.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 25, 2011, through October 1, 2011, as Minority Enterprise Development Week. I call upon all Americans to celebrate this week with appropriate programs, ceremonies, and activities to recognize the many contributions of our Nation's diverse enterprises.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of September, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2011–25197
Filed 9–27–11; 11:15 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8722 of September 23, 2011

Gold Star Mother's and Family's Day, 2011

By the President of the United States of America

A Proclamation

Since our Nation's earliest days, the men and women of our Armed Forces have demonstrated the courage and heroism that have come to define America. Across shores, in deserts, and on city streets around the world, extraordinary Americans have given their last full measure of devotion defending the freedoms we cherish. Their ultimate sacrifice is one we can never fully repay, and the enormity of the grief their families carry we can never fully know.

Gold Star mothers and families know the immeasurable cost of fighting for the ideals we believe in, and they know the pride that comes with exemplary service to America. On this day, and every day, we offer them our deep gratitude and respect, and we are inspired by their strength and determination. Through heartbreaking loss, our Gold Star families continue to support one another, serve their communities, and bring comfort to the men and women of our Armed Forces and their families.

Our fallen heroes answered their country's call to duty, sacrificing all they had and all they would ever know. Their families exemplify that same mark of selflessness and patriotism that has sustained our country and will sustain us through trials to come. We honor their sacrifice, and stand with our service members, military families, and Gold Star families as they have stood for us. Today, we reaffirm our promise to care for those left behind, to uphold the ideals for which the fallen gave their lives, and to carry with us their legacy as we work toward a better future.

The Congress, by Senate Joint Resolution 115 of June 23, 1936 (49 Stat. 1985 as amended), has designated the last Sunday in September as ''Gold Star Mother's Day.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 25, 2011, as Gold Star Mother's and Family's Day. I call upon all Government officials to display the flag of the United States over Government buildings on this special day. I also encourage the American people to display the flag and hold appropriate ceremonies as a public expression of our Nation's sympathy and respect for our Gold Star Mothers and Families.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of September, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2011–25198
Filed 9–27–11; 11:15 am]
Billing code 3195–W1–P

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Federal Register

Vol. 76, No. 188

Wednesday, September 28, 2011

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S. 846/P.L. 112–31
To designate the United States courthouse located at 80 Lafayette Street in Jefferson City, Missouri, as the Christopher S. Bond United States Courthouse. (Sept. 23, 2011; 125 Stat. 360)
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